Missouri Attorney General's Opinions - 1942

Opinion	Date	Topic	Summary
1-42	Feb 12	OFFICERS.	County officers in counties under 50,000 population may purchase own supplies.
1-42	Mar 23	SCHOOLS. SCHOOL DISTRICTS. PARTITION FENCES.	Liability of public school districts for costs of partition fences.
1-42	June 6	TOWNSHIP ORGANIZATION. TRUSTEES.	1. Upon refusal and failure to qualify after being elected, the old board shall call another election. 2. Old trustees shall continue to perform all duties until new trustees are elected and qualified.
1-42	July 9	ELECTIONS.	Qualifications of judges of election.
1-42	Aug 20	Hon. George Adams	WITHDRAWN
1-42	Oct 1	ELECTIONS.	Application of absentee voters in the Armed Forces within and outside of the State, and when such votes shall be placed in the hands of the election officials.
1-42	Oct 21	ELECTIONS.	Members of police force not permitted to be within voters' booths during progress of election, and not entitled to be within polling places unless requested by judges of election.
2-42	Dec 16	STATE PLANNING BOARD.	Appropriation for board limited to $10,000.00 for any biennium.
3-42	Feb 16	Mr. Richard Arens	WITHDRAWN
3-42	May 14	ELEEMOSYNARY INSTITUTIONS. INSANE.	Indigent insane must be resident of county before he may be admitted as a county patient.
3-42	Dec 10	CORONERS.	Election for coroner in 1942 unauthorized and void, and commission should not issue.
4-42	Feb 10	STATE FAIR. COMMISSIONER OF AGRICULTURE.	Commissioner of Agriculture may hold essay or poster contests in schools to carry out purposes of the State Fair Act.
5-42	Oct 22	COUNTY RATIONING BOARD.	Member of the legislature may serve on the county rationing board.
5-42	Dec 28	OFFICERS. CORONER. JUSTICE OF THE	Coroner and justice of the peace may hold the same office.

		PEACE.	
6-42	Jan 12	STATE TREASURER. PUBLIC SERVICE COMMISSION. MOTOR VEHICLE FUNDS.	State treasurer's duties respecting licenses fees on motor vehicles under Section 5728, R. S. Mo. 1939.
6-42	Feb 20	COUNTY COURTS.	Taxes levied to pay off the indebtedness incurred to build a courthouse cannot be used for any other purpose.
6-42	June 22	LIQUOR. BEER STAMPS.	When appropriation of Treasurer exhausted, Liquor Supervisor may purchase stamps out of his printing appropriation.
6-42	July 20	ELECTIONS.	County clerk furnishes ballots. Sheriff posts notice of election on vacancy of member of the legislature.
7-42	Aug 21	SCHOOLS.	Portion of district cannot be annexed to city district unless at least thirty (30) children remain in the district.
7-42	Sept 18	ELECTIONS. PRINTING ABSENTEE BALLOTS.	Clerks may have absentee ballots printed more than ten days prior to election day.
9-42	June 30	BLIND PENSION.	Interpretation of Section 9452, R. S. Mo. 1942.
10-42	Jan 14	STATE PARK BOARD. CONSERVATION COMMISSION. OFFICERS.	The Department of Conservation and State Parks are two separate and distinct departments. Duties of the director of State Parks as provided under Section 15329, R. S. Mo. 1939.
10-42	Feb 4	STATE PARK BOARD.	The State Park Board may repair and maintain Arrow Rock State Park tavern under certain conditions.
10-42	Feb 27	Mr. I. T. Bode	WITHDRAWN
10-42	May 13	Hon. John O. Bond	WITHDRAWN
10-42	Sept 12	Mr. Paul Boone	WITHDRAWN
11-42	Mar 2	MARRIAGES.	Four questions in regard to who issues the license.
11-42	Apr 8	Hon. F. M. Brady	WITHDRAWN
11-42	Apr 27	MARRIAGES.	Justice of the peace not prohibited from soliciting marriage ceremonies.
11-42	July 15	COUNTY COURTS.	County court has exclusive control over motor vehicles owned by county.
11-42	Aug 11	Mr. F. M. Brady	WITHDRAWN

11-42	Oct 12	TAXATION.	Lands assessed for taxation under a void description can not be corrected in a deed by the Collector, so as to convey good title to the lands intended to be assessed and sold.
11-42	Nov 27	COUNTY COURTS. COURTHOUSE.	County courts may dispose of lands acquired for courthouse, if same are not lands acquired and needed for county seat purposes.
12-42	Feb 5	INCOME TAX, FEDERAL ESTATE TAX AND INHERITANCE TAX.	Contributions made to Missouri School for Blind are exempt from income, inheritance and federal estate taxes.
12-42	Feb 20	COURTHOUSE.	County court has authority to provide additional courthouse space, but cannot pledge revenue for future years.
12-42	Mar 3	ELECTIONS.	June 5, 1942, is the last day to file declaration of candidacy.
12-42	Mar 6	ELECTIONS.	July 2, 1942, is the last day for filing initiative petitions.
12-42	Mar 17	ELECTIONS.	Hours of opening and closing polls in 1942 governed by War Daylight Time; in cities of less than 25,000 close at sunset if after 7 p.m.
12-42	Apr 1	ELECTIONS.	Stickers must be placed over identifying numbers on all ballots.
12-42	Apr 20	SECURITIES COMMISSION.	Deposit of Fidelity Investment Association not subject to law relative to deposits of State money.
12-42	Apr 22	MISSOURI SCHOOL FOR THE BLIND.	County court not authorized to pay expenses of students who are not sent by court order.
12-42	Apr 22	MISSOURI SCHOOL FOR THE BLIND.	Resident defined.
12-42	Apr 27	SCHOOLS. MISSOURI SCHOOL FOR THE BLIND.	Board of Managers may use discretion in employing teachers.
12-42	Apr 27	ELECTIONS.	Names of Appellate judge must be published. Returns of result of vote on retention of judges and initiative questions must be separate.
12-42	Apr 30	PRINTING.	(1) Commission may adopt rule of Supreme Court as to briefs, where statute and rule do not conflict; (2) may take bid on statutory basis of ems, tokens or quire on composition and presswork according to method employed and job to be done; (3) may require contractor to obtain receipt from department which receives printing; (4) on binding, commission may cover price on press numbering and perforating by percentage discount from hand schedules.
12-42	June 3	ADMINISTRATION. PROBATE COURTS.	Personal estate of non-resident decedent may be administered by the Probate Court in which the estate is settled. Probate Courts not required to turn over to domiciliary administrator the personal estate

			of a non-resident decedent, after the payment of all debts, if, under the circumstances, such distribution may be best accomplished by administration in this state.
12-42	June 17	Hon. Dwight H. Brown	WITHDRAWN
12-42	June 20	ELECTIONS. PRIMARY.	It is not necessary to print names of minor party candidates on primary election poll books, tally books and other supplies: Minor parties having failed to cast more than 5% of votes at last election for Governor.
12-42	July 2	ELECTIONS.	The Act of 1941 deprives the party committee from filling vacancies on the ballot except in cases where the nominee dies or resigns. – No write-ins on primary ballot except for committeeman or committeewoman.
12-42	July 3	ELECTIONS.	Powers and duties of party committee in filling vacancies after the primary.
12-42	July 7	ELECTIONS – REPRESENTATIVES AND SENATORS – UNEXPIRED TERMS.	Mode of electing senators and representatives for unexpired terms, and mode of nominating them.
12-42	July 10	CONSTITUTIONAL AMENDMENT.	Title for Old Age Pension and Aid for Dependent Children.
12-42	July 10	CONSTITUTIONAL AMENDMENT.	Title for Unicameral Legislature.
12-42	July 13	ELECTIONS – REPRESENTATIVES AND SENATORS – UNEXPIRED TERMS.	Mode of electing senators and representatives for unexpired terms, and mode of nominating them.
12-42	Aug 17	INITIATIVE PETITIONS.	Secretary of State shall allow the withdrawal of initiative petitions when requested so to do by a representative of the petitioners.
12-42	Sept 10	ELECTIONS.	The official judicial ballot shall be published by the clerks of the county courts on each county in the State of Missouri.
12-42	Sept 14	ELECTIONS.	Judicial ballot title; Constitutional Convention ballot title.
12-42	Sept 16	ELECTIONS. ABSENTEE BALLOTS. PERSONS IN MILITARY SERVICE.	Persons in military service in making an application for absentee ballot are not required to reveal their location, unit or rank.
12-42	Oct 7	Hon. Dwight H.	WITHDRAWN

		Brown	
12-42	Nov 19	ELECTIONS. CONSTITUTIONAL CONVENTION. BALLOTS. STICKERS.	Stickers should be placed on ballots voted for delegates to Constitutional Convention.
13-42	Jan 2	COUNTY SUPERINTENDENTS OF SCHOOLS.	Entitled to receive additional compensation for added duties.
13-42	Feb 9	BONDS. BOARD OF ELECTION COMMISSIONERS. COUNTY COURTS.	Governing body liable for payment of premiums on surety bonds where the public official elects to give surety bond and the public body protected consents and approves same.
13-42	May 21	COUNTY CLERKS. FEES.	County Clerk not entitled to fee for filing declaration of candidacy.
13-42	Sept 2	SCHOOLS.	Board of education in town, city and consolidated districts does not have authority to accept anything but cash at sale of school property.
13-42	Oct 27	PROBATION AND PAROLE OFFICERS.	Exempted from “concealed weapon” statute.
13-42	Dec 22	BOARD OF PROBATION AND PAROLE.	Printing must be done in accordance with Public Printing Act.
15-42	Mar 26	ELECTIONS.	Serial number on ballot must be covered by black sticker.
15-42	Nov 17	SCHOOLS.	County superintendent is a member of county textbook commission regardless of fact that he may have been employed by publisher of school books prior to his election.
16-42	Jan 19	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	Lessee operating motor vehicle properly registered in the State of Texas and transporting own goods and wares in the State of Missouri, in operating for hire does not come within the purview of Public Service Act but must register said motor vehicle in the State of Missouri.
16-42	Jan 22	MOTOR VEHICLES.	Finder of numberless automobile tire has sufficient ownership to have a special number assigned by the Secretary of State.
16-42	May 14	MISSOURI SCHOOL FOR THE BLIND. TEACHER’S CONTRACT.	Discussion of what constitutes teacher’s contract.

16-42	July 10	ELECTIONS. STATE REPRESENTATIVES.	In re election to fill vacancy in office of State representative.
16-42	Aug 6	MISSOURI SCHOOL FOR THE BLIND.	Missouri School for the Blind is a part of the free public school system.
16-42	Aug 7	SCHOOL FOR THE BLIND.	Age of pupils must conform to limits fixed by Section 1, Article 11 of the Constitution.
16-42	Sept 9	RELIGIOUS CORPORATIONS.	Pension Board of the Methodist Episcopal Church is not a religious corporation.
16-42	Dec 12	PROSECUTING ATTORNEY.	Term of office continues until successor has qualified.
17-42	Apr 30	TAXATION. EXEMPTIONS.	In re exemptions of American Royal Buildings, American Royal Annex and American Royal Parking Lot.
17-42	Dec 28	PROBATE JUDGE. CLERK OF PROBATE COURT.	Amount, approval and place of signed bond of ex officio clerk.
18-42	Jan 3	HEDGE FENCES.	Form of Petition; Form of Instruction and Form of Verdict, to be used in a proceeding under Section 8578 R. S. Missouri, 1939.
18-42	Jan 24	STATUTES. COOPERATIVE COMPANIES.	Section 14417 R. S. Missouri, 1939, is a special statutes in character, and having been enacted subsequently will prevail over Section 8318 R. S. Mo., '39.
18-42	Feb 16	ADOPTION LAWS.	Discussion of Section 9611B, enacted by 61st General Assembly.
18-42	Apr 7	TAXATION. ROAD DISTRICT. SPECIAL BENEFIT DISTRICTS.	Commissioners may not levy tax for construction and maintenance of roads and bridges.
18-42	May 4	SCHOOLS.	1. Annexation of a district, or a part thereof, provided for in Section 10484 R. S. Mo., 1939 is a "special election." 2. Said election would be valid even though set at the same time as a regular meeting as is provided for in Section 10418 R. S. Mo., 1939.
18-42	June 3	CRIMINAL COSTS. PROSECUTING ATTORNEYS.	Prosecutor not entitled to fee for conviction upon a plea for guilty when plea was set aside and case dismissed.
18-42	Dec 4	SOLDIERS.	Entitled to free copies of public records.
19-42	Jan 8	TAXATION. COLLECTION. PARTIAL PAYMENT	Partial payments of taxes are held by the collector as a trustee and such taxes belong to the tax payer until the full amount of the taxes are paid.

		OF TAXES.	
19-42	Apr 21	HEALTH.	Regulation made by Board of Curators of University of Missouri, requiring all students to submit to vaccination to prevent smallpox and their failure so to do constituting grounds for exclusion from the University, is a reasonable regulation and can be made and enforced by such Board of Curators.
19-42	Aug 25	SPECIAL ROAD DISTRICTS.	May contribute to construction of road within 15 miles of the district limits regardless of county lines. County courts may not contribute to construction of roads outside of its own limits.
19-42	Dec 16	BONDS. CONSERVATION COMMISSION. FISH AND GAME REGULATIONS.	Conservation Commission authorized to furnish surety bonds to cover distribution agents in the sale of hunting and fishing permits.
20-42	Jan 15	OFFICE OF DEPUTY COUNTY CLERK. LEGISLATORS.	Members of the General Assembly may not be appointed Deputy County Clerk during the term for which he is elected to the General Assembly.
20-42	Jan 19	SCHOOLS.	The Board of directors of a common school district can legally bind their successors on warrants drawn on the proper funds provided said warrants are valid and legal.
20-42	Feb 6	ROADS AND BRIDGES. PURCHASING MACHINERY.	Commissioners of special road districts may purchase road machinery with bond funds issued for the purpose of constructing, repairing and maintaining bridges and roads.
20-42	Mar 10	TAXATION.	1. Redemption, after two years, from a certificate issued in 1938, is passed upon by a former opinion. 2. Interest at the rate designated by a collector in a certificate of title shall run from the date of issuance of such certificate for a period of two years and six months thereafter.
20-42	Mar 24	TAXATION. SPECIAL LEVY ORDERED BY THE CIRCUIT COURT.	Special levy of taxes ordered by the Circuit Court Judge are subject to the limitation prescribed by the constitution.
20-42	Apr 15	FEES.	Expense of extradition paid only by the State.
20-42	Apr 17	SCHOOLS.	Consolidated district may change location without the vote of taxpayers.
20-42	May 6	Hon. W. W. Crockett	WITHDRAWN
20-42	May 11	MOTOR VEHICLES. PUBLIC SERVICE COMMISSION.	Employee of Fort Leonard Wood transporting other certain employees to the Fort is not a “motor carrier” or “contact hauler.”

20-42	Sept 22	SCHOOLS.	Four questions regarding elections under Section 10484, R. S. Mo. 1939.
20-42	Sept 23	CRIPPLED CHILDREN SERVICE.	(1) Salaries of the employees under the Crippled Children Service shall be paid from the appropriations for such service and not from the appropriations for the Confederate Home; (2) Transportation may be furnished for crippled children and their nurses under the Crippled Children Service appropriation but not by the Confederate Soldiers' appropriation.
20-42	Nov 27	SCHOOLS.	School property may be disposed of if no longer required for school purposes.
21-42	Feb 6	TAXATION. SALES TAX.	The sales tax should be collected on tangible personal property sold to the county court if the seller is engaged in the business of selling such property.
21-42	Mar 2	TAXATION. MOTOR VEHICLE FUEL TAX. COUNTIES.	Counties which purchase motor fuel or diesel fuel are required to pay the tax imposed by H.B. 516 Laws of Missouri 1941 page 448.
21-42	Mar 19	OFFICERS.	County collector liable for loss in burglary or holdup.
21-42	May 19	COUNTY COURTS. PUBLIC OFFICERS.	1. Can reduce rate of interest below 6% by order on protested warrants for accounts accruing after order. 2. Cannot agree to less than 6% on protested salary warrant.
21-42	May 26	Mr. George O. Dalton	WITHDRAWN
21-42	June 15	LOTTERIES.	Prizes and theater schemes in connection therewith.
21-42	Oct 20	TAXATION. LEVY.	Additional levy authorized by voters of special road district is effective for one year.
21-42	Nov 9	TAXATION.	Surplus from sale of lands in foreclosure of delinquent tax lien must be paid to person entitled thereto. In case of doubt or dispute, such surplus must be paid into county treasury for benefit of person entitled thereto.
22-42	July 13	CORONER'S INQUEST.	Body of person killed on railroad right of way should be removed and some representative of railroad left with remains until coroner arrives.
23-42	Jan 5	STATE BARBER BOARD.	Rules and regulations requiring barber lather brushes to be replaced with mechanical appliances in cities over 20,000 are reasonable if a necessity exists to safeguard public health.
24-42	Feb 12	BOARD OF PHARMACY.	The Governor and Attorney-General, when reviewing decision of Board, must affirm or overrule in toto, cannot modify.

24-42	Feb 19	GOVERNOR. DEFICIENCY APPROPRIATION.	Agreement of the Governor to sign a deficiency appropriation violates certain provisions of the Constitution and Statutes.
24-42	Mar 9	BOARD OF ELECTION COMMISSIONERS.	When term of office expires.
24-42	Mar 28	GRAND JURY.	Notes taken before grand jury cannot be furnished to Attorney General of the United States or anyone other than the prosecuting officer of the county.
24-42	Apr 20	DEFENSE AREAS. CONSTITUTIONALITY OF ACT.	Act providing for formation of defense areas and setting up therein public service districts is constitutional.
24-42	May 11	ATTORNEY-GENERAL.	The Attorney-General is to furnish legal assistance to the prosecuting attorney and circuit attorneys in preliminary examinations in criminal cases when so ordered and directed by the Governor.
24-42	May 20	MOTOR VEHICLES.	Section 8483(c) R. S. Mo. 1939, authorizing the issuance of overweight permits, was not repealed by implication in the enactment of Section 8406, R. S. Mo. 1939.
24-42	May 29	MOTOR VEHICLES.	The Motor Vehicle Commissioner and the State Highway Commission have authority to issue oversize and overweight permits, but said permits are special and may only be issued to each vehicle.
24-42	June 2	MOTOR VEHICLES.	Size and kind of plates to be used for 1943 in view of the Orders of the War Production Board.
24-42	June 8	Hon. Forrest C. Donnell	WITHDRAWN
24-42	June 9	MOTOR VEHICLES.	Federal war regulations suspend State Weight Laws where conflicting.
24-42	June 19	STATE BUILDING COMMISSION.	May appropriate money from funds on hand to investigate physical defects in buildings and to estimate cost of repairs, but cannot expend funds to determine personal responsibility for defects.
24-42	July 9	GOVERNOR.	Writs directing election to fill vacancies in the House of Representative caused by resignation of a Representative from St. Louis City, Missouri, should be directed to the Board of Election Commissioners of the City of St. Louis, Missouri.
24-42	July 10	ELECTIONS.	In re terms of senators elected to fill vacancies caused by resignation of State Senators.
24-42	July 17	NAVAL MILITIA.	Interpretation of Section 15093, R. S. Mo. 1939. Method of electing commander, or captain commanding naval militia.
24-42	Aug 7	Hon. Forrest C.	WITHDRAWN

		Donnell	
24-42	Aug 13	OFFICERS.	Common Law powers of statutory officers.
24-42	Aug 14	TAXATION. GOVERNMENT INSTRUMENTALITIES.	Buildings, structures, furniture and equipment at Weldon Spring Ordnance Works are exempt from taxation.
24-42	Aug 18	INSURANCE. ARROW ROCK TAVERN.	Construing an act of the General Assembly and appearing at page 107, Laws of Missouri, 1923, pertaining to Arrow Rock Tavern.
24-42	Sept 11	GOVERNOR. APPROPRIATIONS. LEGISLATURE.	Neither regular general assembly or specially called general assembly can pass deficiency appropriation.
24-42	Sept 15	FEDERAL SOLDIERS' HOME AT ST. JAMES, MISSOURI.	It is not necessary for a soldier or sailor to have actually served in a war to be entitled to admission to the Federal Soldiers' Home at St. James, Missouri.
24-42	Sept 21	CANNONS.	State of Missouri has title to German cannons on Capitol grounds captured in first World War.
24-42	Oct 12	TAXATION. DATE TAX LIEN BECOMES EFFECTIVE.	Lien for taxes is created on assessment date. Such lien is not extinguished by passing title to tax exempt body.
24-42	Oct 17	ELECTIONS. SPECIAL, FOR STATE REPRESENTATIVES AND SENATOR.	Governor can set election dates in election writs and cannot amend or supplement them. If sheriffs change dates set, an irregularity is created, but House of Representatives and Senate respectively may affirm results of elections.
24-42	Oct 31	APPROPRIATIONS. STATE BUILDING COMMISSION.	Appropriations may be made to this Commission.
24-42	Nov 10	GOVERNOR. OFFICERS. RECESS APPOINTMENTS.	The governor must submit recess appointments for confirmation to the senate of the 61st General Assembly in special session.
24-42	Nov 18	PROBATE JUDGE.	Governor should issue commission to person elected to fill unexpired term.
24-42	Dec 14	APPROPRIATIONS. EXTRADITION OF FUGITIVES.	Governor's appropriation to enforce the laws may be used to pay expense of extraditing criminals.
24-42	Dec 15	APPROPRIATIONS. GRAIN AND	Funds appropriated in 1941 to the Executive Department may not be used to pay operating expenses of Grain and Warehouse Department.

		WAREHOUSE DEPARTMENT. EXECUTIVE DEPARTMENT.	
24-42	Dec 19	APPROPRIATION. GOVERNOR. JUDICIAL COMMISSION.	Governor cannot use funds appropriated in H. B. 571 Laws of Mo. 1941, page 125 D. Operation, for payment of Judicial Commission's expenses.
24-42	Dec 19	COUNTY ASSESSOR.	Induction into the army under Selective Service Act does not create a vacancy.
24-42	Dec 23	SCHOOLS. APPROPRIATIONS.	Free public school fund cannot be appropriated to pay the cost of paying tax bills.
25-42	Jan 14	SCHOOLS.	County court cannot invest school funds in United States securities.
25-42	Feb 19	AGRICULTURE. DAIRY REGULATIONS.	Dairy regulations promulgated by Commissioner of Agriculture.
25-42	June 25	ELECTIONS.	In re residence of persons employed in service – civil or military.
26-42	Jan 16	DEPARTMENT OF AGRICULTURE. STATE VETERINARIAN APPROPRIATIONS.	The State Veterinarian may expend available funds out of the appropriation to his department for the purpose of enforcing the provisions of the law relating to the disposal of diseased animals and carcasses of same.
26-42	Apr 18	NOTICE OF ADMINISTRATOR OF FINAL SETTLEMENT IN PROBATE COURT.	In a county of under 600,000 population a notice of final settlement published in a weekly newspaper for four consecutive weeks prior to time of making final settlement is sufficient.
26-42	June 17	ELECTIONS. ABSENTEE BALLOTS, APPLICATION FOR.	Officers authorized to administer affidavit for absentee ballot.
26-42	June 24	PENAL INSTITUTIONS. PAROLES.	Period provided by 3/4ths law runs only while convict in prison. Where power reserved parole may be revoked for any reason deemed sufficient by Governor. Where convict deprived of 3/4ths benefits, and paroled, his parole may be revoked, and convict required to serve full terms.
26-42	July 8	PARDONS AND PAROLES.	Parole violated during its term, may be revoked after end of such term, regardless when sentence would have expired.
27-42	June 2	BINDWEED.	Section 14264 Laws of Missouri 1941 survey is so indefinite that it is unenforceable.

27-42	June 2	CRIMINAL COSTS.	On plea of guilty to a felony and parole after sentence State is liable for costs.
28-42	Jan 21	OFFICERS.	Trustee of county hospital subject to ouster, criminal prosecution, and civil suit for illegal purchase of supplies.
28-42	Feb 9	COUNTIES.	May purchase road machinery out of any surplus in Class 5.
28-42	Apr 29	PURCHASING AGENT.	Purchasing Agent is not permitted under the statutes to take out insurance policies on any of the State institutions.
28-42	Apr 29	STATE PURCHASING AGENT.	Station wagon is a passenger car and cost cannot exceed $900.00.
28-42	June 18	COMMISSIONER OF PUBLIC PRINTING.	Not required to furnish blank paper to any departments.
28-42	Aug 17	STATE PURCHASING AGENT.	Permitted to purchase coal other than that mined in Missouri for use by State Social Security Commission.
28-42	Aug 31	PURCHASING AGENT.	Purchasing agent may enter into contract, the terms of which are carried into the next biennium.
28-42	Oct 1	COUNTY COURTS.	Whenever two judges of a County Court concur in the payment of a claim against the County, it is the duty of the Presiding Judge of said Court to sign the warrant for the payment of said claim.
29-42	Jan 24	CRIMINAL LAW.	Postdated check on bank in which there is no account; cannot be prosecuted under Section 4694, R. S. 1939, without other misrepresentations.
29-42	Feb 24	MISSOURI REAL ESTATE COMMISSION.	Trustee buying property to protect taxes is not required to have license from Commission.
31-42	Jan 2	Hon. J. Arthur Francis	WITHDRAWN
31-42	Apr 3	SCHOOLS.	Vacancy occurring in a town or city school board should be filled at the next annual school election, regardless of when the vacancy occurs.
31-42	July 11	COUNTY OFFICERS. DEPUTY ASSESSOR. ROAD OVERSEER.	Deputy assessor may also hold the position of road overseer.
31-42	Aug 17	OFFICERS. COUNTY CLERKS.	Deputy County Clerk may attest county warrants.
31-42	Nov 17	COUNTY TREASURER. OFFICERS. BONDS.	County court can refuse to accept a surety bond from a county treasurer.
31-42	Dec 29	CIRCUIT CLERK.	Deputies for circuit clerks, who are ex officio recorders of deeds should

		RECORDERS OF DEEDS.	be approved by judge or judges of the circuit court.
32-42	Apr 9	Hon. J. R. Garrison	WITHDRAWN
32-42	Apr 23	SCHOOLS.	School board cannot use surplus to purchase defense bonds.
32-42	Dec 30	MUNICIPAL CORPORATIONS. MARSHAL. VACANCY.	Marshal of City of the third class does not forfeit office by being drafted into the Army.
32-42	Dec 31	TAXATION. MERCHANTS TAX.	Co-operative stores are subject to taxation as merchants.
33-42	Jan 3	MOTOR VEHICLES.	Rules governing right of way, election of stop signs and failure to observe same and speed permitted on highways of the State.
33-42	Mar 17	OFFICERS. VACANCY.	Conviction in Federal Court does not create vacancy. Service can be had on officer at usual place of abode.
33-42	June 20	ANIMALS. CRIMES.	An attempt to administer a lethal dose of poison to a dog is a misdemeanor.
33-42	July 10	BOARD OF EQUALIZATION.	Deputy Surveyor in Jackson County is not entitled to sit as a member of the Board of Equalization in absence of surveyor and is not entitled to per diem compensation.
33-42	Dec 30	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	Association hauling for hire furniture of its members subject to Public Service Act.
34-42	Jan 29	TOWNSHIP WARRANTS.	Township warrants cannot be used to pay township taxes, even if for the same year.
34-42	June 2	CRIMINAL PROCEDURE.	Approved form of information on Section 4694 R. S. Missouri, 1939, in reference to “no funds” check.
34-42	July 9	HIGHWAYS.	(1) State or County does not hold fee simple title to lands conveyed for highway purposes. (2) Abandoned highways revert to abutting landowners.
34-42	Sept 10	RECORDERS OF DEEDS.	It is discretionary with recorder whether deputy shall perform his duties in office of recorder to the exclusion of some other designated place in county.
34-42	Oct 21	CORONERS. INQUESTS.	Powers and duties of coroners and other officers in relation to inquests.
34-42	Dec 30	NEWSPAPERS. PUBLICATIONS.	Weekly publications of legals should be published on the same day of each week during the period of publication.

35-42	Jan 5		Dead animal disposal.
35-42	Jan 16	ROADS AND BRIDGES. TOWNSHIP ORGANIZATION. TAXATION. SPECIAL ROAD DISTRICTS.	Properties in special road districts in counties under township organization are liable for taxes assessed and levied to pay such bonds, provided such special road districts did not have bond obligations at the time the Township bond obligation is incurred.
35-42	Jan 22	CORPORATIONS. FOREIGN INSURANCE.	Upon statutory conformance, a foreign insurance company becomes an inhabitant of the state of Missouri and may invoke the use of Sec. 8488 R. S. Mo., '39.
35-42	Feb 5	COUNTY SURVEYOR.	Should budget his compensation and expenses as ex-officio county highway engineer under Class 4 – to be paid out of the general revenue.
35-42	May 1	MOTOR VEHICLES. OPERATORS. LICENSING.	(1) Nonresident operator must secure registered operator's license when operating car belonging to some other person in the course of or incidental to his employment, but does not have to secure driver's license. (2) Nonresident who merely operates motor vehicle and who possesses driver's license in home state does not have to secure driver's license to operate in Missouri.
35-42	Aug 12	SOLDIERS' BONUS ACT.	Interpretation of Sec. 9012c, of Chapter 51, Article 9, Missouri Statutes Annotated, page 6313.
35-42	Sept 18	TAXATION AND REVENUE.	Collector must advertise and sell realty for all unpaid delinquent taxes due thereon for all years prior and subsequent to the years for which a certificate of sale was issued and which are not barred by the statute of limitations.
35-42	Nov 6	ESCHEAT FUND.	Appropriation bill not necessary to allow moneys in hands of State Treasurer, to the credit of "escheat fund", to be withdrawn for the purpose of investment.
35-42	Dec 8	NEPOTISM.	Great nephew is within fourth degree.
37-42	Feb 10	TAXATION. COLLECTING MERCHANTS AND MANUFACTURING TAX.	Collector must bring suit on merchants and manufacturing bond before he can obtain credit for tax.
37-42	Feb 13	COUNTY COURTS.	County court does not have authority to expend money out of Class 6 for road and bridges in a special road district.
37-42	Feb 20	PROBATE JUDGE. FEES.	May charge 10¢ for each one hundred words or figures in furnishing copies of order granting letters or refusing to grant letters, and 50¢ for

			certificate and seal.
37-42	Mar 18	BANKS AND BANKING. LOANS.	Interpretation of term “actual market value” in Subsection (c), Paragraph 4, Section 7952, R. S. Mo. 1939, as amended by Laws of Missouri, 1941, page 679.
37-42	Mar 24	BANKS & BANKING. LOANS. TRUST COMPANIES.	Whiskey is a manufactured or processed derivative of agricultural products within meaning of paragraph (4), subsection (c), Section 8032, Laws of Mo. 1941.
37-42	Apr 17	SMALL LOAN LAW. BANKS AND BANKING.	Small Loan Companies domiciled in another state may not have appraisers or agents in this state to solicit small loans in this state without a license.
37-42	May 9	BANKS AND BANKING. MUNICIPAL CORPORATIONS. BONDS.	Savings banks may not invest in municipal bonds when the bonded debt of the city exceeds 5%, under Sec. 8102, 1939.
37-42	May 21	COUNTY COURTS.	Mortgage for county sinking funds must convey title in fee simple.
37-42	May 27	BANKS AND BANKING.	Banks must retain original deposit tickets and ledger sheets, and photographs of same are not sufficient under Sec. 7987, R. S. Mo. 1939.
37-42	July 6	PENAL INSTITUTIONS.	Costs of discharge and transportation of parolees to place of conviction.
37-42	Sept 30	Hon. Leo J. Harned	WITHDRAWN
37-42	Oct 16	ROADS AND BRIDGES.	Road overseers in counties under township organization operate under the provisions of Sections 8819 and 8820 Revised Statutes of Missouri, 1939, and not under the provisions of Section 8525 thereof.
37-42	Oct 26	SCHOOLS.	Approval of substitute bus driver is within provisions of anti-nepotism law; clerk of common school district cannot be removed without cause and without a hearing.
37-42	Nov 19	ELECTIONS.	Votes shown by tally sheets should be counted rather than those shown by certificates of judges and clerks, where there is a discrepancy, but when canvassers have once tabulated the votes and said tabulation has been certified in to proper authorities, canvassers cannot retabulate the votes, nor can the county clerk certify either an amended or new abstract of votes.
37-42	Nov 30	SCHOOL FUND MORTGAGE.	Personal taxes of mortgagor cannot be deducted from surplus proceeds of foreclosure sale.
38-42	Jan 15	CONSERVATION	Construction of regulation #37 – (k) pertaining to resident State

		COMMISSION. STATUTORY CONSTRUCTION.	Wholesale Dealer's Permit.
38-42	Feb 20	CANCER COMMISSION.	Has no authority to convey right-of-way for street.
38-42	Mar 2	COUNTY AND SPECIAL ROAD DISTRICTS.	Who shall pay special road districts' part of publishing county financial statement.
38-42	Mar 3	CANCER HOSPITAL. STATE CANCER COMMISSION.	Cancer Commission is not liable for damages in tort nor can it pay for damages occasioned by the negligence of one of its employees.
38-42	Apr 4	BURIAL ASSOCIATION.	Mayes Burial Association Plan is a plan for insurance business and not a non-profit benevolent society.
38-42	Apr 21	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	Under Section 5728, R. S. Missouri 1939, the annual license issued by the Commission must be attached to said motor vehicle.
38-42	Apr 30	STATE CANCER HOSPITAL.	Inmate in other State Institution becoming infected with cancer, must be returned to county of his legal residence in order that county court may comply with Section 15149 R. S. Missouri, 1939.
38-42	Oct 13	SCHOOLS. SCHOOL LOANS.	Duties of county courts in arriving at valuation of lands upon which a school loan is made.
38-42	Oct 16	OPTOMETRIST. FEES.	Members in armed forces of the United States government are not required to pay renewal fees.
38-42	Nov 24	COUNTY COURT AND COUNTY DEPOSITARIES.	County funds can only be placed in a legally designated and qualified county depositary.
39-42	June 12	INTOXICATING LIQUORS.	Army Post Exchanges and C.C.C. camps' canteens not liable for "gallonage" on intoxicating liquors and non-intoxicating beer, as it is collectible from manufacturer or first vendor.
39-42	June 25	TAXATION.	Merchant's and manufacturer's tax against frozen goods.
39-42	Dec 23	INTOXICATING LIQUOR.	Licensee may employ agent to conduct his business.
40-42	Feb 4	Hon. Wilson D. Hill	WITHDRAWN
40-42	Feb 17	ELECTIONS. BOARD OF ELECTION COMMISSIONERS.	Certificates of nomination filed with Board of Election Commissioners.

40-42	Feb 27	LOTTERIES.	The sales plan for defense stamps and bonds is a lottery.
40-42	Apr 16	TAXATION. COUNTY CLERK.	Duties of county clerk in relation to equalization of assessment by county Board of Equalization, State Board of Equalization and State Tax Commission.
40-42	Oct 7	ROADS AND BRIDGES.	(1) Commissioner cannot appoint his brother to work as laborer on the roads; (2) it is against public policy to sell supplies to his (Commissioner's) road district; and (3) city attorney of city in special road district may charge for legal services rendered special road district.
41-42	Jan 16	COUNTY TREASURER. VACANCY.	Person filling vacancy in office of County Treasurer is not entitled to receive increase in compensation during the term of office.
41-42	Jan 20	Hon. Walter C. Hotaling	WITHDRAWN
41-42	Feb 3	MISSOURI REAL ESTATE COMMISSION.	Several questions on the granting of a license.
41-42	Feb 17	TAXATION. TRUSTEES SALE DISTRIBUTION OF PROCEEDS OF SALE.	Trustee appointed under the provision of Sec. 11131 R. S. Mo., 1939, may sell such lands with approval of county court. Purchase price, after payment of costs therefrom is apportioned by the county court as per the collector's deed and turned over to collector for distribution.
41-42	Feb 25	MISSOURI REAL ESTATE COMMISSION.	Four questions on application, suspension and revocation.
41-42	Feb 26	COUNTY ROADS AND BRIDGES MACHINERY.	County Court is not authorized to purchase road machinery to be leased to townships or special road districts, or other municipal subdivisions.
41-42	Mar 6	MISSOURI REAL ESTATE COMMISSION.	Two corporations must obtain two licenses, but salesmen should only obtain one license.
41-42	Mar 6	MISSOURI REAL ESTATE COMMISSION.	Owners dealing in their own real estate not required to have license.
41-42	Mar 19	MISSOURI REAL ESTATE COMMISSION.	Alien may obtain license.
41-42	Apr 15	MISSOURI REAL ESTATE COMMISSION.	Question of division of commissions.

41-42	Apr 15	MISSOURI REAL ESTATE COMMISSION ACT.	1. Salesman's license cost cannot be transferred to broker's license. 2. Commission is bound by decision of court.
41-42	Apr 16	MISSOURI REAL ESTATE COMMISSION.	Seven questions.
41-42	Apr 23	TAXATION AND REVENUE. SOLDIERS AND SAILORS DELINQUENT TAXES.	Penalty and interest on delinquent taxes of persons in Military Services.
41-42	May 15	MISSOURI REAL ESTATE COMMISSION.	Agent who violates the Act may have his license revoked.
41-42	June 1	MISSOURI REAL ESTATE COMMISSION.	Missouri Real Estate Commission Act is not – and cannot be – retrospective to contracts entered into before January 1, 1942, as to real estate commissions.
41-42	June 1	PRIMARY ELECTIONS.	County clerk may accept the filing declarations of candidates to fill unexpired portion of term of county assessor volunteering for army services.
41-42	June 12	MISSOURI REAL ESTATE COMMISSION ACT.	Broker violates the Act by concealing the fact that property is restricted and need not make the misrepresentation.
41-42	July 15	ELECTIONS.	County court cannot appoint more than six judges in a precinct under any circumstances.
41-42	Sept 9	Mr. J. W. Hobbs	WITHDRAWN
41-42	Oct 21	REAL ESTATE COMMISSION.	Approved information and violation of the Act.
41-42	Oct 29	REAL ESTATE COMMISSION.	Corporation loaning own funds is not required to obtain real estate license.
41-42	Nov 27	REAL ESTATE COMMISSION.	Broker or agent may represent seller or buyer in the sale of restricted property, where the buyer is informed that the property is subject to certain restrictions.
42-42	Mar 3	ROADS AND BRIDGES. TOWNSHIP ORGANIZATION.	Road district under township organization cannot repair roads in cities.
43-42	Feb 4	TAXATION.	The holder of a certificate of purchase of school lands is liable for taxes

		SCHOOL LANDS.	during the time of the ownership of such certificate.
43-42	Apr 2	PETIT JURORS. COST.	When order to appear for adjourned term of court entitled to mileage from home to court and return.
43-42	May 2	CRIMINAL LAW.	A plea of guilty is not a final conviction which requires the revocation of a driver's license for driving while intoxicated.
44-42	Apr 3	PUBLIC BUILDINGS.	May be used for meetings of general public interest when such use does not interfere with regular activities.
45-42	Jan 14	TAXATION.	Tax deeds to trustee must be executed only on tract or tracts of land described in each publication.
45-42	Oct 27	SCHOOLS.	Where districts combine temporarily for educational purposes, the teachers' funds of such districts can be used to pay the salary of the teacher or teachers of such combination of districts.
46-42	Jan 2	ELEEMOSYNARY INSTITUTIONS.	Buildings to house inmates must comply with statutory requirements as to fire escapes.
46-42	Jan 16	COUNTY BUDGET ACT.	Warrants for pauper patients confined in state insane asylums by the court are to be paid from class one. Warrants for children confined in the State Home at Marshall and Carrollton are to be paid out of funds in class five.
46-42	Feb 4	ELEEMOSYNARY INSTITUTIONS. INSANE PERSONS.	Pay patient committed by probate court must post bond.
46-42	Feb 13	BLIND PENSIONS.	Blind pension shall terminate on the date Commission makes finding that such person is not qualified.
46-42	Feb 13	ELEEMOSYNARY INSTITUTIONS. INSANE.	Superintendent of State hospital should not admit person when order of commitment does not find that the patient is insane.
46-42	Feb 24	ELEEMOSYNARY INSTITUTIONS.	Lease for five years is void.
46-42	Mar 11	BLIND COMMISSION.	May require applicant to submit to operation or treatment.
46-42	Mar 30	ELEEMOSYNARY INSTITUTIONS. PATIENTS. ACCOUNTS.	Board of Managers may "write off" uncollectible accounts, but so doing does not relieve responsible persons from payment.
46-42	Apr 8	ELEEMOSYNARY INSTITUTIONS.	Providing room and board for employee is within the discretion of superintendent. Employee if not allowed board should be charged for same.

46-42	Apr 16	Mr. Ira A. Jones	WITHDRAWN
46-42	Apr 24	BLIND PENSION LAW.	Defining the word “Maintain.”
46-42	Apr 27	ELEEMOSYNARY INSTITUTIONS.	Superintendent cannot return patients to county because of inadequacy of appropriation.
46-42	Apr 28	COUNTY BUDGET LAW.	County court in counties not under township organization can purchase road machinery and pay for construction and maintenance of roads out of Class 6 under certain conditions.
46-42	May 26	BLIND PENSIONS.	Eligibility for pension determined as of date of hearing.
46-42	June 9	BLIND PENSIONS.	Money received by applicant in settlement of fire insurance, life insurance or Workmen’s Compensation claims should be considered as property instead of income.
46-42	June 9	BLIND PENSIONS.	Combined income of blind applicant and sighted spouse in excess of $600.00 does not destroy eligibility of applicant where neither has income in excess of $600.00 per annum.
46-42	June 24	ADMINISTRATION.	Creditor of deceased person may make application for refusal of letters of administration when the amount of deceased’s estate does not exceed $100.00.
46-42	July 8	BLIND PENSIONERS.	Applicant not living with spouse who has income in excess of six hundred ($600.00) dollars is entitled to pension.
46-42	July 31	TRUST AND TRUSTEES. STATE SCHOOL NO. 2 AT CARROLLTON, MO.	The income from the Elias and Amelia C. Perry Memorial fund should be paid to the Board of Managers of the State Eleemosynary Institution.
46-42	Aug 21	BLIND PENSIONS.	Income should be computed for twelve successive calendar months, not for calendar year.
46-42	Aug 25	ELEEMOSYNARY INSTITUTIONS.	Missouri not responsible for care of patients paroled from institutions in other states to persons in this state.
46-42	Sept 17	OFFICERS. JUSTICE OF THE PEACE.	Acts performed before taking oath of office are acts of a de facto officer and valid as to third parties.
46-42	Sept 23	Hon. Ira A. Jones	WITHDRAWN
46-42	Oct 20	TAX EXEMPTION.	Personal property of charitable organizations is not exempt from taxation.
46-42	Nov 12	COUNTY COURT. OFFICERS.	County Court may appoint county treasurer or county collector to prepare financial statement.

47-42	Feb 4	TAXATION. BUILDINGS ON LEASED REAL ESTATE.	Buildings and improvements on leased lands should be taxed as real estate.
47-42	Dec 10	TAXATION. MERCHANTS.	Only goods, wares and merchandise of stock in trade should be included in the merchant's tax assessment return.
48-42	Jan 19	CRIMINAL PROCEDURE.	Preliminary for grand jury indictment must be had under Section 3774, R. S. Missouri 1939.
48-42	Jan 23	WEAPONS - CONCEALED - EXPOSED.	Unlawful for guards of U. S. property to carry concealed firearms in Missouri; may carry firearms in plain view peaceably and soberly, without license. License required for purchase.
48-42	May 16	MUNICIPAL CORPORATIONS AND TAXATION.	City cannot increase limitation of tax levy for band purposes by vote of majority of two-thirds voting on the proposition.
48-42	June 5	CRIMINAL LAW.	Civil usury over eight per cent per annum; Criminal usury over two per cent per month.
48-42	Sept 1	SALES TAXES.	Operator of community sales must disclose his principal and, in his sale statement, show that the commodities so sold are exempt from sales taxes.
49-42	Jan 20	SCHOOLS.	A six-day school week for the purpose of accelerating the termination of a school term, is within the discretion of the school board.
49-42	Jan 21	SCHOOLS.	State Board of Education retains custody of United States Savings Bonds purchased out of State School Funds.
49-42	Mar 6	SCHOOLS. STATE BOARD OF EDUCATION. BOND.	Bond given by the State Superintendent of Schools does not cover custodian of securities held by the President of the State Board of Education.
49-42	Mar 13	SCHOOLS.	School district transporting non-resident high school pupils may be paid the cost in excess of three dollars by the "sending" school district.
49-42	Mar 24	SCHOOLS.	State Superintendent has power to prescribe form for reports called for by Section 10501, R.S. Mo. 1939, as amended, Laws of 1941, p. 536; form submitted with request held to be sufficient.
49-42	May 19	HEALTH, BOARD OF.	Clerk of City Board of Health is to remain as the local State Registrar in the City of St. Joseph, Missouri, a city of the first class unless removed by failure or neglect of duty.
49-42	June 24	TWO QUESTIONS IN REGARD TO VOCATIONAL	State Board of Education is not authorized to receive funds from R. E. A. cooperatives for such training program.

		EDUCATION.	
49-42	July 22	SCHOOLS.	Under Section 10501, R. S. Mo. 1939, as amended Laws of Mo. 1941, "copy" of treasurer's statement does not mean "certified copy" or "proof of publication."
49-42	Dec 30	VOCATIONAL EDUCATION. SUPERINTENDENT OF SCHOOLS, COMPENSATION.	Board of Education may employ State Superintendent of Schools as State director and compensate him for such services if same are not a part of his duties as Superintendent and executive officer of Board of Education. Payment for extra services or additional duties does not violate constitutional provision against increasing salary of officer during term.
51-42	Apr 11	SCHOOLS. TAXATION. TOWNSHIP TRUSTEES.	School moneys in counties under township organization should be turned over to township trustees.
51-42	May 18	SCHOOLS. TAXATION. TOWNSHIP TRUSTEES.	School moneys in counties under township organization should be turned over to township trustees except cities, towns and consolidated school district's moneys.
51-42	June 13	SCHOOLS.	Special election can be held under Section 10358 to increase tax levy after the annual election has been held.
51-42	July 15	NEPOTISM.	A school director may vote to employ his son-in-law's niece, being of no kin either by affinity or consanguinity.
51-42	Aug 27	STATE BOARD OF NURSE EXAMINERS.	Permits to practice nursing as provided by Section 10033, R. S. Mo., 1939, cannot be issued to any applicant under the age of 21 years.
52-42	Aug 11	TAXATION. ASSESSMENT OF PROPERTY.	A person owning or holding property in Missouri on the first day of June, is liable for taxes thereon, regardless of the fact that he has been assessed in another state for taxes on such property.
56-42	Mar 31	SCHOOLS.	Registration day should be included as a school day in report of district clerk.
56-42	Nov 5	INSANE PERSONS. ELEEMOSYNARY INSTITUTIONS.	Counties are liable for support of indigent insane soldiers who are residents of such counties, even though such insanity developed after induction into the United States Army.
57-42	Jan 2	CRIMINAL LAW. PRELIMINARY EXAMINATION.	A minor over the age of 17 years has the right to personally waive preliminary examination where he is charged with a felony.
57-42	Feb 4	PARDONS AND PAROLES.	Judges of circuit and criminal courts may place on probation defendant under certain circumstances.

57-42	Feb 20	MINERALS. STATE PARKS. DEED.	Interpretation of a mineral reservation ina deed conveying land to the State of Missouri. Type of mining permissible.
57-42	Mar 3	CONSERVATION COMMISSION. FEES.	Construing Section 8943 and Regulation #17. Fees for Conservation Agent making arrest.
57-42	Mar 17	SCHOOL FUND MORTGAGES.	Who shall execute deed upon foreclosure, and kind of deed to be executed.
57-42	Apr 14	OFFICERS. REMOVAL. TRUSTEES.	Trustee under Jones-Munger Act may be removed at the pleasure of County Court.
57-42	May 14	CRIMINAL PROCEDURE.	Defendant in preliminary examination is entitled to have process for witnesses outside county where examination is held.
57-42	May 14	CRIMINAL LAW. COSTS.	State or county not liable for costs until sentence has been pronounced.
57-42	May 28	CRIMINAL LAW.	Ward under guardianship by reason of unsound mind can be prosecuted criminally.
57-42	June 22	PENAL INSTITUTIONS.	Permission for autopsy in State Penitentiary must be received from Secretary of the Missouri State Anatomical Board.
57-42	Oct 12	CRIMINAL LAW.	Prosecuting Attorney may introduce evidence, even when defendant waives preliminary.
57-42	Oct 15	COUNTY COURTS. PAUPERS.	May apply reasonable annual rental of road machinery on purchase price of said machinery. Inmates of county alms houses who are able to support self should not remain there under certain conditions. County court may grant relief to persons without regard to residence.
57-42	Nov 25	CRIMINAL PROCEDURE. DEPOSITIONS.	Depositions can only be taken after a criminal proceeding has been filed.
58-42	Mar 25	EXECUTORS OF WILLS. TRUSTEES OF ESTATES. CIRCUIT COURT JUDGES.	Judge of Circuit Court may act as executor of will and trustee of estate.
59-42	Jan 23	NEPOTISM.	One is guilty of violation of nepotism section even when appointee receives no compensation.
60-42	Mar 16	COUNTY BUDGET	County Court cannot purchase supplies for Probate office unless there

		LAW.	is a surplus in class five or six.
60-42	July 20	ELECTIONS.	Candidate's receipt alone is not sufficient for placing name on the ballot.
60-42	Dec 18	CONSERVATION COMMISSION. FISH AND GAME.	Right of Conservation Agents to inspect persons and motor vehicles on the highways.
60-42	Dec 21	OFFICERS.	County judge cannot be employed as deputy county assessor.
61-42	Feb 16	MOTOR VEHICLE FUEL TAX. GASOLINE TAX.	Use tax under H. B. 516, Laws 1941, p. 418, applies to interstate commerce.
61-42	Mar 17	MOTOR VEHICLE FUEL. GASOLINE TAX.	Authority granted the Oil Inspector to waive penalties on the use tax imposed on diesel, butane and propane does not authorize him to waive a penalty on the excise tax imposed upon the sale of gasoline.
61-42	Mar 17	MOTOR VEHICLE FUEL. GASOLINE TAX.	Persons selling gasoline to cost plus a fixed fee contractor constructing National Defense Projects is exempt from using said gasoline to measure his tax. Person who is a cost plus a fixed fee contractor constructing National Defense Projects is exempt from tax imposed upon diesel, butane and propane.
61-42	Mar 24	MOTOR VEHICLE FUELS. GASOLINE TAXES.	Payment to be made on or before the 25th day of the month, mailing payment on last day is not sufficient.
61-42	Mar 24	MOTOR VEHICLE FUELS.	Money appropriated to pay refund claim on motor vehicle fuels may be used to pay refunds of taxes paid on diesel, propane and butane.
61-42	May 1	MOTOR VEHICLES. GASOLINE TAX.	Inspector not liable on bond unless loss results and is neglect and proximate cause; Inspector's function of revoking license is discretionary.
61-42	May 28	OIL INSPECTION. DIESEL FUEL.	Railroads and municipalities who use such must have same inspected and pay fees thereon.
61-42	Dec 29	MOTOR VEHICLE FUEL TAX.	Three questions relative to time within which payment of tax can be made; whether delivery to P.O. box is sufficient.
62-42	Jan 10	TAXATION.	Section 11329, R. S. Mo. 1939, applies only to merchants commencing business after the first Monday in June and not to a person who is in business between the first Monday in March and the first Monday in June next preceding.
62-42	Feb 7	BURIAL ASSOCIATION.	Former officers of defunct burial association cannot exceed the powers conferred by judgment of ouster.
62-42	Mar 2	REPRESENTATIVE	Deputy sheriff must resign his office upon qualifying as State

		QUALIFYING FOR OFFICE.	Representative.
62-42	Mar 17	STATE FAIR GROUNDS. COMMISSIONER OF AGRICULTURE.	The State will not lose its title to State Fair Grounds by reason of Federal Government condemning the use thereof for military camp.
62-42	May 6	TAXATION. REVENUE. TANGIBLE PERSONAL PROPERTY. SITUS.	In regard to taxation of tangible personal property including deposits, money, notes, etc.
62-42	May 20	COUNTY ASSESSORS.	Expenses incurred by the various county assessors while attending "group meetings" called by State Tax Commission under Sec. 11027, Laws 1941, shall be paid by the counties from which counties the assessors have attended such meetings.
62-42	May 25	TAXATION.	In assessing franchises of public utilities under Section 11240 R. S. Missouri, 1939, the value of such is to be listed under heading of "all other property."
62-42	July 24	Mr. Noble Mitchell	WITHDRAWN
62-42	Aug 8	Mr. Jesse A. Mitchell	WITHDRAWN
62-42	Sept 9	Hon. H. Mitchell	WITHDRAWN
62-42	Oct 27	TAXATION.	Jurisdiction of Tax Commission to entertain complaint on assessments is not dependent on County Board of Equalization having been appealed to.
63-42	Sept 16	OFFICERS. PROSECUTING ATTORNEY. SURVEYOR.	Prosecuting Attorney's and Surveyor's office incompatible and cannot both be held by same person at the same time.
63-42	Dec 11	TAXATION. COLLECTOR. COUNTY COURT.	County Courts are without jurisdiction to change or abate a personal tax after the same has been assessed, levied and extended.
63-42	Dec 19	SHERIFFS.	Responsible for enforcing law in county.
64-42	Jan 16	TAXATION. GOVERNMENT OWNED LANDS. LEVY AND ASSESSMENT.	Lands which come into possession of the United States Government after assessment but before levy of taxes are not subject to taxes for the year for which such assessment is made.

64-42	Jan 19	TAXATION. BRIDGES.	Illinois taxing authorities may tax that portion of Mississippi River Bridge which lies east of main channel of said river.
64-42	Mar 27	Hon. Mark Morris	WITHDRAWN
64-42	Apr 1	COUNTY BUDGET LAW.	The county court shall, in its discretion, pay for the supplies of the public administrator when they are listed by the public administrator in the estimated supply budget as provided by law.
64-42	Apr 3	Mr. H. N. Morgan	WITHDRAWN
64-42	June 25	POWER OF GRAIN WAREHOUSE COMMISSIONER TO EMPLOY INSTRUCTOR.	Grain Warehouse Commissioner may employ an outside State instructor for purpose of training men to measure grain in warehouses.
64-42	July 24	ROADS AND BRIDGES. PUBLIC ROADS.	Petition is not adequate to confer jurisdiction on County Court for establishment of County Road.
64-42	Oct 28	PENITENTIARY.	Minimum sentence two years in the penitentiary.
64-42	Dec 4	PROSECUTING ATTORNEY.	It is not mandatory for county court to pay stated salary of a stenographer for the prosecuting attorney, but should reimburse prosecuting attorney for reasonable sums paid for such services incurred in the discharge of his duties.
64-42	Dec 21	PUBLIC PRINTING. BALLOTS.	Charge for printing ballots is limited by law.
65-42	Jan 2	BRIDGE BONDS. COUNTIES PAYING FOR.	County courts may not appropriate surplus taxes to pay bonds issued for payment of toll bridges or operation of such bridges.
65-42	Feb 16	CITIES OF THE THIRD CLASS. VACANCIES IN COUNCIL.	Mode of filling vacancy in council of city of third class.
65-42	July 11	TOLL BRIDGES.	All expenses of toll bridges are to be paid from money received from the tolls on such bridges.
65-42	July 13	CRIMINAL COSTS. PAROLES.	Parole is not a part of the case in reference to payment of criminal costs.
65-42	Nov 30	COUNTY TREASURER.	If treasurer appoints wife deputy or clerk he forfeits his office.
66-42	Nov 19	SCHOOLS.	District of child's residence is liable for tuition, under Sec. 10458, R. S. Mo. 1939, but "residence" is a question of fact.
67-42	Nov 10	JUSTICES OF THE	Beginning and ending of term.

		PEACE.	
67-42	Dec 11	SCHOOLS.	Pupils residing on land owned by United States entitled to all school privileges.
67-42	Dec 14	COUNTY CLERK. COUNTY COURT. COUNTY BUDGET ACT.	County Clerk of Jackson County is the accounting officer to certify as such on claims against the county.
68-42	Feb 11	ASSESSORS. TAXATION. FEES.	Assessor should list all property, real or personal on the list of each taxpayer.
68-42	May 11	LOTTERIES.	Distribution of chances by filling stations a lottery.
68-42	May 20	CHIROPODY.	Shoes dealers are exempt from the provisions of Article 4 of Chapter 57, R. S. Mo. 1939.
68-42	Nov 17	ELECTIONS. CORRUPT PRACTICE ACT.	Application of Corrupt Practice Act to candidate on Non-partisan Judicial Ballot.
68-42	Nov 18	SCHOOLS.	When tuition and transportation fees of pupils of a closed district may be paid out of teachers' fund.
69-42	Feb 23	COUNTY SUPERINTENDENT OF SCHOOLS.	How paid for performing duties as Supervisor of Transportation.
69-42	June 13	PARK BOARD.	Construction of Section 84 of House Bill 581 in regard to appropriations for State park purposes.
69-42	June 15	Mr. Eldon W. Palmer	WITHDRAWN
69-42	Aug 1	CONSERVATION COMMISSION. EMERGENCY REGULATION #1.	Emergency Regulation No. 1 is invalid.
70-42	Nov 25	TAXATION. ASSESSMENT.	Notice of assessment by Assessor.
70-42	Dec 21	PROBATE COURTS. JURISDICTION.	Probate Judge may not hold preliminaries and try misdemeanor cases.
72-42	Apr 23	DEPOSITORIES. BANKS & BANKING.	National Banks may pledge their assets to secure the public funds of a city of the fourth class.
73-42	Feb 16	ROADS AND BRIDGES.	Commissioner of Special Road District – while employed by District –

			cannot recover for loss of time and medical care.
73-42	Aug 21	ELECTIONS. JUSTICES OF THE PEACE.	Error of county clerk does not prevent placing name of candidate on the ballot when he was the only candidate for that office.
73-42	Dec 8	CRIMINAL PROCEDURE.	Prosecuting Attorney certifying cost bill that defendant is insolvent is not liable in any manner unless willfully and corruptly done.
74-42	July 16	MISSOURI REAL ESTATE COMMISSION.	Restriction agreement filed after deed of trust does not apply to purchaser at trustee's sale.
74-42	Sept 10	PENAL INSTITUTIONS.	Time in jail on stay of execution is not serving penitentiary sentence.
74-42	Sept 17	PENITENTIARY REVOLVING FUND.	Revolving fund may be used to purchase livestock for the farm industries of the Department of Penal Institutions.
74-42	Sept 21	SCHOOLS.	Directors cannot allow school building to be used as a residence.
74-42	Dec 17	ROADS AND BRIDGES. COUNTY HIGHWAY ENGINEER.	Highway engineer has no authority to appoint maintenance men for the county roads.
75-42	July 9	PENAL INSTITUTIONS. MISSOURI TRAINING SCHOOL FOR BOYS.	Sentences to said School are concurrent, unless ordered by court to be consecutive, and absent applicable statutory provisions to contrary. Board of Probation etc. has power to issue and revoke paroles from said School.
75-42	July 10	PENAL INSTITUTIONS. MISSOURI TRAINING SCHOOL.	Sentence to said School runs consecutively to sentence to county jail. Inmates of school may be produced for trial, in response to writ of habeas corpus ad prosequendum.
75-42	Aug 27	PENAL INSTITUTIONS.	Cannot detail inmates to pick apples outside of penal institutions.
75-42	Sept 21	Mr. W. B. Rissler	WITHDRAWN
76-42	Mar 30	COUNTY FUNDS.	Disposition of balances in County funds.
76-42	May 25	SHERIFFS. CRIMINAL COSTS.	Sheriff cannot receive mileage or transportation costs of a paroled convict in transporting him to Army Induction Station.
76-42	Dec 11	TAXATION. PART PAYMENT OF TAXES.	Any person owning an interest in lands may pay taxes on his proportionate interest.
77-42	Nov 27	FEED.	Missouri State Feed Law does not apply to feed for game birds or fur bearing animals.
79-42	Feb 3	INSURANCE.	Sec. 49, page 204, Laws of Missouri, 1941, does not cover costs and expenses of distributing impounded funds to policyholders.

79-42	Mar 30	INSURANCE.	Medical payment plan included in liability policy does not make policy subject to approval of Superintendent and Attorney General.
79-42	Oct 23	INSURANCE.	Plan for mutualization of St. Louis Mutual Life Insurance Company approved.
80-42	Sept 1	BOARD OF HEALTH.	Two questions involving names of naturalized citizens.
80-42	Oct 23	SCHOOLS.	Lincoln University's School of Journalism may edit newspapers.
81-42	Feb 25	ADMINISTRATION. PUBLIC ADMINISTRATORS.	Public Administrators must turn over all money, property and papers belonging to all estates in which final settlement cannot be made during first regular term of probate court after the expiration of one year after successor takes office.
81-42	July 6	TAXATION AND REVENUE.	1. Certificate holder failing to exercise his rights, under such certificate, within four years from the date of its issuance, loses all his rights thereunder, and the taxes, from which sale was made, must be eliminated from the tax indebtedness against the land. 2. Collector cannot change description of land which has been assessed and equalized for taxation.
81-42	Sept 17	CRIMINAL LAW.	Bond of person in military service is subject to forfeiture.
82-42	Oct 7	ELECTIONS. NOMINATIONS BY PETITION.	Statute providing for nominations by certificates is not repealed by act of 1941.
83-42	Jan 14	PROSECUTING ATTORNEY.	Special Prosecuting Attorney appointed under Sections 12948 and 12949 R. S. Mo. 1939 is not entitled to salaries or fees.
83-42	Jan 16	COUNTY COURTS.	May expend funds for National Defense.
83-42	Feb 6	FEES. TAXATION.	Witnesses and jurors in criminal cases must furnish evidence of no indebtedness to state or county before paid by treasurer.
83-42	Feb 17	SCHOOLS.	Sale under mortgage without suit, circuit court need not be in session.
83-42	Mar 4	COUNTY BUDGET ACT. COUNTY COURT.	Cannot compile a second budget which has been reported to State Auditor.
83-42	Mar 26	CRIMINAL COSTS.	Juvenile cases and seven questions relating thereto.
83-42	Apr 10	SPECIAL ROAD DISTRICT.	Number of commissioners and method of their selection in "eight mile" road district.
83-42	Apr 10	CRIMINAL COSTS.	Seven questions on fees allowed non-resident witnesses and to sheriffs.
83-42	May 4	BUREAU OF MINES AND MINING.	Person mining shale which is manufactured into brick before sale is liable for mining inspection fee.

83-42	June 12	STATE MINE INSPECTOR.	May obtain surveys of all mines in the State.
83-42	Aug 27	BONDS.	The ten year statute of limitation is applicable to drainage district bonds.
83-42	Sept 23	CRIMINAL COSTS. PROSECUTING ATTORNEY.	Prosecuting Attorney not allowed fee where punishment was not assessed in the penitentiary, county jail or by fine.
83-42	Oct 20	TAXATION. ASSESSORS. COMPENSATION.	Compensation allowed assessors. Maximum amount of fees which he may retain.
83-42	Nov 13	JUDICIAL COMMISSION.	Appropriation by the Legislature necessary for the payment of the expenses of the judicial commissions.
83-42	Dec 30	FUND COMMISSION. BONDS.	Type of application required and powers and duties of Board of Fund Commissioners in replacing or paying lost bond or coupons of the State.
84-42	Apr 22	TAXATION. SPECIAL ROAD DISTRICTS.	Commissioners of special road districts not authorized to levy a tax.
85-42	Jan 6	STATE BOARD OF HEALTH.	There is no legal duty for the State Board of Health to make tests of medico-legal nature. There is not statute prohibiting the same to be made by the State Board of Health when the requisite cost is paid by the official or county requesting the same.
85-42	Jan 16	BOARD OF HEALTH.	May select same employees to administer merit system that may already be employed to administer some other merit system, but may not maintain joint records, etc.; may not enter into joint merit system even though upon request of Children's Bureau.
85-42	Jan 21	STATE. INSURANCE.	State Board of Health may insure money against hazard of theft and robbery.
85-42	Jan 23	BOARD OF HEALTH. VITAL STATISTICS.	May not use fees for birth certificate to pay additional help, but must pay into treasury.
85-42	Jan 26	Dr. James Stewart	WITHDRAWN
85-42	Feb 4	BOARD OF HEALTH. TOURIST CAMPS AND RESORTS.	Persons failing to obtain license from the State Board of Health are guilty of misdemeanor under Section 4794, R. S. Missouri, 1939.
85-42	Feb 17	Mr. Hugh Stephens	WITHDRAWN
85-42	Apr 16	SHERIFFS. FEES.	May only charge from place of arrest for transporting insane person to State Hospital.

85-42	May 7	BOARD OF HEALTH.	Legality of rules and regulations construed.
85-42	June 3	HEALTH COMMISSIONER.	The salary of the Health Commissioner of the State of Missouri is $5,000.00 per year.
85-42	June 11	HEALTH, BOARD OF.	Trailer Camps not governed by Sec. 9955 R. S. Mo., 1939, which deals with Tourist Camps and Resorts.
85-42	July 21	STATE BOARD OF HEALTH.	Has authority to construct public sewage disposal facilities but all contracts for such construction must be made by State Purchasing Agent.
85-42	Aug 6	TAXATION. DORMITORY AT STATE TEACHERS COLLEGE.	Property rented to and used by State Teachers College at Warrensburg, Missouri, exempt from taxation.
85-42	Aug 13	BOARD OF HEALTH.	Convalescent, nursing, shelter or boarding home under the provisions of Senate Bill 142, Laws of Mo., 1941, p. 368.
85-42	Aug 15	BOARD OF HEALTH. TOURIST CAMPS.	Establishment consisting of two or more cabins and quartering permanent guests subject to regulation by State Board of Health.
85-42	Aug 26	STATE BOARD OF HEALTH.	Cannot pass rules and regulations which apply to only one county.
85-42	Sept 17	James Stewart, M. D.	WITHDRAWN
85-42	Oct 24	HEALTH, BOARD OF. PROSECUTING ATTORNEYS.	Prosecuting Attorneys have authority to apply for an injunction for the abatement of public nuisances at their own relation.
85-42	Oct 26	HEALTH, BOARD OF.	Resorts and recreational camps not subject to inspection by State Board of Health.
86-42	Mar 30	SCHOOLS. LIMITATION OF TAX RATES.	Rates of taxes for school purposes in cities, towns and consolidated school districts.
86-42	May 14	MOTOR VEHICLE FUELS. STATE HIGHWAY DEPARTMENT.	Oils and fluids sent for inspection to the State Inspector may be used by the State or its agencies.
86-42	Sept 21	Mr. Jos. W. Stillwell	WITHDRAWN
88-42	Feb 24	CITY COMMITTEE.	A political party of the City of Independence has a right to select a city committee to perform such duties as are given either expressly or by custom and practice.
88-42	July 29	ELECTIONS.	A voter who moves from one address to another in an election

		REGISTRATIONS. CHANGE OF RESIDENCE IN DISTRICT.	precinct should have his name transferred to the new address before he is entitled to vote.
88-42	Oct 9	ELECTIONS. WAR BALLOTS AND ABSENTEE BALLOTS.	Public Act 712 of Congress does not relieve Election officials of duty to furnish absentee ballots to persons in military service.
89-42	Mar 4	TOWNSHIP ORGANIZATION.	Governor may order audit of township under Section 13105 R. S. Missouri, 1939.
89-42	Apr 9	Hon. Guy H. Thompson	WITHDRAWN
89-42	Apr 18	CIRCUIT CLERKS. COUNTY CLERKS. CONTRACTS.	May give cause for ouster by failing to personally devote time to duties of office. For purchase of supplies for office are void where clerk represents seller.
89-42	Apr 27	SEEDMAN'S LICENSES.	Manager of a "Community Sale" who sells for a farmer seeds grown by the farmer is not required to have a seedman's license.
89-42	May 6	HOME GUARD. MISSOURI RESERVE FORCE.	Called to active duty does not furnish grounds for forfeiture of county office.
89-42	May 9	OFFICERS.	Prosecuting Attorney relinquishes right to compensation by accepting Commission in the Navy and reporting for duty.
89-42	May 27	PENAL INSTITUTIONS.	Procedure necessary to transfer delinquents from State Industrial Home for Girls to the Missouri State School for Feeble-minded and Epileptic at Marshall.
89-42	June 2	COUNTY OFFICERS.	Entitled to collect full salary for each year although amount not fully included in budget.
89-42	June 11	ELECTIONS.	Failure to file declaration in statutory time.
89-42	July 27	INSURANCE.	(1) Missouri State School for Blind cannot purchase insurance covering damage or loss on property in its department; (2) State of Missouri is not liable in damages for the torts of its officers or agents while in the performance of their duty.
89-42	Sept 16	OFFICERS.	Township officer cannot hold office under the United States.
89-42	Sept 17	ELECTIONS. BALLOTS. BALLOT BOXES. CONDUCT OF	In regard to color of ballots, number and kind of ballot boxes, and depositing of various ballots in the ballot box.

		ELECTIONS.	
89-42	Dec 22	COUNTIES. COUNTY BUSINESS.	County courts should transact all “county business,” which includes purchase of material and supplies for county highway system.
90-42	Aug 25	LABOR.	Boys of 14 and 15 may be employed as telegraph messengers if they procure proper work permits, but such permits would not protect the employer of such boys if such employment turns out to be an employment in interstate commerce.
90-42	Sept 24	CHILD LABOR.	Boys from fourteen to sixteen years of age may be employed as telegraph messengers if they have completed the common school.
93-42	Feb 3	CIRCUIT CLERKS. SALARIES.	Section 13400, R. S. Mo. 1939, does not extend the compensation in term commencing January 1, 1939, that ended December 31, 1938.
93-42	Nov 9	OFFICERS – COUNTY SURVEYORS.	A person can hold the office of county surveyor and city surveyor in the same county at the same time.
93-42	Dec 10	CRIMINAL PROCEDURE.	Suit against sheriff, for excessive fees retained, must be filed within three years after the discovery of the shortage.
95-42	June 3	REPOSSESSION OF MORTGAGE PROPERTY UNDER THE SOLDIERS’ AND SAILORS’ RELIEF ACT OF 1940.	Under the Soldiers’, etc. Civil Relief Act of 1940 a mortgagee cannot repossess an automobile bought by a person in military service prior to Oct. 17, 1940, if the mortgagor is unable to pay because of his military service.
95-42	Oct 26	SCHOOLS.	Directors have the right to refuse to allow the use of a school building for other than school purposes.
97-42	Jan 12	BOARD OF PHARMACY. LICENSES.	Appeal does not vacate Board’s revocation of license pending decision of Governor and Attorney General.
97-42	Jan 27	PUBLIC LANDS.	Sale of public lands.
97-42	Mar 9	TOWNSHIP OFFICERS.	Township officers who failed to qualify as provided by Statutes are de facto officers and full credit may be given their official acts unless the third party has knowledge of the failure to qualify.
97-42	Mar 17	PUBLIC ADMINISTRATORS.	Section 301, Laws of Missouri, 1941, page 286, is constitutional.
97-42	June 11	COUNTY TREASURER. ISSUANCE OF PROTESTED WARRANTS FOR COUNTY LIBRARY	County treasurer may not protest warrants for county library in cases where the revenue for payment of warrants is not collected in the year of the issuance of such warrants.

		EXPENDITURES.	
97-42	Aug 5	CRIMINAL LAW. PROSECUTING ATTORNEY.	Information cannot be filed in Circuit Court where a justice of the peace releases defendant on preliminary.
97-42	Sept 15	BOARD OF PHARMACY.	Rule or regulation with respect to renewal of licenses of pharmacists in armed forces.
97-42	Nov 5	CONSERVATION COMMISSION. FISH AND GAME.	Right to seine rough fish in private lake.
98-42	Apr 27	RECORDER OF DEEDS. RELEASE OF CHATTEL MORTGAGE.	Recorder may indicate partial release of personal property in chattel mortgages.
99-42	Jan 30	INSANE PATIENTS. COUNTY COURT'S LIABILITY.	The liability of the County Court for insane patients must be determined by Section 9358, R. S. Mo. 1939.
99-42	May 12	NEPOTISM.	School director cannot appoint daughter of the half-brother of his father-in-law.
100-42	Apr 13	ELECTIONS.	Central committee of political party can only fill vacancies on a ticket after the primary when nominated candidates die or resign.

OFFICERS: County officers in counties under 50,000 population may purchase own supplies.

February 12, 1942

2-23

Mr. George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

FILE

Dear Sir:

This department is in receipt of your letter of February 5, 1942, requesting an opinion, which reads as follows:

"May I have the opinion of your department on the following questions:

"1. Does the County Court of Audrain County have the exclusive authority to purchase necessary supplies for all county offices?

"2. If the County Court of Audrain County should establish and itself operate a central system of supply for all county offices, and if it does have the exclusive authority to purchase necessary supplies for all county offices, would it be liable for payment for supplies purchased directly from vendors by any of the county offices?

"3. To what extent is the County Court of Audrain County liable for payment for supplies purchased directly from vendors by the respective county offices?

"4. What offices, under the law, are county offices such as come within the purview of the opinion to be rendered on the foregoing questions and what offices, if any, are excepted?"

All four questions which you have set out in your request will be answered by our opinion on your first question.

Section 36, Article VI, of the Missouri Constitution reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of the above section, the Legislature enacted Section 2480, R. S. Mo. 1939, which reads as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The above section was construed in the case of State v. McElroy, 274 S. W. 749, l. c. 752, where the court said:

> "In Russell v. Crook County Court, 75 Or. loc. cit. 169, 145 P. 653, 146 P. 806, 'county business' from a constitutional sense has been well defined. The syllabus reads:

> "'(7) "County business," within article VII, sections 11, 12, of the Constitution, authorizing the Legislature to provide for the election of two commissioners to sit with the county judge while transacting county business, and the statute providing for the election of two persons to sit with the county judge in the transaction of county business, means all business pertaining to the county as a corporate entity, and the Legislature may neither limit nor extend the operation of the Constitution, and a proceeding to create a new county out of territory of an existing county is county business.'
>
> "The California court in Fragley v. Phelan, 126 Cal. loc. cit. 388, 58 P. 625, borrows the New York definition of 'county affairs,' thus:
>
> "'In defining the phrase "county affairs" the court said in Hankins v. Mayor, 64 N. Y. 22: "County affairs are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers."'"

Under the above holding, "county affairs" and "county business" were defined as meaning the county in its corporate entity and not the business or powers of each individual officeholder.

Before the enactment of Article 2, Chapter 75, R. S. Mo. 1939, which is the County Budget Law, the county was liable for all necessary furniture and supplies purchased by the elected and appointed officeholders of the county. It was so ruled in the case of Hammond & Stephens v. Christian County, 62 S. W. (2d) 844, l. c. 845, where the court said:

> "In each of the foregoing cases, cited by appellant, the expense incurred by the county official for which the county

> was held liable was in connection with the necessary equipment or care and maintenance of the office room or rooms or county property under his charge, and for the care of which he was responsible, or in the furtherance and performance of official acts and within statutes held to authorize reasonable expenditures for such necessary purposes."

Also, in the case of Smalley v. Dent County, 177 S. W. 620, l. c. 623, where the court said:

> "We have reached the conclusion, from the examination of the foregoing authorities, that the telephone was not only a public necessity in the circuit clerk's office in Dent county, but that the same should have been maintained by the county, at its expense, as a part of the furniture of said office."

Also, in the case of Motley v. Pike County, 233 Mo. 42, l. c. 46, where the court said:

> "Nor do we think there was error in the allowance for telephone service. The term 'other necessaries' as used in the statute is sufficiently broad to cover this item. We are not living in the 'dark ages,' but in a day of progressiveness and enlightenment. Modern business is transacted by modern means and methods. In this day of the world the use of the telephone is in many instances as much of a necessity in the transaction of both public and private business as in the postal service. The use of the telephone has passed the period of mere convenience. It has reached the period of necessity.

> We are of opinion that the plaintiff with the power to furnish his offices with 'other necessaries' had the right to engage telephone service to facilitate the business of his office with the general public. The testimony is that it was necessary, but even without testimony we would have to know what the general public knows with reference to a matter of this kind."

Also, in the case of Ewing v. Vernon Co., 216 Mo. 681, l. c. 692, where the court said:

> "There is not a word in the chapter (chap. 147), relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons, or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; and when we read in section 9057 that the recorder of deeds must give a bond conditioned that he will deliver up to his successor among other things, 'the furniture and apparatus belonging to the office, whole, safe, and undefaced,' we but gather (what we knew before) that the furniture and apparatus do not belong to the recorder, but to the county, and under Revised Statutes 1899, section 1777, are under the control and management of the county court. Turning to other cognate sections it becomes plain that unless the Legislature deliberately planned to legislate against recorders and in favor

> of other county officers (an unthinkable position), it becomes plain that the county is to furnish the necessaries in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. No one reading statutes relating to clerks, probate judges, etc., can come to any other conclusion."

And the court in that case, at l. c. 695, further said:

> "The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'
>
> "The statute relating to recorders ordains that he 'keep' his office, etc.; the word keep is one of wide and flexible meaning, one meaning being to maintain, to provide for. It involves the idea of continued effort in that line, i. e., that the office shall be carried on, enjoyed, etc. In this view of the case, the great breadth of the statutory word 'keep' permits of the notion that it was the legislative intent that the recorder of deeds should have the power to maintain and provide for his office in a reasonable way for the benefit of

> the public, and (by implication) at the public expense, where county courts violate or renounce their duty in that regard."

Also, in the case of Kansas City Sanitary Co. v. Laclede County, 307 Mo. 10, l. c. 17, the court said:

> "The defendant offered evidence tending to prove that the sheriff, upon whose order the goods were sold and delivered, had no authority to order the same and that they were not needed or necessary. This might be a good defense in so far as the goods sold and delivered for use at the court house and poor farm are concerned. Section 9507 requires that the agent purchasing supplies for the county be lawfully authorized, and this requirement is not done away with, even though the claim may not be defeated, because the prescribed legal steps have not been followed. No question of that sort can be successfully raised as to any part of the goods ordered for and used at the county jail. Under Section 12549 the jail is required to be kept in good and sufficient condition, and under Section 12551 the sheriff of the county has the custody, keeping and charge of the jail. He, therefore, has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. (Harkreader v. Vernon County, 216 Mo. 696.) The sheriff testified that the goods were needed and used at the court house, as well as at the jail. There was no testimony what-

> ever tending to show that the goods ordered were not needed at the jail. Therefore, the circuit court should have directed a verdict for plaintiff, to the extent that such goods were used at the jail, and for that reason the judgment in defendant's favor cannot be sustained."

The rulings in all of the above cases were to the effect that county officers could purchase supplies, furniture, etc., necessary for the carrying out of the duties of the office. The main questions involved were questions of fact and not of law, that is, whether the things purchased were necessary. This rule of law has been changed to a certain extent by the County Budget Law, supra.

The County Budget Law consists of many sections, but Sections 10910 to 10917, inclusive, only apply to counties under 50,000 population, and Sections 10918 to 10935 apply to counties over 50,000 population. There is no provision in the County Budget Law which requires the county to appoint a purchasing agent to purchase supplies for all officers in counties under 50,000 population, but there is a provision for the appointment of a purchasing agent and accounting officer in Section 10932, which only applies to counties over 50,000 population. According to the last 1940 census, the population of Audrain County was 22,673, and the powers of the county court in regard to the County Budget Law are set out in Sections 10910 to 10917, inclusive.

Under Section 10915, every officer who expects to claim pay for services or to receive supplies to be paid for from the county funds shall submit to the county clerk certain information and an estimate as to the amount of money that should be budgeted to his department for the year.

Since the rule of law as set out in the cases in the first part of this opinion has not been changed as to counties under 50,000 population, the county court, which passes upon the estimate as given by the county officer for his salary and supplies, has control over the finances of the county to the extent that it may reduce his estimate. The county court can

revise and amend his estimate by virtue of Section 10917, R. S. Mo. 1939.

"County officers" have been defined in many cases. In the case of State ex rel. Buchanan County v. Imel, 242 Mo. 293, the court, at page 300, defined "county officers":

> "The words 'county officers' have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is co-extensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual political functions, its function of government.' (Sheboygan County v. Parker, 70 U. S. 93, l. c. 96.)"

Also, in the case of State ex rel. Rucker v. Hoffman, 294 S. W. 429, l. c. 431, the court, in holding that a probate judge is not a county officer, said:

> "The duties of official court reporters pertain wholly to the courts of which they are officers, and they perform no duties whatever relating to the functions of county government. The Supreme Court in the case of State ex rel. v. Imel, 242 Mo. 293, 300, 301, 302, 146 S. W. 783, 784, in holding that a probate judge is not a county officer, stated:
>
> "'The words "county officers" have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is co-extensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers "by whom the county performs its usual political functions, its

function of government." Sheboygan County v. Parker, 70 U. S. 93, loc. cit. 96 (18 L. Ed. 33)."

This opinion covers all county officers, which excludes probate courts and circuit courts.

Under Section 10912, the officer claiming any payment for salaries or supplies, who does not include in his budget an itemized statement of the supplies he will require for his office, would not be entitled to purchase such supplies. It is mandatory that he furnish all of this information as to his salary and allowance for supplies before he can receive either salary or purchase supplies.

We are not holding that a county officer can purchase supplies that are not appropriated to him by the county budget, and he should keep within the budget in the purchase of all necessary supplies.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the County Court of Audrain County does not have the exclusive authority to purchase necessary supplies for all county officers.

It is further the opinion of this department that the county is liable for the payment of supplies purchased directly from vendors by any of the county officers of Audrain County providing that the budget of his department contains sufficient money to pay the claim.

Our holding in this opinion applies to all county officers of Audrain County.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS:
SCHOOL DISTRICTS:
PARTITION FENCES:

Liability of public school districts for costs of partition fences.

March 23, 1942

FILE

Hon. George Adams
Prosecuting Attorney
Mexico, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following question:

> "May I have your opinion as to whether or not a common school district can be compelled to put in a partition fense under the statutes relative tofences and enclosures,"

The question which you submit does not involve the question of the authority of a school district to erect fences but it involves the question of whether or not it is mandatory on a school district to erect division fences. On the question of the authority of the district to erect fences, we are enclosing a copy of an opinion to Honorable P. C. Hays, Secretary of School Board, Poplar Bluff, Missouri. This opinion is dated March 24, 1936. While it is not pertinent to the question you have submitted, we thought it might be of some value to you in settling this matter.

On the question of whether or not it is mandatory for the district to erect and pay for a division fence dividing the properties of the school district from other owners, I find that section 14574, R. S. Mo., 1939, pertaining to division fences provides as follows:

> "Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 14569 and 14570, served to enclose the land of another,

> or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner one-half the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence.

You will also note that by section 14575 that if the owners fail to agree on the value of the fence, then it is submitted to a Board of Reviewers. And by section 14576, it is provided that if the person charged with his part of the value of the fence does not pay for same, that it might be recovered before some justice of the peace of competent jurisdiction. If the controversy is between individuals, then there is no question but that the foregoing provisions of the statute are applicable. However, a school district is a subordinate agency, subdivision, or instrumentality of the state, which performs the duties of the state in the conduct and maintenance of the public schools. State vs. Whittle 63 S. W. (2) l. c. 102. That being the case, the school district is in a different class than that of a person involved in a division fence line controversy.

We do not find where such question has been before the courts of this State or any other state. However, we think that the question in which it was attempted to impose a sewer tax against a school district is analogous to the question here. In the case of Normandy Consolidated School District of St. Louis County v. Wellston Sewer District of St. Louis County et al. 77 S.W. (2d) 477, the Sewer district was attempting to collect from the school district the portion of the sewer tax which the lands of the school district were liable for. The sewer tax act under which the suit was brought provided that a uniform tax should be levied "upon all the lands" within any sewer district and that upon the assessment of benefits a tax of a portion of such benefits should be levied "on all lots, tracts and parcels of lands, railroads and other property in the district etc." In that suit the defense was that a school district being a public instrumentality of the government was not included within the act. At l. c. 478 the court said:

> "Now it is accepted doctrine that public schools constitute an arm of the state government and perform a public or governmental function, from which it necessarily

follows that the question of whether the property of school districts is to be held liable to the imposition of a tax against it is to be determined in the light of the rules pertaining to the subject of taxation of public property generally.* * * * *" Citing cases.

* * * * * * * * * * * * * * * * * * * *

"But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment. This doctrine traces its ancestry back to the ancient common-law principle that the crown was not to be bound by any statute, the words of which restrained or diminished any of his rights or interests, unless he was specially named therein; and the theory of the modernized restatement of the principle is that to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. And of course, if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication." Citing cases.

In that case the court held that the school district was not included within the sewer tax act because the lawmakers had not expressly included it. The imposition of the expenses of erecting a division fence upon a school district would be similar to the imposition of the sewer tax expense on a school district. Since the court in the Normandy Consolidated School District case above, held that since the school district is not expressly included in the sewer district act, that it is not liable for the tax; then by the same process of reasoning, since the school district is not expressly included in the statutes pertaining to division fences cited above, we do not think that a school district could be charged with the costs or value of its one-half of any fence which may be erected between its property and other property.

CONCLUSION

From the foregoing, it is the opinion of this department that a common school district cannot be compelled to put in a partition fence nor can it be charged with one-half of the value of the fence.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

TOWNSHIP ORGANIZATION: TRUSTEES:

1. Upon refusal and failure to qualify after being elected, the old board shall call another election
2. Old trustees shall continue to perform all duties until new trustees are elected and qualified.

June 6, 1942

6-9

FILE

Hon. O. D. Algermissen
Mayor-Elect
St. Peters, Missouri

Dear Mr. Algermissen:

This is to acknowledge receipt of your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

"May I beg to present a problem of ours in the Town of St. Peters, Missouri? The regular town election was held on April 7, 1942, and five new members were elected to the Board of Trustees. None of them appeared for qualification prior to twenty days following their election, although they were duly notified of same by U. S. Mail.

"Please advise what is to be done. Shall a new election be held? If so, what procedure shall be followed? Is the old Board of Trustees privileged to act in accordance with the duties of their offices until the newly elected officers are qualified and sworn into office? Could the same present board (that elected in April 1941) remain in office and act legally until time of the next annual election (April 1943) without endangering the forfeiting of the corporate charter?"

Section 7294, R. S. Mo. 1939, provides as follows:

"In case of the failure of any election of trustees or other officers, a majority of the trustees then in office, or any justice of the peace of the township in which said town or village is situated, may cause the election to be held on any other day."

It will be noted from the above section that the section contains the words "any election" and the words "the majority of the trustees then in office." From this wording, we are of the view that it is clearly the intent of the Legislature that where persons fail or refuse to qualify, as is indicated in the opinion request, having been duly elected at a regular annual election for that purpose, it is incumbent upon the trustees holding over in office to call another election. Further, if the trustees do not call an election, any justice of the peace of the township in which said town or village is situated may call the election.

It will be noted that Section 7296, R. S. Mo. 1939, provides in part as follows:

> "* * * * or if the qualified electors of such village shall fail for one year to elect such trustees, then such village shall be disincorporated by the county court of the county where the village is located, upon the petition of any citizen residing in such village, after the publication of notice * * * *"

The above section is clear in its meaning as to the procedure that may be followed by the county court should a village fail to elect persons who will act as trustees.

From a review of the foregoing sections, we are of the opinion that the trustees who have held over shall call another election for the purpose of electing suitable persons who will qualify and act as trustees, or any justice of the peace in the township in which the village is situated may call the election, but it is our opinion the primary duty in upon the holdover trustees, for it will be noted the section uses the word "may" after the provision providing that a justice may act whereas the portion of the section referring to the trustees <u>then in</u> office is explicit in its meaning and directions to the trustees.

In giving notice for the election, Section 7288, R. S. Mo. 1939, provides as follows:

> "The judges of election shall give public notice of the time and place of holding each election, by advertisement published in some newspaper published in their town, or by handbills put up in six public places in such town, not less than ten nor more than twenty days previous to the election."

The above section should be followed in giving notice for the election.

Now turning to the question, "Is the old Board of Trustees privileged to act in accordance with the duties of their office until the newly elected officers are qualified and sworn into office?"

Section 7244, R. S. Mo. 1939, provides as follows:

> "No person shall be a trustee who shall not have attained the age of twenty-one years; who shall not be a male citizen of the United States; who shall not be an inhabitant of the town at the time of his election, and reside therein for one whole year next preceding; who shall not be a householder within the limits of such town; and every trustee shall hold his office for the term of one year, and until a successor is elected and qualified."

It will be noted that the above section clearly provides that a trustee who has been duly elected and has qualified shall hold office for the term of one year, and until a successor is elected and qualified. Therefore, the trustees that are now holding over in office shall perform each and every duty until a new board of trustees are elected and qualified and succeed them.

CONCLUSION

1. It is the opinion of this department that where newly elected members of a board of trustees of a village

fail and refuse to qualify, it is incumbent upon the trustees of the old board to call another election, giving the notice as is provided in Section 7288, R. S. Mo. 1939, for the purpose of electing persons who will qualify and act as trustees for the ensuing year.

2. It is the opinion of this department that where persons are elected to a board of trustees, but who refuse and fail to qualify, the members of the old board of trustees shall continue to perform each and every duty until a new board is duly elected and qualified.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

ELECTIONS: Qualifications of judges of election.

COPY

July 9, 1942

FILED

1

Mr. H. D. Allison
County Clerk, Buchanan County
St. Joseph, Missouri

Dear Mr. Allison:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement:

> "Will you please inform me if it is permissible for a judge or clerk to serve in another precinct or ward other than the one in which he is registered and qualified to vote on election day.
>
> "We do not find any section in the laws which states that a judge or clerk must serve in only the ward and precinct in which he is qualified to vote but since we have had numerous questions asked in regard to this matter, I would appreciate a legal opinion from you."

We refer you to Section 11469, R. S. Mo. 1939, which provides in part as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county,

> city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people: Provided, each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: * * * * * * * * * * * * * * *"

Section 11500, R. S. Mo. 1939, pertaining to qualifications of judges or clerks of election, provides as follows:

> "No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election, and shall moreover be able to read and write."

Since said Section 11500 does not specifically provide that the judge or clerk shall be a resident voter of the ward or precinct in which he resides, we think, under the rule that statutes relating to the same subject matter should be read together, that, therefore, said Section 11500 should be read with said Section 11469. Applying that rule then, the judge or clerk of the election should not only be legally entitled to vote at said election, but he also should be legally entitled to vote in the ward or precinct in which he is to act as judge.

CONCLUSION

It is, therefore, the opinion of this department that the qualifications of the judge of an election should be that he should be legally entitled to vote at the election and that he should also be legally entitled to vote in the

county, city, ward or precinct in which he is to act as judge.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:CP

ELECTIONS - Application of absentee voters in the Armed Forces within and outside of the State, and when such votes shall be placed in the hands of the election officials.

October 1, 1942

10-3

FILED
1

Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

The Attorney General is in receipt of your request for an opinion, of recent date, which partially reads as follows:

> "Sec. 11521 states that ballots must be returned to the County Clerk not later than sixty-six hours preceding the time for opening the polls and that such ballots should be transmitted by the County Clerk to the election judges who are to count same on election day. Does this Section apply to all absentee ballots cast by service men or does it apply only to those who obtain the ballot direct from the County Clerk and vote same in the County Clerk's Office. I do not see how it would be possible for a man to make application within the time limit of from 15 to 5 days prior to election, have his ballot mailed to him, vote it and return it to the County Clerk not later than sixty-six hours before the polls open, if the County Clerk would not even receive his application for ballot until five days before the election.

"I would also like to know if a letter from a service man asking for an absentee ballot, will be sufficient application or is it compulsory that he use the form provided for in Sec. 11472."

Your request involves two distinct interrogations: (1) Must all absentee ballots cast by persons in military service reach the county clerk at least sixty-six hours preceding the time for the opening of the polls, as provided in Section 11521 R. S. Missouri, 1939, or only those returned to the clerk by mail; and (2) may absentee voters in the Armed Forces apply by letter for a ballot, or are they required to execute an affidavit as required by Section 11472 R. S. Missouri, 1939.

I

Inasmuch as, the "right of suffrage is not a natural or inherent right * * but is purely conventional" (State ex rel Ellis v. Brown, 33 S. W. (2d) 104, l. c. 107, 326 Mo. 627) the solution of your inquiry is to be found in the constitutional provision and certain of the absentee ballot statutes later noted herein.

You mentioned Section 11521 R. S. Missouri, 1939. This applies to absentee voters in military service outside this State. This indicates that there is here involved only the votes of members of the military forces present elsewhere than in Missouri. However, as there is a distinction between absentee voters of the Armed Forces within the State and those without the State the statutes applicable to both will be noted.

Section 9, of Article VIII of the Constitution authorizes the enabling of qualified voters, absent from this State on military service and qualified voters absent from their counties, but within the State, to exercise their right of suffrage as may be provided by law. These absent electors were placed in two groups, one group being voters in the Armed Forces beyond the confines of Missouri, and the other being voters who are within the State, but without their respective counties.

Accordingly the legislature enacted what is now a portion of Article 2, of Chapter 76, and Article 3, of Chapter 76, both found in the Revised Statutes of Missouri, for the year 1939. This office has ruled that the first mentioned article applies to qualified voters both civilian and members of the Armed Forces outside their respective counties, but within the State, while said Article 3 (of which Section 11521, supra, is a part) governs only qualified electors outside the State on military or naval services. An epitomization to such rulings is hereto attached.

Qualified voters absent from their counties, but within the State, may apply, in person, or by mail, for an absentee ballot (Section 11471 R. S. Missouri, 1939) and such ballots, when voted, must reach the issuing officer not later than six o'clock P. M., of the day after the election. (Section 11474 R. S. Missouri, 1939).

Section 11519 R. S. Missouri, 1939, applies to qualified voters in the Armed Forces and beyond the confines of Missouri, reads as follows:

> "Any absent voter as defined under the provisions of this article, who shall have complied with the pro-

> visions of the law relating to registration whether by the form outlined in section 11518 of this article or in person may make application by mail not more than fifteen nor less than five days prior to such election, to the county clerk of the county of which he is a resident, or board of election commissioners of the city of St. Louis or clerk of the city, town or township, as the case may be, for an official ballot to be voted at such election."

The language of this section may be somewhat confusing, as may be the wording of Section 11521, supra, yet certain rules of statutory construction will apparently govern.

While elections should be so conducted as to afford a free and fair expression of the popular will, yet "mandatory statutory requirements must be followed." (State ex inf. McKittrick v. Stoner, 146 S. W. (2d) 891, l. c. 894.)

It is a primary rule of construction to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the legislature, its plain meaning. (Artophone Corporation v. Coale, 133 S. W. (2d) 333, 345 Mo. 344.) The intention of the lawmakers will prevail over literal sense of terms. (State v. Swartsmann Service, 40 S. W. (2d) 479.) However, if the meaning of a statute is plain and unambiguous, it may not be construed, but must be given effect as written. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667, 347 Mo. 456.) Furthermore, the statutes should be read together to determine the intent of the legislature.

It was evidently the legislature's intent that a person in the military forces could make written application, if beyond the State, for an absentee ballot, or if he was present in the county of his residence but expected to be outside of the State on election day he could apply in person for an absentee ballot, but that such application in either event should be made no more than fifteen, nor less than five days prior to the election. This is according to Section 11519 R. S. Missouri, 1939, and that portion of Section 11521, supra, which reads as follows:

> "The elector shall upon receipt of a ballot or ballots, go before an officer authorized by law to take oath, administer and make and subscribe to the affidavit on back of envelope in which ballot or ballots are to be enclosed, and the voter shall thereupon in the presence of such officer and no other person, mark such ballot or ballots, but in such manner that said officer cannot know how said ballot or ballots were marked, and the ballot or ballots voted shall, in the presence of said officer, be folded by such voter so that each ballot will be separate and so as to conceal the marking and be enclosed in the envelope in which the affidavit was taken, in the presence of said officer, and in case there are rejected or unvoted ballots, the voter shall fold such ballots together and enclose in another envelope marked 'unvoted ballots' and enclose such envelope in the same envelope with the voted ballots which shall be securely sealed and registered to the office from which ballots were received, as per address on face of envelope: * * * * * * * * * ."

This section proceeds with:

> " * * * Provided further, any elector may make application to the clerk, whose duty it is to issue ballots as defined by this article for an official ballot, if such ballots are in such officer's hands, and take oath as prescribed and vote and said clerk shall hold said ballot in his office until time to be sent to the precinct at which said elector is a qualified voter as hereinafter defined: Provided, however, that all absentee ballots shall be in the hands of the county clerk or other official whose duty it is to forward ballots and election supplies to the various voting precincts not later than sixty-six hours preceding the time for opening the polls at such election. And the clerk shall note upon the envelope containing such ballots, the day and hour which he received same."

The last quoted portion is definite and certain and leaves little, if any, room for construction. Section 11522 R. S. Missouri, 1939, provides, among other things, that the absentee ballot shall be delivered to the judges of the election at the same time and in the same manner as the poll books and ballots are delivered, which must be delivered before the polls open; then, of necessity the ballots could reasonably be required to be in the hands of the clerk or election board, as the case may be, a period of time before the other election supplies are delivered.

It is the opinion of this department that the absentee ballots of qualified voters in the Armed Forces, absent from the State must be in the hands of the county clerk, or board of election commissioners, as the case may be, at least sixty-six hours preceding the time for the opening of the polls at such election. This conclusion, however, does not apply to qualified voters outside their county, but within the State, casting absentee ballots. The latter are governed by Section 11474 R. S. Missouri, 1939.

II

Your second question is to the effect that: May absentee voters in the Armed Forces apply by letter for a ballot, or are they required to execute an affidavit as prescribed by Section 11472 R. S. Missouri, 1939?

The statute you mention in this connection (Section 11472 R. S. Missouri, 1939) requires the execution of an affidavit and application for an absentee ballot and prescribes the form of such. Section 11471, supra, requires such affidavit and application to be made, not more than thirty nor less than five days before the election. Said application and affidavit may be made in person before the county clerk, or board of election commissioners, if the county has such board. As has been pointed out these statutes are a part of Article 2, of Chapter 76, and apply only to absentee voters, including those in the Armed Forces who are within the State, but outside their county on election day.

Section 11519, hereinabove quoted, which is a part of Article 3, of Chapter 76, of the Revised Statutes of Missouri, 1939, apply solely to absentee voters in

military service who will be out of the State on a general election day. By authority of this statute, the application may be in writing, but is not required to be verified. This statute does not prescribe a form for the application, and, as nothing may be added to the requirements of the statute by way of construction, the application may be informal and a request by letter for an absentee ballot would, therefore, be sufficient.

By Section 11521, supra, the legislature evidently intended that a soldier or sailor who would be beyond the confines of the State on a general election day, could vote by applying in person to the county clerk or board of election commissioners, depending upon the size of the county. The oath mentioned in this section refers, no doubt, to the oath on the envelope in which the ballot is placed, and as set out in Section 11519, supra.

Thus Section 11519, supra, provides for a written application for absentee ballot, with reference to soldiers and sailors who may be outside the State on a general election day, and Section 11521, supra, provides that they may appear in person before the clerk or board of election commissioners, and cast their ballots, if they will be outside of the State on election day.

The absentee voters' statutes, as above pointed out, provide that absentee voters, without their respective counties but within the State, shall make an affidavit and application for an absentee ballot not more than thirty nor less than five days before the election, and that their ballots, when cast, shall reach the issuing official not later than six o'clock p. m. of the day succeeding the election; and that those voters without the State in military service shall make application in person, or in writing, not more than fifteen nor less than five days before a general election day, and that their ballots shall be in the hands of the

proper official not later than sixty-six hours preceding the time for opening the polls on election day.

The question then presents itself if the time limitations expressed in such statutes are directory, and may be waived, or mandatory, and therefore to be strictly followed.

The principle of complying with election law provisions is stated in Volume 20 C. J. 152, Section 181, which provides in part as follows:

> "Since electors cannot be disfranchised because of the neglect of the officers charged with the duty of preparing the ballots, technical errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots nor invalidate the election, unless the statute expressly makes a specified irregularity fatal. * * *"

This principle has been followed by the Missouri courts. Horsefall v. School District of Salem, 143 Mo. App. 541, 128 S. W. 33; Nance v. Kearbey, 251 Mo. 374, 158 S. W. 629.

The rule for the procedure for election officials under the election laws is that such officers must follow the provisions of the statute. This principle of law is announced in Lamar Township v. City of Lamar, 261 Mo. 171, l. c. 189:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they

> are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * "

See, also, State ex inf. McKittrick v. Stoner, 146 S. W. (2d) 891, l. c. 894, hereinabove cited.

CONCLUSION

It is the opinion of this department that a qualified voter in the Armed Forces who expects to be outside the State of Missouri on a general election day may make application for an absentee ballot by informal letter, or in person, not more than fifteen nor less than five days before such election, and without executing a verified application; and that a qualified voter in the Armed Forces who expects to be inside the State of Missouri but outside his county on election day may make application for an absentee ballot in person, or by mail, but is required to do so by an affidavit and application, as set out in Section 11472, R. S. Missouri, 1939, and not more than thirty days nor less than five days before the election.

It is the further opinion of this office that the time limitations with reference to applying for absentee ballots, voting the same, and returning them to the proper receiving official are mandatory, and must be strictly followed.

Respectfully submitted

APPROVED:

VANE C. THURLO
Assistant Attorney General

ROY McKITTRICK
Attorney General

VCT: HR

ELECTIONS: Members of police force not permitted to be within voters' booths during progress of election, and not entitled to be within polling places unless requested by judges of election.

October 21, 1942

10-22

FILED

Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

Your request of recent date for an opinion from this department is acknowledged. It is partially as follows:

> "Are members of the police force permitted to stay inside a polling place or within 100 feet of such polling places on election day? In the past election, the police were stationed in many of the election booths just as a means of intimidating the voters; they were not called in to settle any disturbances. If the police are allowed to be within the booths, would the Sheriff and his deputies also have the same privilege in a County Election."

The term "polling place" is not synonymous with "booth". The words "polls" and "polling place" mean the place to which voters go to cast their ballots. Adams v. Corwin, 195 N. Y. S. 41, l. c. 42, 118 Misc. 701.

Section 11600, R. S. Missouri, 1939, is in part as follows:

> "All officers upon whom is imposed by law the duty of designating the polling places, shall provide in each place designated by them a sufficient number of places, booths or compartments, which shall be furnished with such supplies and conveniences as shall enable the voter conveniently to prepare his ballot for voting, in which compartment the electors shall mark their ballots, screened from observation, and a guard so constructed that only persons within the said rail can approach within five feet of the ballot boxes, or the places or compartments herein provided for. The number of places or compartments shall not be less than one for every one hundred and fraction of one hundred electors who voted at the last preceding general election in the district; in cities having registration, the number shall be one for every hundred or fraction of one hundred names registered. * * * * * * *"

Thus, an election booth is a place, booth or compartment in the polling place for the use of the voters in marking their ballots, "screened from observation".

In substance, two questions are submitted, namely: (1) May members of the police force stay inside a polling place or within 100 feet of it on election day, and (2) if policemen are allowed within the booths, may the sheriff and his deputies likewise enter the booths during the progress of the election.

The system of elections in the United States is entirely statutory, and the exercise of the right of suffrage is controlled solely by constitutional and legislative provisions. Taylor v. Buckham, 178 U. S. 548, 44

L. ed. 1187; State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, l. c. 107; State ex rel. Edwards v. Ellison, 196 S. W. 751, 271 Mo. 123.

The questions asked will be answered in inverted order.

I.

Your second proposition is, in effect, if policemen are allowed within the booths during the progress of an election, may the sheriff and his deputies likewise enter the booths.

Section 9 of Article II of the Missouri Constitution is as follows:

> "That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Section 3 of Article VIII provides:

> "All elections by the people shall be by ballot. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter who presents it. All election officers shall be sworn or affirmed not to disclose how any voter shall have voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the

> violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

Section 4 of Article VIII provides:

> "Voters shall in all cases except treason, felony, or breach of the peace be privileged from arrest during their attendance at elections, and in going to and returning therefrom."

The framers of the Constitution, in certain and definite terms, by these provisions, provided for the secret, free and uncoerced expression of the right of franchise.

The Legislature has enacted definite provisions to further the constitutional requirements. Section 11600, supra, provides for a guard rail in front of the screened booths and ballot boxes so that only persons within the rail may approach within 5 feet of the boxes and booths. This section then states:

> " * * * No persons, other than electors engaged in receiving, preparing or depositing their ballots, shall be permitted to be within said rail, except by authority of the judges of election, and except as is now by law otherwise provided. * * * * * "

Section 11604, R. S. Missouri, 1939, prohibits more than one person from occupying a booth at one time. Judges and clerks of the election are not even allowed to enter an election booth to assist an illiterate voter in preparing his ballot. Section 11606, R. S. Missouri 1939. In addition, the election officials are required to keep secret how all persons voted.

These provisions are clear and certain and must be given effect as written. St. Louis Amusement Co. v. St. Louis County, 147 S. W. (2d) 667, 347 Mo. 454. They are mandatory and should be strictly followed. State ex inf. McKittrick v. Stoner, 146 S. W. (2d) 891, l. c. 894.

The allowance of more than one person in a voting booth, be he an official or a private individual, cannot be too strongly condemned. The presence of an officer in a voting booth at any time other than when he is actually preparing his individual ballot would tend, we believe, to destroy the sanctity of the ballot and the untrammeled right of suffrage.

CONCLUSION

It is, therefore, concluded that, while preparing his ballot, no person other than the individual voter may be in a booth at any one time during the election's progress.

II.

Your second question has been stated as follows: May members of the police force stay inside a polling place or within 100 feet of it on election day?

Section 11495, R. S. Missouri, 1939, provides:

> "All judges, clerks and voters shall be free from arrest, except for felony or breach of the peace, in going to, attending on and returning from election.

In Section 11494, R. S. Missouri, 1939, the following appears:

> "The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

Section 11495, R. S. Missouri, 1939, is as follows:

> "The judges of the election shall preserve good order and punish any disorderly person for contempt by fine not exceeding twenty dollars, at their discretion, and commit the offender to the jail of the county until the fine imposed be paid."

Section 11628, R. S. Missouri, 1939, provides that in case the judges of election are not present at the time fixed for opening the polls, the voters present to the number of ten or more may proceed to elect judges to act at such poll, and by Section 11600, supra, it is provided that no persons, other than electors, while receiving, preparing and depositing their ballots, shall be permitted within five feet of the rail in front of the ballot boxes and booths, without authority of the judges.

The statutory provisions indicate that the Legislature intended that the judges of election should be in charge of the election in their respective polls. The constable is required to be in attendance at the election "and perform such duties as are enjoined on him by law,

under the direction of the judges." (Underscoring added.) Section 11494. The judges are required to preserve order and are authorized to punish disorderly persons by a fine and commit such persons to jail until such fine is paid. Section 11495. The ballots are delivered to the judges. Section 11598. They may authorize persons other than electors engaged in receiving, preparing and depositing their ballots to be behind the guard rail. Section 11600. And evidently the election cannot proceed until the judges are present and qualified. Section 11628.

A cardinal rule of statutory construction in this state is that the legislative intent should be ascertained and given effect, if possible, from the words used in the statute. Artophone Corporation v. Coale, 133 S. W. (2d) 333, 345 Mo. 344; State ex rel. McKittrick v. Carolene Products Co., 144 S. W. (2d) 153, 346 Mo. 1049; Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452; Cummins v. Kansas City Public Ser. Co., 66 S. W. (2d) 920, 334 Mo. 672; Rust v. Missouri Dental Board, 155 S. W. (2d) 80. Furthermore, statutes on the same subject are to be read together and harmonized. In re Rosing's Estate, 85 S. W. (2d) 495, 337 Mo. 544; State v. Mangiaracina, 125 S. W. (2d) 58, 344 Mo. 99; State ex rel. Henning v. Williams, 131 S. W. (2d) 561, 345 Mo. 22; State v. Gomer, 101 S. W. (2d) 57, 340 Mo. 107; State ex rel. Central Surety Ins. Co. v. Commission, 153 S. W. (2d) 43.

While the words "election officers" and "election officials", by virtue of Section 11627, R. S. Missouri, 1939, include, among others, "city marshal or police officer when on duty taking part in the conduct of any * * * election, * * * as required by the provisions of this article", yet no statute requires police officers to be present at the election nor gives such officers a single duty to perform.

The District Court of Pennsylvania in the decision of Police at Polls, 3 Pa. Dist. Rep. 243, in passing upon statutes providing that police officers, constables and deputy constables, "now required by law to be present at the polls," remain within the voting room, and preserve order therein, and when no other statutory provisions

required police officers to be present at the polls, held, l. c. 244:

> "The draughtsman of the Acts of 1891 and 1893, being, in all probability, aware of this provision of the Act of 1839, seems to have taken it for granted that it embraced police officers as well as constables, for which there is no warrant whatsoever. As police officers are the chief instruments for the preservation of order in cities, he was evidently under the impression that police officers were required by existing laws to be present at elections in cities to preserve the peace, while in rural localities he no doubt thought that the same functions were to be performed by constables. Of course there is no foundation for this.
>
> "I need not stop now to argue that the mere recital in a law of another law which is supposed to exist, but which in point of fact has no existence whatever, does not amount to a legal enactment. It would be superfluous to waste time on the discussion of such a proposition. An enactment is an enactment. It must be made by appropriate enacting words, and is never left to stand upon mere inference and surmise, especially where the inference and surmise are altogether false and unfounded in fact.
>
> " * * * * In like manner the provisions with regard to the presence of police officers at the polls, in the Acts of 1891 and 1893, not being in the nature of enactments requiring their presence

> there, but mere recitals or statements of facts which have no existence, but which are founded in a total mistake of fact, there being no such existing laws, it cannot be pretended that they have the force of enactments.
>
> "An erroneous assumption in an Act of Assembly that a law exists which has no existence whatever, except in the imagination of the draughtsman of the Act, can by no theory of sound reason, or legitimate construction, be held to be a law itself. The people of this state are not left at the mercy of such loose legislation as that would be. If they were they would be no better off than were the subjects of that ancient tyrant whose decrees were posted so high above their heads that they could not read them.
>
> "The conclusion is, that neither by virtue of the Acts of 1891 and 1893, nor by any other existing law, are police officers required to be present at the polls."

While the question of police officers being present at the polls on election day has apparently never been passed upon by the appellate courts of Missouri, the rule has been stated as follows:

> "In the absence of statute there is no authority for the presence of police officers at the polls, except for the purpose of casting their own votes or, in cases of actual necessity, for the purpose of preventing the commission of offenses or of preserving the public peace." (29 C. J. S., Sec. 200, page 287.)

In Police at the Polls, supra, the Pennsylvania Court ruled, l. c. 244-245:

> "Fortunately there is no necessity ordinarily for their presence there. If they are required at any poll for the preservation of the public peace, or the prevention of crime, they can be dispatched thither, at very short notice, in sufficient numbers, by the head of the department, to make their presence there effective and decisive. Unless they are required for those purposes, it is more consistent with the character of our institutions, and with the requirements of art. 1 of the constitution of Pennsylvania that 'elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,' that the elections should be conducted without the presence of any officers, military or civil, other than those appointed by law for the holding and conducting of elections. It is a pregnant fact, illustrative of the jealousy of the people against the presence of either soldiers or civil officers other than the election officers at the polls, that while the Act of July 2, 1839, prohibits the presence of troops at election places, the Act of March 24, 1877, prohibits the presence of sheriffs' deputies at the polls also.
>
> * * * * * * * * * * * * *
>
> "We are therefore of opinion that the director of public safety is under no obligation of law to detail policemen

> for the several election divisions of Philadelphia on election day, and that the police officer has no business at the polls, except to cast his own vote, or to preserve order, in case his presence there is rendered necessary for that purpose. Nor is his presence in the poll when the vote is counted required by any law, unless his services are invoked by the election officers to prevent the commission of offences, or to preserve the public peace."

The Supreme Court of Kentucky in the case of Scholl v. Bell, 125 Ky. 750, 102 S. W. 248, l. c. 259, declared:

> " * * * The statute has designated the persons who shall have charge of the conduct of an election, and the members of the police force are not included among their number. We know of no law which demands, or even justifies, their participation in the conduct of an election, nor has the able counsel for the contestees referred us to any.
>
> "The conduct of an election under the supervision of either military or police authority has never been sanctioned by our courts, nor approved by our people. On the contrary, whenever the occasion has presented itself, it has been uniformly held that an election conducted under the supervision of the military power is not a 'free and equal' election; and the record in this case shows that the conduct of an election under police supervision is not less repulsive. * * * * * "

Section 11625, R. S. Missouri, 1939, contains the following:

> " * * * No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. * * * * * "

This proviso throws little light upon the question, but a part of Section 4369, R. S. Missouri, 1939, is worthy of note. It is as follows:

> " * * * or any person who shall approach within one hundred yards of any polling place during the time any election therein is being conducted or the votes therein being canvassed or returned, carrying concealed or deadly weapons, or who shall then and there exhibit the same for the purpose of intimidating any voter, or display any deadly weapon or make use of the same; * * * * * shall be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

This statute does not exempt policemen from its terms and would apparently apply unless such police were summoned by the election judges to assist the judges in maintaining good order and to enforce the law.

CONCLUSION

It is, therefore, concluded that the judges of election are in charge of the election in their respective polls and are responsible for the good order and peace in and about the polls, and authorized to punish those who do not maintain the peace and keep good order.

It is further concluded that policemen and other peace officers, except constables, at times other than when they are actually voting, should not be present at the polls unless summoned by the judges of election to maintain the law and good order.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HR

STATE PLANNING BOARD: Appropriation for board limited to $10,000.00 for any biennium.

December 16, 1942

FILED
2

Mr. William Anderson
Director
Missouri State Planning Board
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 7, 1942, which reads as follows:

> "At the meeting of the State Planning Board held on November 16, the matter of appropriations for the State Planning Board for the next biennium was discussed. A remark was made that the provision in Section 15393, page 3899, 1939 Revised Statutes, was not binding. One of the members stated that the Appropriations Committee of the Legislature is not under obligation to follow this since one session cannot bind another session with regard to money. In order to have a definite understanding about this, we would like to have a ruling from your Department concerning this provision."

Section 15393 R. S. Missouri, 1939, reads as follows:

> "The state planning board shall be so limited in the number and compensation of employees and assistants that

> their salaries, together with the expense provided for herein for members of said board shall not exceed for any biennium the sum of ten thousand ($10,000.00) dollars."

This section is not a limitation on future legislatures, for the reason that it can be repealed or amended. An act of the legislature should not be declared unconstitutional unless it appears beyond a reasonable doubt that it is in contravention of the Constitution. (Hull v. Baumann, 131 S. W. (2d) 721, 345 Mo. 159).

Under the above section any appropriation in excess of Ten Thousand ($10,000.00) Dollars for any biennium would not be valid. If an appropriation is made in excess of the Ten Thousand ($10,000.00) Dollars for the biennium it would not be an amendment of the section for the reason that legislation cannot be included in an appropriation bill. It was so held in the case of State v. Smith, 75 S. W. (2d) 828, l. c. 830, pars. 4-6, where the court said:

> "It cannot be said that the act appropriating $3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R. S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate $3,000 from one fund to another. It reads as follows:
>
> "' There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand ($3,000.00) dollars to the Board of Barber Examiners Fund.' (Laws 1933-34, p. 12, sec. 12B.)

> "Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S. W. 338."

The proper procedure for the appropriation of a larger amount than Ten Thousand ($10,000.00) Dollars for the biennium would be to either amend Section 15393, supra, or repeal the whole section.

CONCLUSION

It is, therefore, the opinion of this department that Section 15393 R. S. Missouri, 1939, is binding, and the legislature is not authorized to appropriate a larger amount than Ten Thousand ($10,000.00) Dollars for the biennium, as set out in said section.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELEEMOSYNARY INSTITUTIONS: Indigent insane must be resident of county before he may be admitted as a county patient.
INSANE:

- -

May 14, 1942

5-24

Hon. Omer H. Avery
Prosecuting Attorney
Lincoln County
Troy, Missouri

FILE
3

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "I have a question to present to you concerning a party who probably should be adjudged insane. This party is a resident of a W.P.A. Work Camp No. WP 9407 near Troy, Lincoln County, Missouri. He was brought to this camp from the City of St. Louis about two years ago, and on one occasion he was released, returned to St. Louis where he remained about thirty-five days, and then returned to this camp.
>
> "The question involved is whether he is a subject to be dealt with by the City of St. Louis or by Lincoln County."

Section 9328, R. S. Mo. 1939, provides in part as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * * * * * * * *"

Section 9335, R. S. Mo. 1939, provides as follows:

"For the admission of county court patients the following proceedings shall be had: Some citizen residing within the county, of which the alleged insane person is a resident, shall file with the Clerk of the County Court of such county a verified statement in writing which shall be substantially as follows:

"State of Missouri)
)ss.
County of _____)

"The undersigned, a citizen residing in the county and state aforesaid, on his oath, according to his best information and belief states: that _____, a resident of the county and state aforesaid is insane; that his insanity is less than _____ year's duration; the said _____ has not sufficient estate to support him at a state hospital for the insane; that the said _____ (is or is not) so deranged as to endanger himself or others and _____ (will or will not) be dangerous to the safety of the community by being at large and that he _____ (is or is not) now being confined or restrained; and that the foregoing facts can be proved by _____ and _____ (naming at least two persons one of whom shall be a reputable physician).

"Dated this ____ day of _____, 19___.

_____.

"Subscribed and sworn to before me this _____ day of _____ 19__.

_____
County Clerk."

Section 9339, R. S. Mo. 1939, provides in part as follows:

> "If, after such examination, the court, or the jury, if one shall have been employed, shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record, upon their own decision, or, where the verdict of the jury has been rendered, upon the verdict. * * * * * * * * * * * * * * *"

Under the above sections it will be seen that in order for a person to be admitted to a state hospital as a county patient that he must be a "resident" of the county. As pointed out in Thomas v. Macon County, 175 Mo. 68, l. c. 74:

> "The sections above referred to contain the only provisions to be found in our statutes expressly authorizing the cost of keeping a patient in the asylum to be charged to a county and in each of those cases it requires that the person be a resident of the county and that the county court should take the prescribed action in the premises."

Section 655, R. S. Mo. 1939, defines "residence":

> "* * * * seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; *."

It is the rule in this state that the word "residence" has no fixed meaning applicable in all cases. State ex rel.

v. Smith, 64 Mo. App. 313. But the question must be determined from all the facts. The intention of the party is a large factor in determining his residence. State v. Snyder, 182 Mo. 462, 82 S. W. 12; State ex rel. v. Dayton, 77 Mo. 678.

As pointed out in 54 C. J. 708, a man's residence is the place of actual abode to which, wherever he may be, he intends to return.

Under the facts submitted in your request, we are unable to determine whether the person in question is a resident of Lincoln County or not, but this fact should be determined by the County Court in passing upon the statement of a citizen of the county asking that the person in question be admitted to a state hospital as a county patient.

CONCLUSION

It is, therefore, the opinion of this department that a person, in order to be admitted to a state hospital as a county patient, must be a "resident" of the county. What constitutes a person a "resident" of the county is a matter of fact which must be determined by the county court.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

AO'K:CP

APPROVED:

ROY McKITTRICK
Attorney-General

CORONERS: Election for coroner in 1942 unauthorized and void, and commission should not issue.

December 10, 1942

FILED
3

Mr. Richard Arens
Secretary to the Governor
Executive Office
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request of December 8, 1942, for an opinion upon the following question:

> "Should the Governor issue a Commission to one who was on the 3rd day of November, 1942 elected coroner of a county in Missouri?"

Section 10 of Article IX of the Constitution of Missouri provides as follows:

> "There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county

> shall be hereafter established, the Governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

Section 11 of said Article IX, in so far as it applies to coroners, provides as follows:

> "Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. * * * If any vacancy happen in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

While Section 11459, R. S. Mo. 1939, provides for the election of certain officials, including coroners, in the year of 1880, and every two years thereafter, its terms with reference to coroners are now ineffective, due to the adoption of Section 10 of Article IX of the Constitution long after the enactment of the statute. Marsh v. Bartlett, 121 S. W. (2d) 739, l. c. 745, 234 Mo. 526.

The Constitution (Section 10 of Article IX) provides for the election of coroners in the general election of 1908 and every four years thereafter. This provision is definite and prevents any construction other than that coroners should have been elected at the general election in 1940, and will be again elected in 1944.

Under the clear provisions of Section 11 of Article IX of the Constitution, any vacancy occurring in the office of coroner is filled for the remainder of the four year

term by county court appointment. It is apparent, therefore, that these two constitutional provisions preclude the holding of an election for coroner in the year of 1942.

In 29 C. J. S., page 101, the following rule is announced:

> "Time and place are of the substance of an election , and it is essential to the validity thereof that it be held at the time and place provided by law.
>
> "Time and place are of the substance of every election, and as a rule it is essential to the validity of an election that it be held at the time and in the place provided by law, and, if it is not so held, the eligibility of the candidates voted for will not help the matter.* * *"

18 Am. Jur., page 250, states:

> "In most jurisdictions constitutional provisions, of which the courts may take judicial notice, fix the times of the election of various officers. Although such a provision should be adhered to, it does not preclude the legislature from fixing the time of elections not mentioned therein.
>
> "The prevailing view seems to be that where the date of an election is not left to the determination of officials, but is unequivocally fixed by statute, the provision is regarded as mandatory and the election officials have no authority to change the date. An election held at a time other than that prescribed will be declared void, * * *".

The St. Louis Court of Appeals in State ex rel. v. Ruark, 34 Mo. App. 325, and the Kansas City Court of Appeals in State v. Webb, 49 Mo. App. 407, l. c. 412, ruled that an election held on an unauthorized date was void.

CONCLUSION

It is, therefore, the opinion of this department that an election for coroner held on November 3, 1942, is unauthorized and void, and that a commission should not issue to the one receiving the highest number of votes at such election.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General
VCT:HR

STATE FAIR:
COMMISSIONER OF
AGRICULTURE:

Commissioner of Agriculture may hold essay or poster contests in schools to carry out purposes of the State Fair Act.

February 10, 1942

2-22

FILE 4

Mr. Ernest W. Baker
Secretary-Manager
Missouri StateFair
Sedalia, Missouri

Dear Mr. Baker:

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts and requests:

> "I would appreciate an expression of your opinion as to whether or not it would be permissible for the Missouri State Fair to hold an essay or poster contest in the various schools throughout the State of Missouri, and offer a cash prize, probably a defense bond."

The Missouri State Fair is created by statute and the powers and duties of the officers thereof are derived from these statutes together with such other powers as may be implied from the act.

The rule that "that which is implied in a statute is as much a part of it as that which is expressed", has been applied in the case of State ex rel O'Connor v. Riedel, 46 S. W. (2d) 131, 329 Mo. 616; and in State ex rel Bybee v. Hackmann 207 S. W. 64, 276 Mo. 110.

And in the case of Lamar Township v. City of Lamar 261, Mo. 171, 189, the court announced the rule as it applies to powers and duties of officers in the following language:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that

> they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Applying these rules here, we refer to the statute creating the State Fair to ascertain what powers have been conferred upon the officials delegated to administer that act.

Section 14154 R.S. Mo., 1939, provides in part as follows:

> "For the purpose of encouraging the development of the agricultural, horticultural, mechanical, mineral, stock raising and all other industrial interests of the State of Missouri, there is hereby established a state fair, to be held annually at Sedalia, Missouri, and on the state fair grounds heretofore conveyed by deeds of conveyance to the state of Missouri and hereafter to be acquired by the state of Missouri as hereinafter provided; and said fair shall be under the control and management of the state commissioner of agriculture as hereinafter provided;* * *."

Section 14155 provides in part as follows:

"The commissioner of agriculture, at such time as may be determined upon by him shall hold, annually, a fair upon the state fair grounds above designated; and at these fairs all important products of the state shall be recognized, according to merit, by premiums or rewards, for excellence offered by the commissioner of agriculture, out of a fund provided therefor by the legislature of the state at each biennial session thereof, or from funds that may be otherwise provided; but all parties receiving awards for excellence or merit shall not collect the same, nor is it collectible until he furnishes to the commissioner of agriculture to his satisfaction, a complete history of how the exhibit was produced, and all other information concerning the entry that would be of interest or benefit to the general public;* * *"

Section 14159 provides in part as follows:

"The commissioner of agriculture shall have power to make all rules, regulations and by-laws necessary and suitable for the conduct and government of the exhibitions, the sale of privileges, and for the proper control, operation and conduct of the fair not inconsistent with the purposes of this article, nor with the Constitution and laws of this state.* * *"

Said section 14155 permits the commissioner of agriculture in the administration of this act to recognize according to merit by premiums or rewards all important products of this state. It is of general knowledge that the construction placed on this clause by those who have heretofore administered this act construed the term "important products of the state" to include educational exhibits as well as other Missouri products.

Referring to your request, we think an essay or poster contest on subjects which would be in relation to Missouri

products would be in keeping with the spirit and purpose of the act, providing the contestants are required to comply with the provision of said section 14155 in respect to furnishing the commissioner of agriculture, to his satisfaction, a complete history of how the exhibit was produced and all other information concerning the entry that would be of interest or benefit to the general public.

The commissioner, by section 14159, has the authority to make the necessary rules and regulations for the carrying on of each contest and to fix the prize or award to be given to the winner, which prize or award should be awarded at the State Fair when other exhibits are placed on exhibition.

CONCLUSION.

From the foregoing, it is the opinion of this department that the commissioner of agriculture in recognizing according to merit the educational products of this state, may hold essay or poster contests in the schools of this state, and offer such premiums or awards for the excellence of the exhibit as he may deem proper, providing such exhibit is offered and award is made at and during the State Fair period.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:AW

COUNTY RATIONING BOARD: Member of the legislature may serve on the county rationing board.

- -

October 22, 1942

FILED
5

Honorable William Barton
House of Representatives
Montgomery County
Jonesburg, Missouri

Dear Mr. Barton:

Under date of September 19, 1942, you wrote this office requesting an opinion as follows:

> "May Representative be eligible to serve as a member of the County Defense Council?
>
> "May a Representative be eligible to serve as Chairman of a Ration Panel in the County? As I understand it, the chairman has to take an oath and sign a personnel affidavit as required under the Price Control Administration or Price Administration?"

Due to the heavy work in the office at this time and the further fact that the law relating to emergency measures is as times difficult to find a reply has been unavoidably delayed.

Inasmuch as this office has been informed that you have accepted appointment upon the County Defense Council it is presumed that you have satisfied yourself upon that question and it will not be treated herein.

It is first desired to call your attention to two sections of the Constitution of Missouri, Section 12 of Article IV and Section 4 of Article XIV, which sections are respectively as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

The local rationing boards were first set up as "tire rationing boards".

Pursuant to the emergency powers conferred upon the President, the President by Executive Order created the Office of Price Administration and authorized the Office of Price Administration to provide for local agencies.

By an order issued December 30, 1941, Leon Henderson, Administrator of the Office of Price Administration, authorized the creation of local "tire rationing boards". From this order we quote:

> "Personnel. The tire rationing program established in these regulations by the Office of Price Administration, pursuant to the delegation of power from the Office of Production Management in Supplementary Order No. M-15-c, will be administered by Local Tire Rationing Boards, Local Tire Rationing Administrators, and State Tire Rationing Administrators, all of whom shall be federal employees, serving without compensation, subject to the supervision and control of the Office of Price Administration.
>
> "Eligibility. Members of Boards, Local Tire Rationing Administrators, and State Tire Rationing Administrators must be eligible to serve as federal employees, without compensation, under state and federal laws.
>
> "Appointment. Members of boards and Local Tire Rationing Administrators shall be selected by the Local Defense Councils in the areas in which they are to serve and shall be appointed by the Office of Price Administration. State Rationing Administrators shall be selected by the State Defense Councils in the states in which they are to serve and shall be appointed by the Office of Price Adminis-

tration. Any appointment subject to provisions of these regulations may be terminated at any time by the Office of Price Administration.

"Duties. The persons appointed to administer the tire rationing program shall have such duties and responsibilities as the Office of Price Administration may from time to time direct."

From time to time additional duties were placed on the local boards, and the 77th Congress by the Emergency Price Control Act, Public Law 421, set out in the Congressional Code, 1942, page 23, and following by Statute created the Office of Price Administration.

It will be observed that the members of the local boards were employees, without compensation. Also that the constitutional prohibitions are against members of the General Assembly being appointed to any office under this state, or any municipality, during their term and against persons holding lucrative offices under the United States, this State or any municipality, and against a person holding an office of profit under the United States holding an office of profit under this State during the continuance of such United States Office.

CONCLUSION

It is, therefore, the conclusion of this office that a member of the General Assembly may serve as chairman of a local rationing board.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

OFFICERS: CORONER; JUSTICE OF THE PEACE:
Coroner and justice of the peace may hold the same office.

December 28, 1942

12-31

FILED
5

Honorable William Barton
Member of House of Representatives
Jonesburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 22, 1942, which reads as follows:

> "Please advise if a duly qualified and acting Justice of Peace may also accept an appointment as Coroner of the County in which the Justice of Peace resides, where there is a vacancy in the office of Coroner, and legally hold both the Justice of Peace office and the Office of Coroner."

In a careful research we fail to find any statute or any section under the Constitution which prohibits a person from holding two county offices. The Constitution does prohibit a state officer holding an office under the United States as it appears in Section 4, Article XIV of the Constitution of Missouri. The Constitution of Missouri also prohibits, in counties or cities having more than two hundred thousand (200,000) inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set out in Section 18, Article IX of the Constitution of Missouri.

Section 18, Article IX of the Constitution of Missouri reads as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Although the above section only applies in cities or counties having more than 200,000 inhabitants and prohibits the holding of a state office, or the office of any county, city, or other municipality at the same time, and prohibits the filling of two municipal offices, yet, it specifically sets out that the section shall not apply to justices of the peace.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, which was passed upon by the Supreme Court of this state, June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The case of State ex rel. Walker, Attorney General, v. Bus, supra, was followed in the case of State ex rel. Langford v. Kansas City, 261 S. W. 115, and in that case the court held that the office of a deputy

sheriff was not incompatible with the office of city clerk. In paragraph 1 the court said:

> "The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of the trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159.

In that case the court, at page 116, said:

> "In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was

> most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):
>
> "' The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two — some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

46 C. J. sets out the rule in Section 46, page 941, as to the construction as to whether or not two offices under the common law are incompatible.

Section 46, of 46 C. J., supra, reads as follows:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

We must therefore look to the powers and duties of the justices of the peace and coroners, respectively. We fail to find in Chapter 91 R. S. Missouri, 1939, which applies to Inquests and Coroners, any duties that are incompatible, conflicting, repugnant and inconsistent with the duties of a justice of the peace and those of a coroner.

The only officer set out by statute as being ineligible to be a justice of the peace and another officer, at the same time, is a clerk of the circuit court, or county court, as set out in Section 2526 R. S. Missouri, 1939.

A justice of the peace is a township officer, for the reason that his jurisdiction and election are confined to a township. A justice of the peace is commonly called a county officer. We do not find any constitutional or statutory prohibition which would prevent a justice of the peace from holding another county office at the same time, except that of clerk of circuit or county court, as set out in Section 2526, supra.

The main question involved, where there is no statutory or constitutional prohibition, is, whether or not the duties of a justice of the peace, and the duties of a coroner are incompatible, conflicting, repugnant or inconsistent.

We also do not find any law which would prohibit a justice of the peace from performing the duties of a coroner. On the other hand, by Section 13243 R. S. Missouri, 1939, it is specifically provided that in case the coroner is unable to take an inquest a justice of the peace may take the inquest and perform all the duties enjoined on the coroner.

In the State of Pennsylvania it was held that a justice of the peace and an associate judge of the court of common pleas were not incompatible officers, although the incumbent, as judge, might be called upon to give judgment in the common pleas on a judgment rendered by him as a justice of the peace. (Commonwealth v. Sheriff of Northumberland County, (Pa.) 4 Serg. & R. 275.)

CONCLUSION

It is, therefore, the opinion of this office that a person may hold the office of justice of the peace and coroner, for the reason that the duties of either office

are not incompatible, conflicting, repugnant or inconsistent with the duties of the other.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

STATE TREASURER: PUBLIC SERVICE COMMISSION: MOTOR VEHICLE FUNDS: State treasurer's duties respecting licenses fees on motor vehicles under Section 5728, R. S. Mo. 1939

January 12, 1942

1-29

FILE 6

Hon. Wilson Bell
State Treasurer
Treasury Department
Jefferson City, Missouri

Dear Mr. Bell:

This is in reply to your letter of recent date wherein you submit the following questions:

"1. Can I lawfully designate a member of the staff of the Public Service Commission as an assistant cashier of the State Treasurer, such person to be on duty at the office of the public Service Commission and to receive the fees required in said Section 5728?

"2. Can the Public Service Commission lawfully pay such assistant cashier of the State Treasurer out of its, Public Service Commission's, funds?

"3. Can the Public Service Commission pay the premium on the bond which I may require such person to give?"

Section 5728, R. S. Mo. 1939, to which you refer in your letter, provides in part as follows:

"(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5721 shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the State of Missouri the annual license

> fee, as set out in this article, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued: * * * *.
>
> " * * * * The commission, upon the issuance of a license for any vehicle, as defined in this article, shall notify the state treasurer who shall receive the license fee for such vehicle; and the commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicle in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates."

From your request you indicate that you do not contemplate paying the assistant cashier who handles these funds out of your appropriation. That being the case, you are not confronted with the provisions of Section 48 of Article 4, of the Constitution which is as follows:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize

> the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

We also note that the appropriation to your department does not mention assistant cashiers.

In our research on this question, we fail to find any statute providing for the appointment of such assistant cashier. However, from an examination of the various statutes imposing different duties on the State Treasurer we think he has implied powers to appoint such assistants as are needed to carry out those duties. In the case of State ex rel. Hueller v. Thompson, 289 S. W. 338, the right of the Board of Permanent Seat of Government to appoint an assistant commissioner was authorized. It also authorized the appointment of as many watchmen as is necessary, but did not fix their salary. The court disposed of the question in the following language:

> "Since the Legislature has not, by any general law, fixed the compensation of any employees or appointees of the board of the permanent seat of government, except that of the commissioner thereof, and has not named or limited the number of such employees or appointees, save and except certain temporary employees (section 9267, R. S. Mo. 1919), it is to be presumed that it intended to give the board a discretion as to the kind and number of assistants and helpers necessary to carry on the duties enjoined upon the board by said chapter 84, as well as the compensation of such employees, helpers, and assistants. Indeed, the number of persons necessary to take care of and protect the property of the state, as contemplated and required by law, is a matter which the Legislature could not foresee. Therefore the placing of no inhibition upon the employment of such help, but to leave the same to the wisdom and discretion of the board of the permanent seat of government, reflects a wholesome legislative policy. We hold therefore, that the board, in its dicretion, had the power to appoint an assistant commissioner and to fix his compensation. * * * * * * *."

Following the ruling in this case, if an assistant cashier is needed by your department, to perform the duties imposed upon you, it seems that you would have implied authority to make such an appointment.

Upon the question of the authority of the Public Service Commission to pay the salary of this assistant cashier, we refer you to the Public Service appropriation for this biennium, Laws of Mo. 1941, pages 153, 154. You will note that that appropriation act does not mention an assistant cashier. Section 19 of Article 10 of the Constitution provides as follows:

> "No moneys shall ever be paid out of the treasury of this state, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Therefore, if the appropriation act fails to mention an assistant cashier, then the Public Service Commission would not be authorized to pay a salary out of that appropriation.

However, by your request, you suggest that a member of the staff of the Public Service Commission will be designated as assistant cashier. If this procedure is followed and if such person, if told he is designated by you as assistant cashier, is in fact a member of the staff of the Public Service Commission, then we think said Section 19 of Article 10, supra, would not be violated by paying such member of the staff out of the appropriation of the Public Service Commission for this biennium. Of course this is conditioned on the fact that the appropriation to the Commission for this biennium includes the compensation of such staff member.

On the question of the Public Service Commission paying the premium on the bond of the assistant cashier, we do not find any statute authorizing such a bond. However, such person may execute a common law bond which would be binding on him and his sureties. Such a bond would be classed as a common law bond. The assistant cashier, in the absence of statute requiring such a bond, could give a voluntary bond which would be binding on him and his surities. Such bonds have been held proper and binding on the parties in two cases in this state, namely State v. Cochrane, 264 Mo. 581, 175 S. W. 599, where the court held at l. c. 595, as follows:

> "For the reason that the bond in suit shows on its face terms, involving the assumption of an obligation by the appellant Surety Company, to indemnify the public, against any default of its principal in the performance of its duties as a warehouseman (aside from stipulations to comply with the inspection laws), we think that instrument is a valid common-law obligation and enforceable in this action by the plaintiff, who though not named in the bond, is entitled to sue in the name of the State for the breach of a bond made for its benefit. (Barnes v. Webster, 16 Mo. supra.) The judgment is therefore affirmed. All concur."

And, Loinberger v. Krieger, 88 Mo. 160; La Crosse Lumber Company v. Schwartz, 163 Mo. App. 659, 147 S. W. 501, where the Court at l. c. 664, said:

> "The instrument is not a statutory bond but we think it is good as a common law bond. A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute. (Barnes v. Webster, 16 Mo. 258.) And it is a well-settled rule that a bond taken by a public officer in attempted compliance with a statute is good as a common law bond though it falls short of fulfilling the requirements of the statute. (Waterman v. Frank, 21 Mo. 108; State v.

> Thomas, 17 Mo. 503.) Since the bond was not a statutory obligation and was not executed to the state, plaintiff was not compelled to sue in the name of the state to the use of plaintiff. The only theory on which plaintiff who was not a party to the bond may recover upon ip is that it was executed for his benefit. * * * * * *"

Referring to the appropriations to the Treasury Department and Public Service Commission, Laws of Missouri, pages 133 and 153, it will be seen that the appropriation for "operation" includes payments of premiums on bonds for each department. However, since the bond is to be executed by the person for the performance of his duties as assistant cashier, which office would be under your department, we do not think that the payment for the premium on this bond could be taken out of the Public Service Commission appropriation. We are further supported in our position by the fact that the appropriation to the Public Service Commission for administering the law pertaining to motor bus and truck service does not include an item for the payment of premiums on bonds. Section 56, page 154, Laws of Missouri, 1941.

CONCLUSION

From the foregoing, it is the opinion of this department that the State Treasurer may designate a member of the staff of the Public Service Commission as assistant cashier, which person may be on duty at the office of the Public Service Commission to receive the fees required under Section 5728, R. S. Missouri, 1939, pertaining to motor bus and truck traffic.

We are further of the opinion that the Public Service Commission may not pay such person as assistant cashier to the State Treasurer out of its appropriation, but such person may be paid as a staff member of the Commission.

We are also of the opinion that the Public Service Commission may not pay the premium of the bond on such Assistant cashier but that the State Treasurer may pay same

out of his appropration providing funds are available.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

COUNTY COURTS: Taxes levied to pay off the indebtedness incurred to build a courthouse cannot be used for any other purpose.

February 20, 1942

2-25

FILE 6

Mr. Noah Bell
Presiding Judge
Oregon County Court
Alton, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an opinion, which reads as follows:

> "Q 1. We have our New Court House completed and moved back into the building and in our old Court House the A. F & A. M. had the 3rd. floor leased for a period of 99 years and in building the old building the Lodge paid almost $1000.00 in building it and thereby got the lease and all the Lodges consisting of the I.O.O.F., Rebeckah and Eastern Star and M. W. of A. all met.
>
> "In the New Building we have two rooms designated as Community or Recreation rooms and the A. F. & A. M. wants their lease to continue on as the old lease given on the old building, and the County Court is wondering if they have the power and authority to grant a lease to the Lodges.
>
> "In getting the W.P.A. grant the rooms as above stated had to be designated as Assembly or Recreation rooms before being allowed Government aid.
>
> "So will you please advise as soon as possible what steps for us to pursue.

"Q 2. Under the new law in regard to the County Treasurer's Salary, will you please advise when the increase or the stipulated salary will go into effect.

"Q 3. Also will you please advise if we can use the surplus money on hand that has accumulated from our Bond levy after we have paid off the bonds and interest for the year that the levy was made and no other obligations to meet. If we can use the surplus we want to buy furniture to equip our new building."

In answer to your question No. 1, we enclose a copy of an opinion given by this department to Mr. Carl F. Wymore, Prosecuting Attorney of Cole County, which holds that a county court may not lease county property for a term of years. Based upon the reasoning and authorities contained in said opinion, we have no hesitancy in holding that the county court does not have authority to grant a lease to the lodges for the third floor or any part of the courthouse for the remainder of the 99-year period or any portion thereof.

In answer to your question No. 2, we enclose a copy of an opinion given by this department under date of August 20, 1941, to Hon. Everett H. Pittman, Treasurer of Clinton County. You will note from this opinion that whether or not the stipulated salary is now in effect in your county depends on whether or not it would increase the salary of your county treasurer. If it does, it would not go into effect until the end of his term, but if not, it was effective on the 10th day of October, 1941.

In answer to your question No. 3, we assume that bonds were issued to pay for the courthouse in compliance with Article 4, Chapter 16, R. S. Mo. 1939, and that the county court, in pursuance of Section 3296 of said article, provided for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to create a sinking fund for the payment of the principal thereof within twenty years from the date of contracting the indebted-

ness. Your question is not whether the proceeds of the bond sale could be used to buy furniture for the courthouse, but whether the tax levied to pay the interest and create a sinking fund for the payment of the bonds could be used to buy furniture.

Section 11219, R. S. Mo. 1939, reads in part as follows:

> "It shall be the duty of the county treasurer to separate and divide the revenues of such county in his hands and as they come into his hands in compliance with the provision of law; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund which several funds shall be known and designated as provided by law; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court as aforesaid. * * *"

Section 11220, R. S. Mo. 1939, provides as follows:

> "Any county court or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and on conviction thereof shall be punished as provided in section 11042."

You will note that, under the provisions of the above section, any county officer who orders the payment of any money for any purpose other than the specific purpose for which the same was assessed, levied and collected shall be guilty of a misdemeanor. The tax in question is levied, as pointed out above, for two purposes, to pay the interest and principal of the indebtedness incurred to build a courthouse, and to pay same out for any other purpose would be a violation of the above statutes.

Section 13829, R. S. Mo. 1939, reads as follows:

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Under the above section, the balance credited to a special fund which is no longer needed for the purpose for which it was raised may, by order of record, be transferred to the credit of the general revenue fund, or to any other fund. However, the fund created by taxes levied to pay the interest and indebtedness in question may not be used or transferred for any other purpose until the entire indebtedness and interest thereon is paid.

It is, therefore, our opinion that funds derived from a levy to pay bonds issued to build a courthouse and interest thereon cannot be used for any other purpose unless there is a surplus after said indebtedness is paid in full.

Respectfully submitted

JOHN E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TEM:ldg

LIQUOR: When appropriation of Treasurer exhausted, Liquor Supervisor may purchase stamps out
BEER STAMPS: of his printing appropriation.

June 22, 1942

6-24

FILED
6

Honorable Wilson Bell
State Treasurer
Jefferson City, Missouri

Dear Mr. Bell:

This is in reply to your request for our opinion by your letter dated June 17, 1942, which is in the following terms:

> "The Sixty-first General Assembly appropriated, for the use of the State Treasurer in paying the expenses of providing stamps for the collection of inspection fees for the manufacture and sale of beer, the sum of $15,000.00. This amount has been expended, and the State Liquor Department has asked us for five million 4½¢ stamps to be used on the enlarged bottles as ordered by the War Production Board. These additional stamps will cost approximately $2,500.00.
>
> "Inasmuch as we do not have the money to buy these stamps, w ich will return to the Treasury about one-fourth million dollars in revenue, we are asking you if it will be unlawful for the Department of Liquor Control to pay for these stamps out of their Operation Funds, as set out on Page 197, Laws of Missouri, 1941. Mr. Henderson, the Supervisor, informs us that he has the money and will be glad to pay for the stamps if it can be legally done."

With reference to stamps evidencing payment of the inspection fee on intoxicating beer, Section 4923, R. S. Missouri, 1939, in part, provides:

> "It shall be the duty of the state treasurer, upon the taking effect of this act, to provide suitable and inimitable state certificates and labels for this inspection, gauging and labeling, having on each proper places for countersigning by the state treasurer and supervisor of liquor control, and shall safely keep the same together with the plates used in making them, when not in actual use. The state treasurer shall from time to time upon demand, deliver the aforesaid labels to the supervisor of liquor control, * * * * * * * * * * *."

Regarding stamps evidencing payment of such tax on nonintoxicating beer, Section 4968, R. S. Missouri, 1939, in part, provides:

> "It shall be the duty of the state treasurer to secure and furnish to the supervisor of liquor control suitable and inimitable labels and certificates, which may be in combination, and stamps, of such denominations as the supervisor of liquor control may require for the purposes of this article. * * * * * * * * * * * * * * * * *. The state treasurer shall from time to time, upon the written requisition of the supervisor of liquor control, issue and deliver to said supervisor such number of labels and certificates and such amount of stamps as may be required by such requisition and take the receipt of said supervisor therefor. * * * * * * *."

In this connection, the exhausted appropriation of the State Treasurer, for the year 1942, is found in Laws of Missouri, 1941, page 134, section 18, which provides:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund; for the use of the State Treasurer in paying the expenses of providing stamps for the collection of inspection fees for the manufacture and sale of beer, the sum of Fifteen Thousand Dollars ($15,000.00), or as much thereof as may be necessary for said purpose."

Appropriations to the Treasurer for other periods, and for other functions connected with the liquor traffic, are at Laws of Missouri, 1941, pp. 38, 39, sections 21 and 22.

The available appropriation of the Supervisor of Liquor Control is found in Laws of Missouri, 1941, p. 197, section 36, which in part provides:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, * * * * * * * * to the Department of the Supervisor of Liquor Control, to pay for the personal service, additions, and operating expenses required in connection with the administration of the Liquor Control Law, for the years 1941 and 1942, as follows: * * * * * * * * * * * * * * * *
>
> "C. Operation;
> General expenses consisting of communication, printing and binding, transportation of things, travel, rent, obtaining evidence,

stationery, office supplies, witness fees, and mileage and other general miscellaneous expenses, insurance and premiums on bonds . . . . . $196,200.00."

An appropriation for another period is in Laws of Missouri, 1941, page 100, section 48.

In answering your question, attention must be given to the purpose for which the stamps are used, and the duties of the Supervisor of Liquor Control in that regard.

With reference to nonintoxicating beer, Section 4956, R. S. Missouri, 1939, provides that the Supervisor, "shall collect, for the inspection of nonintoxicating beer, inspection fees at the rate of sixty-two cents (62¢) per barrel * * *." The stamps involved here are sold by the Supervisor to the dealers, and are the "stamps evidencing the payment of the inspection fees by this article required * * *." Section 4967, R. S. Missouri, 1939. Said ptamps must be affixed to the containers and packages of beer (Section 4972, R. S. Missouri, 1939), and the fees so collected by the Supervisor must be paid into the State Treasury. (Section 4982, R. S. Missouri, 1939).

Substantially the same provisions are in the law applicable to intoxicating beer. It is the duty of the Supervisor to inspect such beer, and the same kind of stamps or labels must be affixed to the containers of such beer (Sections 4920, 4922, R. S. Missouri, 1939). The Supervisor must collect the same amount, "sixty-two cents (62¢) per barrel," for the inspection of intoxicating beer (Section 4925, R. S. Missouri, 1939). Finally, it is unlawful for anyone to transport or sell any beer except in containers bearing the stamps and labels evidencing payment of the inspection fee (Section 4932, R. S. Missouri, 1939).

The obvious intent of the Legislature, in enacting all of the above cited statutes, was to provide for the collection of revenue.

Since the appropriation of the State Treasurer for purchasing the inspection fee or tax stamps has been exhausted, we must decide whether the Supervisor of Liquor Control may pay for the purchase of the stamps. Looking only at the statutes applicable to the State Treasurer, it might appear on the surface that the question is governed by the maxim, "Expressio unius est exclusio alterius." That is a rule sometimes applied by the courts in construing ambiguous statutes. It means that, "where the statute . . . limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done." Keane v. Strodtman, 18 S. W. (2d) 896, l. c. 898 (2-4), 323 Mo. 161. In other words, the rule is that the expression of one thing or method in an ambiguous statute is the exclusion of another.

In construing statutes, the primary object is to ascertain and effectuate the real intention of the Legislature. Technical maxims of construction should be used only where there is ambiguity. It was so ruled in State ex rel. Wabash Ry. Co. v. Shain, 106 S. W. (2d) 898, l. c. 899, 900, 341 Mo. 19, where the court said:

> "* * * * * The cardinal rule to be followed in the construction of statutes is to arrive at the legislative intent. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker." Sutherland on Statutory Const., Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.'"

It is always true, as ruled in Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22, l. c. 25 (3), 323 Mo. 990, 66 A. L. R. 1053, that:

> "* * * * * the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmaker from the language used. Kane v. Kansas City, Ft. Scott & M. Ry. Co., 112 Mo. 34, 20 S. W. 532; State ex rel. v. Slover, 126 Mo. 652, 661, 29 S. W. 718."

If the State Treasurer were the only officer who could pay for the stamps, then no stamps would be provided at all, during the remainder of this year, and no revenue would be collected. Revenue in the amount of one-quarter of a million dollars would be lost.

The Legislature did provide that it, "shall be the duty of the State Treasurer to secure and furnish . . . to provide, the stamps." Sections 4968 and 4923, supra. The plain object of all the statutes is to obtain revenue. The Legislature also provided that the, "supervisor . . . shall collect," the tax (section 4956, supra). The Supervisor has the duty to sell the stamps to beer manufacturers and dealers, and the stamps, "shall, by the manufacturer or distributor, be placed upon each package," of beer (section 4967, R. S. Missouri, 1939).

The duty of the Supervisor is as plain as the duty of the Treasurer, and cannot be performed without stamps. We believe that when the Legislature imposed the above mentioned duty upon the Supervisor, it meant he was to discharge that duty with all the means at his disposal, and intended that if it should become impossible for the Treasurer to purchase stamps, that the Supervisor should buy the stamps and collect the tax. This view is strengthened by the fact that the Legislature provided a method whereby the Supervisor can purchase stamps. The appropriation of the Supervisor includes funds for printing. The stamps are printed, and, in the circumstances of this case, may, in our opinion, lawfully be paid for out of the Supervisor's appropriation.

When all of the statutes are read together, there is no ambiguity. Therefore, such technical rules of construction

as the expressio unius etc. rule, are not needed. It was so ruled by the Supreme Court of Missouri in City of St. Louis v. Baskowitz, 201 S. W. 870, l. c. 873, 273 Mo. 543, and the court said:

> "* * * In other words, the maxim 'Expressio unius est exclusio alterius' has no application where the statute upon its face clearly conveys a contrary intention of the Legislature."

The same reasoning was applied by the learned Judge Barclay, then of the St. Louis Court of Appeals, in McFarland v. M. K. T. Ry. Co., 94 Mo. App. 336, l. c. 342, 343, 68 S. W. 105, in the following terms:

> "The maxim which declares that the expression of one thing is the exclusion of others not expressed, should be applied only where it appears to point to the legislative intent. The maxim is useful as an aid to discover that intent, but it should never override a different purpose plainly indicated. * * * * * * * * * * *."

To the same effect is City of Lexington v. Bank, (K. C. Ct. App.) 130 Mo. App. 687, l. c. 692, 693, 108 S. W. 1095.

May we recommend that all of the present procedure with reference to accounts, the keeping of the stamps by the Treasurer, and issuance of stamps by him to the Supervisor, should be maintained.

CONCLUSION.

Under the above mentioned authorities, it is our opinion that when the State Treasurer has exhausted his appropriation provided for the purphase of beer stamps, the Supervisor of Liquor Control may lawfully purchase and pay for such stamps out of his appropriation for printing.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

EH/rv

ELECTIONS: County clerk furnishes ballots. Sheriff posts notice of election on vacancy of member of the legislature.

July 20, 1942

7-22

FILED
6

Bellamy & Harvey
Attorneys at Law
Farmers Savings Bank Building
Marshall, Missouri

Attention: Mr. W. T. Bellamy.

Gentlemen:

We are in receipt of your letter of July 16, 1942, in which you request an opinion as follows:

> "I am in receipt of your letter of the 14th inst. enclosing copy of opinion dated July 7th to Honorable Dwight H. Brown, Secretary of State, and also supplemental opinion regarding special election of representatives for General Assembly; also copy of your other opinion to the Prosecuting Attorney of Cass County, and thank you for the information therein contained. However, the particular matter that was bothering me is whether or not the notice of this election should be posted. That is the way I read the statute, but I would like to have your opinion about that. In the next to the last paragraph on page 4 of your opinion of July 7th to the Secretary of State, it is stated 'From these sections it would appear that a special election is conducted in the same manner and governed by the same law as a general election', etc. From this I am in doubt as to whether it is your opinion that the notice should be published in the same manner or whether

notices should be posted.

"From the above quoted portion of your opinion of July 7th, I judge it is your opinion that returns of this election should be made to the County Clerk as in case of general election as there is nothing in the statute that directs otherwise. However, in view of the statement in the statute about putting up notices, it seems to me that with reference to this election we might be required to put up notices by posting three in each municipal township but that the results of the election should go to the County Clerk.

* * * * * * * * *

"P. S. Since dictating the foregoing letter I have learned that our County Clerk is contending that it is not his duty but the duty of the Sheriff to have ballots for this special election printed. I will therefore appreciate it if you will give me your opinion.

"1. Whether the notice of election should be posted or published in a newspaper;

"2. Whether it is the duty of the County Clerk or the Sheriff to have the ballots printed for the election;

"3. Whether the returns of the election should be filed by the Judges and Clerks in the office of the County Clerk or in the office of the Sheriff."

In reference to your first question we set out the following:

Section 12858 R. S. Missouri, 1939, partially reads as follows:

> "If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing to the governor; * ."

Section 12859 R. S. Missouri, 1939, reads as follows:

> "Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

By reason of Section 14, of Article IV of the Constitution of Missouri, the legislature enacted Section 12860 R. S. Missouri, 1939, which reads as follows:

> "When any vacancy shall happen in the senate, for a district composed of more than one county, the writ of election shall be directed to the sheriff of the county first named in the law establishing the district; and when such

> vacancy shall happen in a senatorial district, which shall have been divided or altered after the general election next preceding the occurence of such vacancy, the writ of election shall be directed to the sheriff of the county first named in such old district; and when any vacancy shall happen in either house, for any county which shall have been divided after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the old county."

Section 12861 R. S. Missouri, 1939, reads as follows:

> "The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election;

> and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

The above section specifically states:

> " * * * shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, * * ."

There is no provision for the publication of a notice, as set out in the general election laws.

Sections 12858 to 12861, supra, inclusive, are special statutes referring to elections to fill vacancies in either house of the general assembly and the regular election laws are general laws. Where a special statute and a general statute apply to the same subject matter the special statute governs.

Section 11492 R. S. Missouri, 1939, is part of the general provisions and provides that the sheriff shall give notice under the writ of election to fill any vacancy, but Section 12861, supra, specifically state that the notices are "to be put up." Section 11546, R. S. Missouri, 1939, which applies to primary elections, specifically excepts special elections. Since the special laws as to vacancies in both the house and senate of the legislature have been specifically set out that law must govern.

It has been held that where one of two conflicting statutes must prevail, a special statute, all else being equal, must take precedence over the general law." (Collins v. Twellman, 126 S. W. (2d) 231, 344 Mo. 330.)

Section 12861, supra, in referring to notices being put up in the different counties in the district, specifically says:

> "* * * shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, * * * * ."

Although the above section specifically states "copies" it refers to the sheriffs of each of the counties of the district, and when the legislature saw fit to say "copies" it referred to more than one sheriff. We cannot say that the section provides for the putting up of more than one in any county in the district by each sheriff of each county. The section does not provide for the putting up of more than one notice in each county.

According to Webster's New International Dictionary, Second Edition, the word "put" is defined as meaning: "Fixed, set, in place." This authority also defines the word "place" as: "To put in a particular place or spot." Both "place" and "put" are synonomous with the word "post."

In the case of Pedro v. Grootemaat, 183 N. W. 153, 174 Wis. 412, held that under a statute which required posting, as well as publishing of statement of delinquent lands and notice of tax sales is essential to validity of tax deed; "post" being a meaning distinct from what is implied by "publication."

In other words, the sheriff may post or put up a notice in the county in the district and not publish the same in a newspaper for the reason that the section does not require publication in a newspaper.

In answer to your second question, as to whether or not the county clerk, or the sheriff, should print and furnish the ballots, and in answer to your third question, as to whether or not the election returns should be made to the sheriff, or the county clerk, we set out the following special sections, 12858 to 12861, inclusive, supra, applying to special elections and the filling of vacancies in either the House of Representatives of the State Senate. These are the only sections on that subject. Nothing is mentioned as to who shall furnish the ballots, or as to whom the return shall be made under those sections.

Since the general laws of election are in force, the only exceptions are the special election laws above set out. The special election sections, 12858 to 12861, inclusive, supra, only apply to the question of proclamation and notice of election, and not to the conducting of the election in general.

The courts have the duty, in construing to or more statutes relating to the same subject, to read them together, and then harmonize them, if possible, and to give force and effect to each, and the rule applies, not only to acts passed at the same session of the legislature, but also to the acts passed at prior and subsequent sessions. (State ex rel Central Surety Insurance Corp., v. State Tax Commission, 153 S. W. (2d) 43.)

Under Section 11594 R. S. Missouri, 1939, it is the duty of the county clerk of the county court of each county, to provide printed ballots for every election for public officers, and it was held in the case of Bradley v. Cox, 271 Mo. 438, 197 S. W. 88, that no ballot shall be cast or counted except those officially presented. Under Section 11614 R. S. Missouri, 1939,

the poll books which show the result of the election must be returned to the clerk of the county court in the county.

We find no provision for the sheriff to furnish ballots, except that he must deliver them, after being furnished by the county clerk, as set out in Section 11598 R.S. Missouri, 1939.

CONCLUSION

It is, therefore, the conclusion of this department that the notice of election should be posted in the county, and not be published in a newspaper.

It is further the opinion of this department that it is the duty of the county clerk to have the ballots printed for the election.

It is further the opinion of this department that the returns of the election should be filed by the judges and clerks in the office of the county clerk, and not in the office of the sheriff.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WJB:RW

SCHOOLS: Portion of district cannot be annexed to city district unless at least thirty (30) children remain in the district.

August 21, 1942.

8-25

FILED
7

Mr. Davis Benning
President, Board of Education
Louisiana, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which request reads as follows:

> "I am writing you for the Louisiana Board of Education to ask your office for an opinion on one provision in Section 10484 Revised Statutes Missouri 1939.
>
> "The United States Government is constructing an ammonia plant near Louisiana and is contemplating the construction of a housing project for employees of the plant. The government plans to acquire a tract of 12 acres for this housing project, the 12 acre tract lying near Louisiana and immediately adjacent to the Louisiana School District, and wants this tract annexed to the Louisiana School District. It now is a part of what is known as the Buffalo School District.
>
> "Section 10484 above referred to provides the method and procedure by which the annexation can be made and provides further 'that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation

or thirty children and nine square miles of territory.'

"The Buffalo School District only contains at the present time fifteen children and would therefore have less than thirty children left in it after the proposed annexation, even though no children would be taken from it by the annexation of the 12 acres. The remaining part of the district would still have more than thirty thousand dollars in assessed valuation.

"Query: If all of the provisions of Section 10484 were complied with in the proposed annexation, except that there would be less than thirty children left in the remaining portion of Buffalo District, would the annexation proceedings be invalid, when there were less than thirty children before the annexation?

"The government authorities here are anxious to have your opinion on this question as well as the Louisiana School District as they want to start the housing project as soon as possible and want very much to use the proposed site."

Section 10484, R. S. Mo. 1939, after providing for an election to determine whether a part of a district adjoining a city, town or village school district desires to be annexed to such other district, provides:

"* * *Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to

> consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. In case an entire district is thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory. * *"

The first sentence of the foregoing quotation, standing alone, would indicate that when the necessary vote was certified in to the city, town or village district and the board of such latter district approved the annexation, the boundary lines would thereupon be changed. However, the second sentence provides for a division of the property of the district so voting to join the city district, and then provides that "that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory." This latter language of the quotation is very clear and distinct. The Legislature evidently did not want a district to be divided up so that the portion remaining should be too small either in territory, assessed valuation or enumeration to carry on a public school. While the school district you inquire about does not now contain

thirty children, yet it does contain the necessary territory and valuation which the Legislature deemed the minimum for maintaining a school.

It is a well established rule of the courts that in construing a statute all of the statute must be given effect. The rule was stated in the case of DeJarnett v. Tickameyer, 328 Mo. 153, 40 S. W. (2d) 686, 687, as follows:

> "All provisions of the statute should be considered in determining the meaning of any particular portion thereof, and effect given to every part of the statute where it is possible to do so."

To give any effect and meaning to the provision as to the amount of territory and assessed valuation and school enumeration, we must necessarily take the language for what it says, and such language necessarily limits the right of a district to allow a portion of its territory to be annexed to a city, town or village school district.

Conclusion

It is therefore the opinion of this office that a portion of a school district cannot be adjoined to a city, town or village school district unless there remain in the district so desiring to be annexed at least thirty children. In addition to said amount of children there are requirements as to valuation or territory, but these are not in question in the case you inquire about.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:EG

ELECTIONS:
PRINTING
ABSENTEE
BALLOTS:

Clerks may have absentee ballots printed more than ten days prior to election day.

September 18, 1942

9-22

FILED
7

Hon. E. W. Bennett,
Assistant Prosecuting Attorney,
Dent County,
Salem, Missouri.

Dear Mr. Bennett:

This is in reply to yours of recent date wherein you submitted the following question:

> "Can the County Clerk under the latter provisions of Sec. 11472 print Absentee ballots so they can be voted anytime after 30 days before the general election, or does the old election law, providing that ballots shall be printed ten days before day of election apply to the absentee ballots."

Under the primary election law, Section 11558, R. S. Mo., 1939, it is provided that:

> " * * * * * * On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, * * * * * * * * "

It will be noted by this provision that the clerk

is required to have had the ballots printed and distributed for the primary election on or before the tenth day before the holding of the primary. This section would indicate that it is necessary for the clerk to have had the ballots printed more than ten days before the date for holding the primary election.

Under the general election law applying to absentee voters which was amended in 1933, Laws of Missouri, 1933, page 218, R. S. Mo., 1939, Sections 11470-11479 inclusive, provisions are made for absentee voting by persons absent from their voting precinct but within the boundaries of the State of Missouri on election day. Under Section 11471 R. S. Mo., 1939, a person desiring to vote an absentee ballot may apply for an absentee ballot not more than thirty days nor less than five days prior to the date of the election.

Under Section 11472, R. S. Mo., 1939, which pertains to the affidavit and application for the absentee ballot and the printing of the ballot it is provided in part as follows:

> " * * * * * Immediately upon receipt of such application within the time and in the manner provided by this article, the county clerks of the county, or the board of election commissioners, if any, or other official charged herein with the duty of furnishing ballots to such applicants, shall make a list of the names of such absent voters whose applications for ballots have been received, and shall cause such list to be immediately posted

in a conspicuous place accessible to the public at the entrance of the office of such officer or officers which list shall show also the postoffice address, street address, ward or precinct number given by such applicant. Such list shall be supplemented daily by the addition thereto of the names, addresses, and precinct numbers of those thereafter making application for such ballots as by this article authorized: Provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote as by this article authorized who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official bal ot or ballots if more than one are to be used and voted at said election to such applicant. The official charged by law with printing and supplying ballots under the general election laws of this state, shall cause to be printed and supplied a sufficient number of ballots to have printed at the top of such ballots the words 'official absentee ballot' to be furnished such absentee

voters under the provisions of this article."

Provisions for voting absentee ballots in this State are purely statutory; therefore, we must look to the statutes alone for directions as to the proceedure to be followed in preparing absentee ballots and voting the same. From an examination of the sections hereinbefore referred to, it will be seen that no time is designated for the printing of such absentee ballots. Inasmuch as the law permits the applicant for the absentee ballot to apply for his ballot thirty days before the date of the election; and since Section 11472, supra, requires the clerk to immediately consider the application for the ballot, then it stands to reason that if the clerk finds that the applicant is entitled to vote he should at that time forward to the applicant the absentee ballot. As stated above, the primary election law fixes the minimum time within which the clerk must have the ballots prepared and delivered to the election officials.

We are further supported in our views herein by the fact that under Section 11471 the applicant may apply in person for the ballot during the period of not more than thirty nor less than five days before the election. This provision would indicate that the lawmakers contemplated that at the time the applicant makes application in person for his absentee ballot the county clerk should have such ballots on hand.

CONCLUSION

We are, therefore, of the opinion that absentee ballots for the general election may be printed more than ten days prior to the date of the election and may be printed in ample time so that a person applying for such ballot can have the privilege, as stated in Section 11471, supra, of applying within the full time of thirty days before the general election.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:FS

BLIND PENSION: Interpretation of Section 9452, R. S. Mo. 1942

7-1

June 30, 1942

FILED
9

Hon. Charles T. Bloodworth, Jr.
Prosecuting Attorney
Poplar Bluff, Missouri

Dear Mr. Bloodworth:

This will acknowledge receipt of your letter of June 26, 1942, in which you request an opinion based on the following statement of facts:

> "A man who has been on the blind pension roll of the State of Missouri has requested me to seek an opinion from you concerning the amount of visibility which, if a person has, shall keep him off the blind pension rolls of the State of Missouri.
>
> "I do not know whether your department has an opinion of this kind, but if you do have I would appreciate a copy of it so that I may advise the gentleman. He has been on the pension roll and was recently taken from the pension rolls because, as was stated to me, he had too much visibility to qualify under the blind pension law."

Section 9452, R. S. Missouri, 1939, fixes the vision test for applicants for blind pensions. This section is as follows:

> "No person shall be entitled to a pension under this article who has vision with or without proper adjusted glasses greater than what is known as light perception; that light perception as used in this section means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye; and no person shall be entitled to receive a pension except upon scientific vision test supported by the certificate of a competent oculist, that such person does not possess a greater vision than that provided above in this section; and every person passing the vision test and having the other qualifications provided in this article shall be entitled to receive a pension of three hundred ($300.00) dollars per annum, payable quarterly."

The foregoing section is clear and unambiguous and from its terms, it seems apparent that a person who can distinguish between light and darkness and recognizes the motion of a hand at a distance greater than twelve inches from the eye is not entitled to receive a blind pension.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:NS

STATE PARK BOARD:) The Department of Conservation and State
CONSERVATION COMMISSION:) Parks are two separate and distinct
OFFICERS:) departments.
Duties of the Director of State Parks as provided under Section 15329, R. S. Mo. 193

January 14, 1942

1-16

FILE
10

Mr. I. T. Bode
Director,
Conservation Commission,
State Park Board
Jefferson City, Missouri

Dear Mr. Bode:

This will acknowledge receipt of your letter of January 9, requesting an official opinion from this Department, which reads:

> "This is a request for an opinion on the legal possibility of entirely separating the State Park and Conservation Departments under existing law, or more particularly, for separating the Conservation Commission and the State Park Board.
>
> "Is it legally possible to relieve the Director of Conservation of any responsibility for the work of the Park Department other than serving as a member of the State Park Board, in this event the Director of Conservation to have no more legal responsibility for any work of the department than either the Governor or Attorney-General.
>
> "Particular reference is made to those parts of existing Park Board law which refer specifically to the Director of Conservation or to the Director of State Parks - Sec. 15328 and Sec. 15329, R. S. Mo. 1939, and more particularly

to that part of Sec. 15329 which provides that the Director shall audit all vouchers."

Your first inquiry is what is the possibility of completely separating the administration of the State Parks from that of the Conservation in the State? The Conservation Commission, at the present time, is vested with full control and regulation of conservation, wildlife, and forestry in this State. Section 16, Article 14, Constitution of Missouri, better known as the Conservation Amendment, was approved by the voters in this State on November 3, 1936. Said section provides as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows; one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his other successor is appointed

and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of eachmember of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for

> said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

The State Park Board is now vested with the control and regulation of all state parks. This is by virtue of Section 15329, R. S. Missouri 1939, which was enacted subsequent to the above Conservation Amendment creating the Conservation Commission. Said section 15329 provides:

> "The state park board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said park board or the exercise of its powers hereunder necessary for the recreation of the people of the state of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission. Said park board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the director of state parks and when presented to the state auditor shall be paid out of the funds appropriated for such purposes."

Obviously, the fifty-ninth General Assembly in construing the foregoing amendment thought there was no part of said amendment which authorized the Conservation Commission or its agents, to regulate, control and manage state parks, for it immediately passed Sections 15328-30, inclusive, of Article 1, Chapter 133 of the Revised Statutes of Missouri, 1939, which creates and establishes a State Park Board, the members of which shall control and regulate the state parks, and further provides what their duties shall be. Had the Fifty-ninth General Assembly been of the opinion such jurisdiction was vested in the Conservation Commission there would certainly have been no need for such legislation.

It is a well established rule of statutory construction that great weight will be given by the courts to legislative interpretation of a statute as is stated in Robertson v. Manufacturing Lumbermen's Underwriters , 346 Mo. 1103, l. c. 1109:

> "The insurance code has been on our statute books for many years. The right of appeal has been exercised by the Insurance Department as well as by litigants deeming themselves aggrieved by any judgment in favor of the department. The Legislature has not, in view of this interpretation of the law, seen fit to expressly prohibit appeals. This continued acquiescence in that interpretation by the Insurance Department and also the State Legislature implies that the law has been correctly interpreted. We rule, therefore, that the right of appeal exists in cases of of this nature and the motion to dismiss will be overruled."

Furthermore, the Conservation Amendment nowhere specifically authorizes the Conservation Commission to control and regulate the State Parks of Missouri. The Amendment clearly provides what the duties of the Commission shall be. Section 16, Article 14, Constitution of Missouri, supra,

places the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of same and the administration of all law pertaining thereto. Nowhere is there any indication in reading said Amendment that it purports to vest such control and regulation of state parks in the Conservation Commission. Ordinarily, when there is no ambiguity to be found in a statute there is no room for construction.

It is quite true that the Conservation Commission controls and manages all hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purpose whether same be located in state parks or otherwise. In some parks there are such things and in such cases the Conservation Commission shall assume control and regulation but there is nothing anywhere in the Amendment vesting such authority in the Conservation Commission regarding areas constituting purely recreational parks. This is vested in the State Park Board. If such powers were vested in the Conservation Commission then Article 1, Chapter 133, R. S. Missouri 1939, would be unconstitutional as being in violation of Section 16, Article 14, supra, which provides that the legislature may enact laws in aid of, but not inconsistent with, the provisions of this Amendment.

The mere fact that the legislature has in its wisdom included the Director of Conservation as a State Park Board member in no way indicates its intention to have the Conservation Commission administer the laws pertaining to the administration of the state parks.

The most logical conclusion would be that in view of the fact the Director of Conservation has certain functions to perform in the state parks upon certain wildlife areas as hereinabove mentioned and that such functions in many respects are akin to necessary functions in the administration of state parks, and the Director of Conservation being an experienced man in such administration naturally the legislature would consider it beneficial to the state to vest such person with the title of Director of State Parks.

Therefore, it is the opinion of this Department that the law pertaining to the administration of the state parks and conservation in this state does not contemplate the two departments shall be administered jointly or that the personnel of one department shall be the personnel of the other, but that said departments shall constitute two separate departments, separate and distinct from each other.

You further inquire if it is legally possible to relieve the Director of Conservation of any responsibility for the work of the park department other than serving as a member of the State Park Board. Section 15329, supra, places an additional duty upon the Director of Conservation or under said provision, the Director of State Parks, in that all vouchers for the payment of bills or for compensation shall be drawn and approved by him. This is the only additional statutory duty required of the Director that is not required of the other members of said Board. In Ray County v. Bentley, 49 Mo., l. c. 242, the court held the county court is a creature of statute and only has such powers as given it by the legislature. In so holding the court said:

> "The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may chose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36, Mo. 555.)"

Also, see Harris v. Bond Company, 244 Mo., 664, l. c. 688-89-95 the court in referring to a special road district held in similar manner.

The same principle of law is applicable to other officers and to the members of the State Park Board as well as to the Director of said Board. Such Board is purely a creature of statute and has only such power as the legislature may see fit to give it. While the legislature has placed only one exclusive duty on the Director of State Parks, if it deems it advisable it may place additional duties on said Director. The ordinary meaning of the word "director" as most commonly understood and used is defined in Webster's New International Dictionary as,"One who directs, one who regulates, guides or orders; a manager or superintendent."

A well established rule of statutory construction applicable in the instant case is that the inclusion of one thing is the exclusion of all others as stated in Kansas City v. Threshing Machine Co., 337 Mo., 913, l. c. 930:

> "'It is a general principle of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius.'" (25 R. C. L., 981, Section 229; 25 C. J., 220; 59 C. J., 980-86, Section 580-83.)

All of which very vividly indicates to the writer that the legislature by creating the office of Director of State Parks and specifically providing what his duties shall be fully intended that such Director in such capacity should not be burdened with further statutory duties. The above statute providing that the Director of Conservation shall also be the Director of State Parks is permissible in so far as the state offices are not incompatible with each other. In State v. Bode, 113 S. W. (2d) 805, the court held that the Director of Conservation was a public officer. In State ex rel. v. Bus, 135 Mo., 325, l. c. 330, the court said:

> "The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second

> office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers, secs. 30, 51.
>
> "The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4 B. & Ad. 9."

The question then arises as to what determines whether or not the state offices are incompatible. In State ex rel. v. Bus, supra, l. c. 338, the court said:

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.
>
> "It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations

> to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

Since the Conservation Commission has control, management, conservation, restoration and regulation of the bird, fish, game forestry and all wildlife resources of the state including hatcheries, sanctuaries, refuges, reservations, etc., we are unable to see wherein the action of the Director of Conservation in the performance of his constitutional duty conflicts in any manner with the performance of his statutory duties as Director of State Parks.

Therefore, it is the opinion of this Department that the Director of Conservation under Article 1, Chapter 133, R. S. Missouri 1939, shall act as a member of the State Park Board and shall draw and approve all vouchers for payment of bills or compensation. This is the extent of his duties as Director of State Parks.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH:EAW

STATE PARK BOARD: The State Park Board may repair and maintain Arrow Rock State Park tavern under certain conditions.

February 4, 1942

2-43

Mr. I. T. Bode
Director
State Park Board
Jefferson City, Missouri

FILE
10

Dear Sir:

This will acknowledge receipt of your letter of January 22, requesting an official opinion which reads as follows:

> "We are asked by the State organization of the Daughters of the American Revolution to do some maintenance work on the tavern at Arrow Rock State Park. Enclosed is a copy of the original contract between the State of Missouri and the Daughters of the American Revolution which was entered into at about the time that the tavern was purchased by the State.
>
> "From the standpoint of the State Park System it appears desirable that this old tavern be maintained in a proper manner as a historic landmark.
>
> "The question is, do we have legal authority to maintain this tavern - to repair the roof, plaster, sanitary system and whatnot, which appear to be badly in need of maintenance work?"

Apparently, from the above request, proper care and maintenance are not now being given to Arrow Rock tavern.

It is the writer's understanding that this is not due to lack of interest of the organization of the Daughters of the American Revolution who now have custody of Arrow Rock tavern in compliance with legislative enactment but that said condition is caused by lack of money or funds within said organization which may be used for such expenditures.

The Fifty-second General Assembly enacted a law whereby Arrow Rock tavern was to be purchased by the State of Missouri, providing the owner could furnish the State with an abstract of title showing that the State would get a good title clear of all incumbrances, as shown in Sections 1 and 2, Laws of Missouri, 1923, page 107.

> "That the governor be and he is hereby authorized to purchase from the owner thereof, for the state of Missouri the property known as the Arrow Rock Tavern and annex consisting of a sixteen-room brick building and contents, (excepting a few personal pictures and two pieces of tapestry reserved by the owner), including the hotel equipment and numerous relics of great historical value, and other buildings all situated on a tract of land and in the village of Arrow Rock in Saline county, Missouri, having a width of 59 feet in front and 105 feet in the rear by a depth of 210 feet; provided that said property can be secured as it now exists free of encumbrance for the sum of five thousand dollars.
>
> "It shall be the duty of the governor to see that said owner furnishes the state an abstract of title showing that the state gets good title to the property clear of all encumbrances, and upon delivery by the owner of such abstract and the deed making such conveyance and the delivery of such property to the state intact the state auditor shall, at the direction of the governor, draw a warrant on the state treasurer for the said sum of five thousand dollars

payable to the owner."

Apparently this was done, for the State purchased said Arrow Rock tavern. Section 3 of the above act reads as follows:

> "Upon the acquisition of said property as provided in section 2, it shall be the duty of the governor to place the same, by contract in the name of the state of Missouri, in the custody of the Missouri Society of Daughters of the American Revolution, (D. A. R.) making such restrictions and provisions therein as in his judgment will be necessary for its preservation and maintenance in its present condition without cost to the state."

In compliance with said provision the then Governor of the State of Missouri entered into a contract with the Missouri Society of Daughters of the American Revolution whereby the Society in a resolution, adopted October 4, 1923, and made a part of said contract hereinabove referred to, agreed to make and pay for the necessary repairs upon said property in order to preserve same in good condition. The contract specifically sets out that the essence of the contract is the preservation and maintenance in its present condition as an historic edifice and repository for relics of the property mentioned and the preservation and maintenance for their historic value of contents thereof, and further provides that the Governor of the State shall be the judge of whether or not the Society complies with said contract. That for any violation of the terms of said contract, upon giving sixty days written notice, the Governor may terminate tenancy of said property by said Society. The contract further provides that whenever it shall appear to the Governor that said property is not being preserved and maintained without cost to the State of Missouri, he may immediately terminate said contract.

It is the writer's opinion that the Fifty-second General Assembly in enacting Section 3, supra, fully intended that the

Society of Daughters of the American Revolution should maintain and keep said property in its then present condition without any cost to the State of Missouri, and that so long as this Society fulfilled its obligation under the contract hereinabove referred to, the State of Missouri was not to interfere or terminate said contract. However, should they fail in their obligation to preserve and maintain said property then the Governor may terminate said contract.

The primary rule of construction of statutes is to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object and the manifest purpose of the statute. (Artophone Corp., v. Coale, 133 S. W. (2) 343.) At least by implication the legislature intended such custody to remain in this Society so long as they continued to repair and properly maintain said property. Furthermore, it was the opinion of the then Governor of the State, and others, in entering into said contract that in case the Missouri Society of Daughters of the American Revolution should fail to discharge properly their obligations under said contract that they should no longer have custody of said property. This is evidenced by the very terms of the contract reserving to the Governor the right to terminate said contract upon failure to preserve and maintain the tavern without cost to the State. In the construction of a statute by those charged with the duty of enforcing it, while not binding on the courts, is entitled to weight where the meaning is uncertain. (Automobile Gasoline Co., v. City of St. Louis, 32 S. W. (2) 281.)

Section 15329, R. S. Missouri 1939, authorizes the State Park Board to undertake the necessary repairs and proper maintenance for the improvement and preservation of all state parks.

> "The state park board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said park board or the exercise of its powers hereunder necessary for the recreation of the people of the state of Missouri. In the event the right of eminent domain be exercised, it shall be exercised

> in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission. Said park board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the director of state parks and when presented to the state auditor shall be paid out of the funds appropriated for such purposes."

Therefore, since this Society has failed to maintain properly said property, thereby breaching said contract, the State of Missouri still remains the owner of said property and, upon the Governor declaring said contract terminated, the custody of said property shall revert to the State of Missouri. The sole purpose in purchasing said property was to preserve it in its then present condition. Therefore, it is the opinion of this Department that upon the Governor terminating said contract, that under Section 15329, supra, the State Park Board is authorized to make the proper and necessary repairs upon said property.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:EAW

MARRIAGES - Four questions in regard to who issues the license.

March 2, 1942

3-5

Hon. Paul E. Bradley
Prosecuting Attorney
Jasper County
Joplin, Missouri

FILE
11

Dear Sir:

This will acknowledge receipt of your request for an opinion upon four questions based upon the following facts:

> "In this and surrounding counties we have a rather loose method of issuing marriage licenses. In this county the Recorder has designated a girl in Joplin as Deputy Recorder, but as I understand, she never does any work in the Recorder's office and receives no salary. The Recorder's office is at the county seat in Carthage. The Recorder signs marriage licenses in blank and leaves them with her, and then when couples appear before a Justice of the Peace for a marriage license, the Justice makes out the application and has it signed by the contracting parties and then presents the application to this so-called Deputy Recorder, who then fills out one of the blank marriage licenses then in her possession, which has already been signed by the Recorder.
>
> "In some instances, I understand, in surrounding counties, a Justice of the Peace will call up a Recorder on the telephone and give him the

> names of the parties who desire to be married, and say that the application has been signed, and then the Recorder says 'license issued', and the Justice then proceeds with the ceremony without having a license issued by the Recorder before him at the time the ceremony is performed.
>
> "Growing out of this practice we have a lot of drunken Saturday night marriages, and it does not appear to me that this procedure conforms to the statute. I, therefore, would like your opinion as to the following questions: * * "

I

Your first question reads as follows:

> "Must at least one of the contracting parties personally appear before the Recorder before the Recorder can issue a license?"

In answer to your question, we are herein enclosing an opinion rendered by this office to the Hon. B. D. Hardesty, Circuit Clerk, Lincoln County, Troy, Missouri, in which we held that it was discretionary with the Recorder of Deeds whether or not applicants for license are required to appear personally.

II

Your second question reads as follows:

> "Can the Recorder appoint a person as Deputy, who in fact does not act as Deputy Recorder and is never present in the Recorder's office?"

In answering this question we are assuming that the person appointed is not a legally appointed deputy recorder, but is merely designated as a deputy.

Section 3365 R. S. Missouri, 1939, specifically states:

> "The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, * * * ."

There is no provision for the recorder to perform that duty by the designation of a person to issue licenses who is not a deputy recorder of deeds.

Since the above sections provide that only the recorder can issue the marriage license it cannot be issued in any other manner. This rule of law was set out in State ex rel. Kansas City Power & Light Co. v. Smith, State Auditor, 111 S. W. (2d) 513, l. c. 514, where the court said:

> " * * * To uphold appellant in his contention would 'violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another.' State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, loc. cit. 692, 195 S. W. 714, 716."

Of course, a deputy recorder performs the same duties as the recorder.

CONCLUSION

It is, therefore, the opinion of this department that the recorder of deeds cannot appoint a person as deputy who is not a deputy recorder to issue marriage licenses.

III

The third question in your request reads as follows:

> "Can a person who has been designated as Deputy Recorder charge a fee of more than $1.00 for the issuance of a license?"

In answering this question, we are presuming that the person designated as deputy recorder, has been legally appointed to issue marriage licenses.

Section 3366 R. S. Missouri, 1939, reads as follows:

> "The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

Under the above section the recorder of deeds receives a fee of one dollar to be paid by the person obtain-

ing the marriage license, for the purpose of the recording of such license. Some recorders of deeds require an application first to be signed, which is an affidavit giving them the general information as to age of parties, etc., before the marriage license is issued. There is no provision in the law for this application, but the recorder of deeds may require such an affidavit in order to protect him from the penal statutes concerning prohibited marriages as are set out in Sections 3370 and 3361 R. S. Missouri, 1939. This so-called "written application" for a marriage license is not a certificate under seal by the recorder of deeds, but is merely an affidavit.

Section 13181 R. S. Missouri, 1939, reads as follows:

> "Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

Under the above section the recorder shall receive a compensation for taking the affidavit of persons, the same as clerks of other courts of record. The clerks of courts of record are the county clerk and the circuit clerk. Under Section 13403 R. S. Missouri, 1939, the fee of the clerk of the county court for oath and certificate to an affidavit is twenty-five cents.

Section 13407 R. S. Missouri, 1939, provides that the clerks of the circuit court shall receive twenty-five cents for orders and certificates of affidavits. We are also aware of Section 13426 R. S. Missouri, 1939, which allows a recorder of deeds fifty cents for every certificate and seal, but the distinction between the two amounts is that a certificate certifies in the body of the certificate to facts given by the recorder of deeds, where the affidavit merely acknowledges the signature of a person swearing to the facts in the body of the affidavit. An affidavit is a declaration in writing, sworn to and affirmed by party making it before some person who has authority to administer oath, or an oath reduced to writing signed by party deposing and sworn before and attested by him, who has authority to administer same. (Guaranty Finance Corp. v. Ten Eyck, 74 S. W. (2d) 484.)

It has been held that an affidavit made by a father for the consent to issue a marriage license is not a certificate, but is merely an affidavit. It was so held in the case of State v. Rhine, 50 N. W. 676, 84 Ia. 169, where the court held when a person delivers to the officer whose duty it is to issue marriage licenses a paper purporting to be a request from the father of the girl to issue a license to marry her, such paper is not a "certificate," within Code 1873, secs. 3917, 3918, inflicting penalties for falsely making, altering, forging, etc., or uttering and publishing, any attestation or certificate of any public officer or other person in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof, as section 2191 provides that, if either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after being acknowledged by the said parent or guardian or proved to be genuine; and the writing contemplated by the section is not mere proof of a fact. It is the act or deed itself constituting the consent of the parent or guardian which must be filed with the clerk, and the proof of that consent is the acknowledgment of the person who gave it or other competent evidence.

In order that the recorder of deeds be allowed compensation for the issuing of a marriage license, or for

the payment of acknowledgments to affidavits, in reference to the marriage license, such as the application used for protection and affidavits as to age, etc., he must point out the law entitling him to that compensation. It was so held in Smith v. Pettis County, 136 S. W. (2d) 282, l. c. 285, where the court said:

> "The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * * * *."

Also, in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860, the court said:

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

It is, therefore, the opinion of this department that the recorder of deeds can only charge one dollar for the issuing of the marriage license and twenty-five cents for each acknowledgement of an affidavit in reference to the

information given the recorder of deeds for his protection in the issuance of the marriage license.

IV

Your fourth question reads as follows:

> "Can a Recorder issue a license when the Justice of the Peace calls him up over the telephone and says application has been signed, and can the Justice of the Peace or any other authorized person marry a couple without having the license before him, duly issued by the Recorder, at the time the ceremony is performed?"

Most of this question has been answered by your first three questions.

Section 3371 R. S. Missouri, 1939, reads as follows:

> "Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter, or shall fail to keep a record of the solemnization of any marriage, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars, and in addition shall be subject to a civil action by the parent, guardian or other person having care or custody of the person so married, to whom services are due wherein the recovery shall not exceed the sum of five hundred dollars;

> and any recorder who shall issue a license contrary to the provisions of this chapter shall be subject to a like punishment."

Under this section any one who solemnizes a marriage, where the parties have not obtained a license as provided by this chapter, is guilty of a misdemeanor and subject to a civil action by the parents, guardian or other persons having care and custody of the persons so married. It also provides that the recorder of deeds shall be subject to like punishment.

CONCLUSION

It is, therefore, the conclusion of this department that a recorder cannot issue a license when the justice of the peace calls him up over the telephone and says the application has been signed.

It is further the opinion of this department that a justice of the peace is not authorized to marry persons without having before him the license duly issued by the recorder, at the time the ceremony is performed.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW
ENC (1)

MARRIAGES: Justice of the peace not prohibited from soliciting marriage ceremonies.

April 27, 1942

4-20

FILE

Hon. G. R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We are in receipt of your letter of April 21, 1942, in which you request an official opinion, as follows:

> "I would like to have an opinion from your department upon the following state of facts.
>
> "'This county is in the northeast corner of the State adjoining both Iowa and Illinois. Because of the laws regulating marriage licenses in those states, many couples come to Kahoka, the county seat of this county to get married. Especially on Saturdays this business of issuing marriage licenses in this county is heavy. Generally seventy-five or more licenses will be issued on each Saturday. A Justice of the Peace with office close to the Court House solicits the business of performing the marriage ceremony for these couples. He has several men working for him who approach each automobile bearing an out-of-state license plate as it approaches the courthouse. They ask the occupants of the car if they have come to get married and if so that they will gladly take them where they can get their their license and get married. If the

> parties are willing these solicitors then escort the couple to the Recorders Office and wait while they get the license and then take them to this justice of the peace who performs the marriage ceremony.
>
> "Not all occupants of cars with these foreign licenses who come to the courthouse on business are looking for marriage licenses. But they are all approached and solicited. Naturally they are embarrassed by this. The practice has also caused much unfavorable comment on this county. The practice is generally detested by our people.
>
> "Is there any action that can be taken in any court to restrain this justice of the peace and his agents from engaging in this practice?'"

Section 3363 R. S. Missouri, 1939, reads as follows:

> "Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

The above section specifically states who may solemnize a marriage.

In a careful research of the statutes we find no law which prohibits a justice of the peace from soliciting the

performance of marriage ceremonies.

A justice of the peace in performing a marriage ceremony is not acting in a judicial capacity. It was so held in the case of St. Louis v. Sommers, 148 Mo. 398, l. c. 401, where the court said:

> "The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be performed anywhere within his jurisdiction, at any and all hours of the night or on Sunday and there is nothing which requires the clerk to attend the justice in his perambulations or to take ex officio notice when parties will call upon the justice at his home to perform the marriage ceremony nor does it require the justice to report such ceremony to his absent clerk."

I am assuming from the facts stated in your request that the justice of the peace and his agent are soliciting the marriage ceremony business upon the street, and not in the confines of the courthouse, or courthouse yard.

There is no question but that the county court can make a rule governing the soliciting of any business in the courthouse or courthouse grounds. This rule has been stated in the cases of Walker v. Linn County, 72 Mo. 650, Morgan v. Owen, 193 Mo. 587, and in Volume 15 C. J., page 536, section 220.

CONCLUSION

It is, therefore, the opinion of this department that the county court, as the agency which is placed in the control and management of county property, is authorized to

prohibit persons from soliciting in and about the courthouse, providing such solicitation prevents the public officials from performing their official duties, or interferes with the general public in its free access to, and use of, the public grounds.

It is further the opinion of this department that a justice of the peace, or his agent, cannot be restrained from soliciting marriage ceremonies on the public streets if they do not interfere with the official acts of the county departments.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY COURTS; COUNTY COURT HAS EXCLUSIVE CONTROL OVER MOTOR VEHICLES OWNED BY COUNTY.

July 15, 1942.

7-24

FILED
//

Honorable Paul E. Bradley
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Bradley:

The Attorney-General hereby acknowledges receipt of your letter from your office, of July 13, 1942, in which you requested an opinion from our Department. The request, omitting caption and signature, is as follows:

> "The County Court of Jasper County has requested that I write to your office for an opinion concerning the County Engineer and Surveyor's Office. The County Surveyor is appointed County Highway Engineer also, and receives a salary of $2,000.00 per year. He has an Assistant Engineer who receives $1200.00 per year.
>
> "The County Court some years ago did away with Road Overseers and the County Highway Engineer looks after and oversees the county roads in all Townships under the County jurisdiction.
>
> "The County Court purchased a Chevrolet car for the use of the Highway Engineer. The Engineer uses the car to drive to and from his work and to oversee and inspect the County roads. The County garage and buildings are located in Carthage, the County Seat, but the Engineer lives in Joplin. He uses this car to drive back and forth to his home and also from his home to work to any place in the County where he is to oversee or inspect the roads.

"The County Court is divided on the question of the use of this car, namely, whether the car should be left in Carthage and driven from Carthage each day to the place of work or whether the car should be in the custody of the Highway Engineer and driven to and from his home in Joplin and from his home in Joplin to other points where he works in the County.

"In searching the statutes and laws I find no provision for furnishing the Highway Engineer with a car or transportation. The Special Road District had the same problem and requires their cars to be stored at their headquarters and driven from that headquarter each day with the strict accounting for mileage. The Highway Engineer contends that he is on duty and on call 24 hours a day and that it is nearer for him to drive from Joplin to the northwest part of the County than it would be to come to Carthage and then go to the northwest part of the County.

"The County Court also uses this car to inspect farms for prospective loans from the school funds and to make trips involving County business.

"The main contention and concern of the County Court is whether the County Engineer should be allowed to drive the car back and forth to his home in Joplin or whether he should leave it in Carthage and start from here each morning, keeping account of the mileage and places visited, which he does not do under the present system.

"We would thank you for an early reply and opinion in regard to the above matter."

The matter about which you have asked in your request is one on which there seem to be no statutes. As I understand

the matter from your letter the Chevrolet automobile in question is the property of the county of Jasper and is not the property of the Highway Engineer. I will refer you to Article VI, Section 36 of the Constitution of Missouri, which reads as follows:

> "County courts.--In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

As can be seen from the above constitutional provision the county courts of the various counties in the State of Missouri have jurisdiction to transact all the county business in their respective counties. The car in question was apparently purchased by the county court of Jasper County, who, under the provisions of the Constitution, would have the control and custody of this car, and under and by virtue of their powers would have the right to say in what manner such car was to be used.

With respect to the County Highway Engineer, I will cite you to Section 8661, R. S. Mo. 1939, which provides as follows:

> "The county highway engineer shall be custodian of all tools, material and machinery belonging to the road districts and to the county, except as may be otherwise provided by law. When delivering to any road overseer the tools and machinery belonging to the district, he shall require from the overseer an inventory and receipt for all such tools and machinery, and the overseer shall be responsible for the proper care and handling of said tools and machinery, and shall see that they are properly kept when not in use, and shall account for the same to the county highway engineer."

It seems that the above section is the only section under which the county highway engineer could contend that he had custody and control over the automobile and we do not think that a Chevrolet automobile would be termed as part of the "tools, material and machinery belonging to the road districts and to the county." We believe that the question as to expense and convenience of the car being kept in either Joplin or Carthage, is a matter to be gone into by the County Court of Jasper County, who would have the right to rule as to the manner in which the car should be operated.

CONCLUSION

Therefore, it is the opinion of this Department that this is a matter to be governed by the County Court of Jasper County, who, under Article VI, Section 36, of the Constitution of Missouri, have the power to control the operation of the automobile in question.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

JSP:EG

TAXATION: Lands assessed for taxation under a void description can not be corrected in a deed by the Collector, so as to convey good title to the lands intended to be assessed and sold.



October 12, 1942

Mr. M. M. Brees
Collector of Revenue of Knox County
Edina, Missouri

Dear Mr. Brees:

This is to acknowledge your inquiry of October 9, 1942, relating to the Jones-Munger Law, which is as follows:

"Mr. Tom B. Brown
Prosecuting Attorney of Knox County Mo.
Dear Mr. Brown:

"In 1938 this office advertised in the tax certificate sale of delinquent tax the following real estate.

"The tax records of this county described the property in question as follows, and it was so advertised and tax certificate issued to the purchaser.

" 8 acres NE cor SW SE. Section 12, Township 62, Range 10.

"Before deed was made in 1940 it was discovered the correct description should have been, 8 acres NE cor NW SE. Section 12, Township 62, Range 10.

"We wish to know if a corrected deed can be furnished to the purchaser of this property or how title can be furnished. The original owners have made no move to redeem or seem to be interested in any way, but the purchasers at tax sale do want title to what they and all parties at the time of sale thought was the land in question."

Eight (8) acres of a quarter section of land is merely an indefinite part of such quarter section. From which part of such area is the above acreage to be carved? A surveyor could not locate land described in such manner.

In the case of Lowe v. Ekey, 82 Mo. 286-7 in passing on this question the Court held:

> "* * * The tax deed is void, and utterly insufficient to convey that part of the northwest quarter of northeast quarter, section fifteen, township forty-two, range one east, which lies north of the Union road, and west of the Atlantic & Pacific R. R., for the following reasons: 1. Because it does not purport to convey 13 15-100 acres in northwest quarter of northeast quarter of said section fifteen, lying north of said Union road, and west of said railroad, when the land sued for is but about half of the land in said northwest quarter of northeast quarter lying north of said Union road, and the deed does not indicate in what part of the tract north of the Union road the 13 15-100 acres are located. City of Jefferson v. Whipple, 71 Mo. 519; Nelson v. Goebel, 17 Mo. 161; Alexander v. Hickox, 34 Mo. 496. There was no evidence tending to show that the land was known by the description contained in said tax deed. The proceedings in tax sales are not viewed as on the same footing with proceedings on execution in ordinary suits. Blackwell on Tax Titles, p. 301, side page 304. See, also, Blackwell on Tax Titles, (3Ed.) top pp. 379 to 381, side pp. 381 to 383 and top pp. 123 to 129, side pp. 124 to 130.* **"

Such description is bad and cannot be corrected during any step of the action in the foreclosure of a general lien for delinquent taxes on real estate. Certainly such description is bad when there is an additional error in using "SW for NW."

The above question was passed upon by the Supreme Court in the case of State v. Childress, 134 S.W. 2d l.c. 139 in the following language:

> "*** Respondent, it would seem, proceeded at the trial on the theory that the state had a lien for taxes on the land, regardless of the description on the assessor's books, or on the collector's books, or in the notice of sale, and that if the land was correctly described in the petition and then it was shown by oral evidence that such land was, in fact, the land owned by defendant, that such was sufficient and would cure any defect in description on the tax books or in the notice of sale.
>
> "The state's lien for taxes 'does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax.' McAnally v. Little River Drainage District, 325 Mo. 348, 28 S.W. 2d 650, 651; Sec. 9747, R. S. 1929, Mo. St. Ann. Sec. 9747 p. 7868.
>
> "State ex rel. Flentge v. Burrough et al., 174 Mo. 700, 74 S. W. 610, was an action 'for back taxes.' The tax bill described the land as 'pt. out lot 54, survey 2199.' It was held that such description would not support a judgment for taxes, and that a correct description in the petition would not validate or cure such description. See also State ex rel. Wyatt v. Wabash R. Co. et al., 114 Mo. 1, 21 S.W. 26; State ex rel. Ward v. Linney, 192 Mo. 49, 90 S. W. 844; State ex rel. Smith v. Williams et al., Mo. Sup., 216 S.W. 535; State ex rel. and to Use of Ross v. Lamb, Mo. Sup., 25 S. W. 2d. 83."

CONCLUSION

THEREFORE, it is the opinion of this department that a sale of land made under the Jones-Munger Law and described in the above manner is fatally defective and that a deed by the collector with a proper description of the lands intended to be assessed and sold would not validate or cure such description.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

COUNTY COURTS: County courts may dispose of lands acquired for courthouse, if same are not lands acquired
COURTHOUSE: and needed for county seat purposes.

- -

November 27, 1942

11-30

FILED
11

Hon. Paul E. Bradley
Prosecuting Attorney
Jasper County, Missouri

Dear Sir:

This is in response to your request of recent date, which is as follows:

> "About forty years ago the County Court of Jasper County acquired two lots in Joplin on which to erect a court house. Some years later the court house burned and since that time the County Court has rented rooms in Joplin for holding Circuit Court. The two lots are vacant and the County Court would like to sell them if it has the power and authority to do so.
>
> "I would appreciate it if you would let me have your opinion as to the authority of the County Court in this respect."

Section 36 of Article VI of the Missouri Constitution, is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or

> more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2480, R. S. Mo. 1939, is as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

By these provisions of the Constitution and the Statutes it would seem that the county court would be authorized to sell the lands in question, if there are no other provisions of the law limiting or denying it such right.

In the case of Bayless v. Gibbs, 251 Mo. 492, the powers of county courts were discussed and there the court said:

> "County courts are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

Also, in the case of State ex rel. Major v. Patterson, 229 Mo. 373, the court said:

> "Under the constitution, Article 6, Section 36, providing that a county court shall have jurisdiction to transact all county business and such other business as may be prescribed by law, county courts are denied any rights except those expressly conferred."

And, in Blades v. Hawkins, 240 Mo. 187, the court held that county courts are given incidental powers. The court said:

> "While the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

In searching through the statutes we find a limitation on the power of the court to dispose of lands acquired for a courthouse in case such lands are "county seat" lands. Under Article 2, Chapter 100, R. S. Mo. 1939, provision is made for the establishment of "county seats" and the courts have held that lands purchased and dedicated for a courthouse, jail and other public county buildings in a county seat town shall be the permanent seat of justice. State ex rel. Norman v. Smith, 46 Mo. 60.

In Van Pelt v. Parry, 218 Mo. 680, 681, the court, in discussing a question similar to this, stated:

> "Here, then, was a permanent appropriation and disposition of the land for the purpose of establishing a permanent seat of justice and that visible, actual, palpable appropriation for that important public purpose, coupled with acts <u>in pais</u> in platting the land into lots

> and blocks, streets, alleys, lanes, avenues, public squares, etc., and dealing with the property by making sales of lots to build up a county town, made Lamar a permanent seat of justice to all intents and purposes and effectually for all time took the Parry forty out of the salable list of swamp lands as such. It was no longer swamp land but land appropriated for county seat ends -- i.e., county seat land. Barton county having irrevocably devoted it to county seat purposes, could not turn about in after years and trade or sell it as mere swamp land to a purchaser having full notice that it had been devoted to a seat of justice and that such purpose was alive, on foot, and being carried out. Its power to deal with it as swamp land was functus officio, we think. * * * * * *"

Since the county seat of Jasper County is at Carthage, then the court would not be restricted by the law applicable to "county seats."

CONCLUSION

From the foregoing it is the opinion of this department that the county court of Jasper county may sell real estate not needed for county purposes and not located at the county seat and used for a courthouse or jail.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

INCOME TAX, FEDERAL ESTATE TAX AND INHERITANCE TAX: Contributions made to Missouri School for Blind are exempt from income, inheritance and federal estate taxes.

February 5, 1942

FILED
12

Mr. R. Wilson Brown
Supt. Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Sir:

This will acknowledge your letter of recent date, requesting an opinion from this department, reading as follows:

> "This letter is to clarify the following points in reference to gifts and bequests to the Missouri School for the Blind.
>
> "Gifts by will to the Missouri School for the Blind are exempt from what federal and state taxes?
>
> "Are contributions made in any year to the Missouri School for the Blind exempt from gift taxes imposed by the federal and state laws?
>
> "Are contributions to the Missouri School for the Blind deductible from income taxes of the donor to the extent provided by law for federal and state?
>
> "Is the following form for bequests proper?
>
> "'I give and bequeath to the Missouri School for the Blind, now located at 3815 Magnolia Avenue in St. Louis, Missouri, the sum of _____ Dollars ($_____), to be used for its general purposes.'"

Also your letter clarifying the above questions, reading as follows:

> " * * * I am trying to determine whether or not the Missouri School for the Blind is considered as a charity. If it is, those who make us gifts may deduct such gifts from their income tax reports.
>
> "I am trying to determine whether or not bequests made through wills are subject to inheritance taxes and whether large donations are exempt from gift taxes."

Before considering precise questions you have propounded, we consider the nature of the Missouri School for Blind. In this respect, your attention is directed to Section 10845, as contained in Article 25 of the Revised Statutes of Missouri, 1939. That section reads in part as follows:

> "The 'Missouri school for the blind' at Saint Louis, * * * * * shall be regarded, classed and conducted wholly as educational institutions of the state."

We have examined the whole article before referred to, and do find that the duties enjoined upon the persons in charge of this school are such as will further the education of those who are blind, in order that such persons may become self sustaining. While the article contemplates that the institution be denominated as that of an educational institution, it is believed nevertheless, that such institution is in the nature of a charitable institution. This may be tested by what was said by the Supreme Court of Missouri in the case of Robinson v. Crutcher, 277 Mo. 1, 8, 209 S. W. 104, in the following language:

> " * * * In so doing, it will suffice to content ourselves with the modern definition of a public charity as 'a gift to be applied consistently with existing laws, for the benefit of an indefi-

> nite number of persons, by bringing their minds under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, or by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government."

From these considerations, we are convinced that while the legislature has denominated the institution as educational, it is also in the nature of a charitable institution.

The management and control of the property of the Missouri School for Blind is provided for by Section 10864 of the Revised Statutes of Missouri, 1939, in the following language:

> "The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

Attention is also directed to Section 11349 of R. S. Mo., 1939, reading in part as follows:

> "Contributions or gifts made by individuals and corporations within the taxable year to corporations, associations and societies organized and operated exclusively for religious, chari-

table, scientific or educational purposes, or for the prevention of cruelty to children and animals, not part of the net earnings of which inures to the benefit of any private stockholder or individual, to an amount not in excess of 15 per centum in the case of an individual or 5 per centum in the case of a corporation of the amount of the tax payer's net income on which tax is paid.

"In the cases of those taxable under subdivision 2, Section 11343, only such part of the foregoing deductions shall be used as arose wholly in this state except income taxes under authority of the United States. Such portion of the United States income taxes shall be deducted as the net income from all sources in Missouri, without considering said United States taxes, shall bear to the net income under the laws of the United States."

Attention is also directed to the Internal Revenue Code, Regulations 103 of the United States Treasury Department, p. 126, which reads in part as follows:

"In the case of an Individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

(1) The United States, any State, Territory, or any political sub-division thereof, or the District of Columbia, for exclusively public purposes;

(2) A domestic corporation, or domestic trust, or domestic community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or

> otherwise attempting to influence legislation; * * * * * * * * * * * * * * *
>
> "To an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this sub-section. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary."

With respect to whether or not gifts made to the Missouri School for the Blind are exempt from the payment of inheritance taxes, your attention is directed to Section 502 of R. S. Mo., 1939, reading as follows:

> "When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in the state; to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members."

With respect to whether or not gifts made to the Missouri School for the Blind are subject to a federal estate tax, attention is directed to Section 812 (d) and Articles 44-77, Regulation 80 of the Internal Revenue Code, which provides in substance and effect that gifts to any state for exclusive public purposes, or to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific or educational purposes are deductible.

CONCLUSION.

From the above considerations, it follows:

1) That gifts by will to the Missouri School for Blind are exempt from federal and state taxes;

2) Contributions made during the calendar year to the Missouri School for Blind are exempt from state inheritance taxes;

3) That contributions to the Missouri School for Blind are deductible for federal and estate income taxes, provided such contributions do not exceed 15% of the taxpayer's net income, on which the tax is paid;

4) That bequests to the Missouri School for Blind should be made to the Board of Managers of such institution, as contemplated by Section 10864 of R. S. Mo., 1939.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

COURTHOUSE: County court has authority to provide additional courthouse space, but cannot pledge revenue for future years.

February 20, 1942

2-25

FILE 12

Hon. Tom B. Brown
Prosecuting Attorney
Edina, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 11, 1942, requesting an opinion, as follows:

> "The County Court of Knox County has requested an opinion from the Attorney General's office concerning the following matter.
>
> "Knox County has a county court house, but it does not meet the demand for office space at this time. The county now rents additional office rooms. They desire to purchase a building in Edina for use as additional office space for governmental agencies, and for storage of county property.
>
> "Do they have authority to purchase a building for that purpose? If so what is the proper procedure?
>
> "If the county has the power to purchase the building can they enter into a contract to pay a yearly rental for four years for the same, with the provision that if the rentals are paid for the four years the lessors will deliver a deed for the property?"

In replying to your request, attention is called to the following brief quotation from the early case of Wolcott v. Lawrence County, 26 Mo. 272, l. c. 275:

> "The county court is only the agent of the county, and, like any other agent, must pursue its authority and act within the scope of its power. In respect to many things that concern the county, it has a large discretion; but in reference to the erection of county buildings its authority is defined by a public law, and is special and limited. It can not act like general agents, whose acts may bind their principals if performed within the general scope of their agency, though in violation of private instructions unknown to those who deal with them; for it has no power over the subject except such as is given by law; and every person who deals with the county court, acting in behalf of the county, is bound to know the law that confers the authority. There is no difference in this respect between public and private agents; and if the county court exceeds its special and limited authority, conferred by the statute, in a material matter, the county will not be bound."

The above-mentioned case was one involving payment for construction of a courthouse.

Section 2480, Article 13, Chapter 10, R. S. Mo. 1939, sets out the powers of the county court, and is as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any

property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Article 4, Chapter 100, R. S. Mo. 1939, treats of county buildings, and the following sections of the statutes are taken from said article and chapter.

"Sec. 13717. The county court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a court house, jail or poorhouse or infirmary; or, when the county owns such site or sites, to acquire by purchase improved or unimproved real estate as an addition to or enlargement of the same; and if the county court and the owner or owners of the real estate sought to be purchased for any of said purposes cannot agree upon the compensation to be paid therefor, or if for any other reason the title thereto cannot be acquired by contract, the county court of such county may proceed, in the name and on behalf of said county, to appropriate and condemn such real estate in the manner provided by article 2 of chapter 8, R. S. 1939, and the same proceedings shall be taken as are provided in said article for the condemnation of lands for other public uses, as far as the same may be applicable."

"Sec. 13718. The county court of any such county may pay for the real estate acquired under the provisions of

> section 15717 out of any money in the county treasury belonging to the contingent fund or out of any surplus in any other fund at the close of any fiscal year, after the payment of all warrants drawn during such year against such fund and of all other previously issued and outstanding warrants against the same."

In connection with the above sections, attention is called to the following extract from the case of Watson v. Kerr, 312 Mo. 549, l. c. 561:

> "It is the contention of appellant that the purchase of an infirmary site is not a 'current county expenditure' within the meaning of Section 12859 and consequently that such a purchase can be made only from funds derived from a special levy made in accordance with the provisions of Section 12860, or else from the proceeds of a bond issue voted for that purpose. But many years after the passage of the Cottey Act what are now Sections 9458 and 9459, Revised Statutes 1919, were enacted. They provide: 'The county court of any county . . . shall have power to acquire by purchase . . . improved or unimproved real estate for a site for . . . infirmary. . . . The county court . . . may pay for the real estate acquired . . . out of any money in the county treasury belonging to the contingent fund or out of any surplus in any other fund at the close of any fiscal year, after the payment of all warrants drawn during such year against such fund and all other previously issued and outstanding warrants against the same.' These provisions and those of the Cottey Act are of like efficacy, deal in part with

> the subject-matter and should therefore be read together. (Decker v. Diemer, supra.) When so considered the buying of an infirmary site must be regarded as a current expenditure; in any event the county court is expressly authorized to pay for such a site out of taxes levied and collected for current county expenditures. As specific authority is given for the making of the payment out of the contingent fund, without imposing conditions or restrictions of any kind, there is no reason why warrants drawn for that purpose, in respect to the order of their payment, should not stand on a parity with other warrants drawn against the same fund."

Since the above decision was rendered, the County Budget Law has been enacted. But what is said above in regard to money in the contingent fund would seem to be applicable to the contingent fund under the Budget Act if there should be sufficient money in the contingent fund not otherwise appropriated.

It would appear to be within the power of the county court to purchase additional ground and erect additional office and courtroom buildings, or to purchase a building already constructed, if needed for public purposes of the county.

Your letter fails to state whether the county has on hand sufficient cash to make the purchase of the building. If it does not have, then it would be necessary to submit the question to the voters of the county under the statutes which authorize incurring indebtedness by a county, a county not being permitted to become indebted in excess of its anticipated revenue for the year in which the debt is incurred except by a vote of the people. Section 12, Article X, of the Constitution of Missouri is as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the

State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of court house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein; and provided further, that any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide

> for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same; * * * *"

In regard to the second question as to whether the county court has power to enter into a contract to pay a yearly rental for a building for four years, with a provision that if the rentals are paid for the four years the lessor will deliver a deed to the property, attention is directed to the portion of Section 12, Article X, of the Constitution.

In the case of Ebert v. Jackson County, 70 S. W. (2d) 918, a contract entered into by the County Court of Jackson County to lease a building for a term of four years was held void as in violation of Section 12, Article X, supra, the following language being used at l. c. 920:

> "In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff $4,320 for the use of the room for four years, beginning August 1, 1925, payable $90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.
>
> "The contract was an effort to anticipate the income and revenue of the county for several years following the year the

> contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

In the case of Hawkins v. Cox, 66 S. W. (2d) 539, a contract entered into by a special road district, for the purchase of machinery on the basis, $500.00 down and $500.00 per year for several years, was held void as to the amounts to be paid in future years, as a violation of the above constitutional provision. The following quotation is from this case at l. c. 544:

> "The contract for the purchase of and payment for this road machinery made in February, 1928, is void at least to the extent it attempted to obligate the district for payments beyond the cash payment made at the time and the amount to be paid out of the revenues provided for 1928. Anderson v. Ripley County, 181 Mo. 46, 65, 80 S. W. 263."

CONCLUSION

If additional courtroom space, office space and storage space is needed for the public purposes of Knox County, the county court has authority to purchase or lease a building or erect a building. The building may be paid for in cash if there are sufficient funds available under the county budget to make the payment. If funds are not available for cash payment, it would be necessary to submit the question of the county becoming indebted to the voters. Any contract entered into which would attempt to pledge the revenue of future years would be invalid as to such future years.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

ELECTIONS: June 5, 1942, is the last day to file declaration of candidacy.

March 3, 1942

3-5

FILE
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

We acknowledge receipt of your letter requesting an opinion, which reads as follows:

> "The deadline of candidates filing for office is 60 days before the primary election. I plan to keep the office open until 11:59 P. M., on that date.
>
> "May I be favored with your opinion as to the exact date in June -- the last day on which a candidate may file for office?"

Under the provisions of Section 11547, R. S. Mo. 1939, the primary election this year is to be held on the first Tuesday of August, which is August 4, 1942.

Under the provisions of Section 11550, R. S. Mo. 1939, a candidate must file his written declaration at least sixty days prior to such primary.

Subdivision 4 of Section 655, R. S. Mo. 1939, provides that "the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded; * * *."

CONCLUSION

Applying the above statutory rule of construction to the problem about which you inquire, it is our opinion that June 5, 1942, is the last day for a candidate to file his declaration of candidacy.

Respectfully submitted

JOHN E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:HR

ELECTIONS: July 2, 1942, is the last day for filing initiative petitions.

March 6, 1942

3-18

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

FILE
12

Dear Mr. Brown:

We acknowledge receipt of your letter requesting an opinion, which reads as follows:

> "The deadline for filing initiative petitions is four months prior to the general election.
>
> "May I be favored with your opinion as to the date next July? I plan to keep the office open until 11:59 P. M., on that date."

Section 57 of Article IV of the Missouri Constitution provides:

> "* * * * * Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. * * * * * * * * * *." (Underscoring ours)

The General Election this year, at which any initiative proposition will be voted upon, falls upon November 3, 1942.

There is hardly any doubt but that the word "month", as used in the Constitution, means calendar month. Section 655, R. S. Missouri, 1939, provides:

> "The construction of all statutes of this state shall be by the following additional rules * * * * * * * * *; third, the word 'month' shall mean a calendar month, * * * * * * * * * * *."

While this statute, by its own terms, is said to apply to "construction of statutes," yet in Beaudeau v. City of Cape Girardeau, 71 Mo. 391, the Supreme Court applied other provisions contained therein relative to computation of time in construing what is now Section 12 of Article V of the Constitution, fixing the time within which the Governor may approve or disapprove a bill.

However, in Union Trust & Saving Bank v. City of Sedalia, 300 Mo. 399, 413, the Court said Section 655, which also defines "year" to mean calendar year, "* * * may have no application as to the word 'year' in the Constitution, because the statute is made applicable to statutes."

Whether the statute may be applied or not does not seem important to me. The universal rule for construing constitutional provision is to ascertain the intent of the people. The initiative amendment was adopted November 3, 1909. The Gregorian Calendar was adopted by the English Parliament in 1751 by an act becoming effective September 3, 1752. (Funk & Wagnall Dictionary) This calendar, our present, has been the one used in this country since that time.

However, even though the Gregorian Calendar was adopted at an early date, it seems that the courts in England continued to hold that the word "month" in laws, meant the lunar month of twenty-eight (28) days. This construction was changed by statute in 1850 (26 R. C. L. p. 732, Sec. 6) to calendar month. In this country the English common law rule was followed at an early date but, beginning in 1794 in Pennsylvania, such was rejected and since that case it has almost been a uniform rule that reference to a month in law means calendar month (Guaranty Trust & Safe Deposit Co. v. Buddington, 12 L.R.A. 770 (Fla.) where cases are collected.

Therefore, there is no cause to believe that the people had anything in mind in 1909 except the calendar month, when they used the word "month" in the initiative amendment.

Section 655 provides that time shall be computed by "excluding the first day and including the last, if the last day be Sunday, it shall be excluded." This section also provides that rules therein stated are to "apply" unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute." Thus it appears, whether the statute may be applied to the Constitution or not, it lays down no hard and fast rule which must be followed.

We do not think it is to be followed in computing the time before which an initiative petition must be filed. The plain context of Section 57 of Article IV precludes the application of such rule. The provision designates that such petitions "shall be filed" at a time "not less than four months before the election."

In 62 C. J., Section 33, page 986, it is stated:

> "Where a period of time during or within which an act may or must be performed is referred to as being 'before', * * * * * a designated day or date, such words are generally construed as words of limitation of time, and as excluding, in the computation of the specified period, the day or date designated, and requiring the act to be performed prior to that day or date; and in such a case the general rule excluding the first day and including the last does not apply. * * * * * * * * *."

The text then states:

> "* * * This construction, however, is not of universal application, and the effect to be given to such a word depends on the intention with which it is used, as manifest by the context and considered with reference to the subject to which it relates; and, accordingly, it may be construed as either inclusive or exclusive of the day mentioned, in accordance with the intention of the particular case. * * * * * * * * * * *."

In Bailey v. Lubke, 8 Mo. App. 57, the act was required to be done "ten days before" a designated date. The court, while recognizing the rule, stated in Section 655, said l. c. 60:

> "When, as in the present case, it is said that an act is to be done a certain number of days before a given date, we do not think that, in the plain meaning of the phrase, it is intended that both the date named and the day of doing the act should be excluded. What is to be done one day before the 10th of the month, according to the plain, ordinary meaning of the phrase, is to be done on the day before, -- that is, on the 9th. * * * * * * * * * * *."

It thus appears the court held "before" to require exclusion of the date named in computing the time.

However, in Jewell Realty Co. v. Dierks, 18 S. W. (2d) 1043 (Mo. Sup.) the opposite rule was applied. There the parties had "until" (a word of similar import to before) June 26th to act. They acted on the 26th and the court ruled such to be within the allotted time, by consulting the context and finding such word to be inclusive rather than exclusive.

Were only the word "before" used in the initiative amendment, we might hesitate to hold it to be exclusive, but when we find such word coupled with the phrase "not less than" four months "before," there can be no doubt that the date designated - that is, November 3, 1942, must be excluded in computing the four months time, and this precludes resort to the rule of exclude the first date and include the last, for the reason that the first date is already excluded.

The rule to be followed in computing calendar months is stated in 62 C. J., page 970, Section 18, as follows:

> "* * * it runs from a given day in one month to a day of the corresponding number in the next or specified succeeding month, * * * * * * * * * * *."

Stated otherwise (In Re Custer, 55 Fed. (2d) 718, 719) it,

> "* * * denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one."

These rules are identical and the same result is reached by application of ~~other~~ either.

Excluding November 3, 1942, by counting back four months from the date, that is, from midnight November 2, 1942, we arrive at, that is to, the end of the day of July 2, 1942, the day of the corresponding number in the fourth preceding month.

Excluding November 3, 1942, that is, counting back four months from November 2, 1942, the day of beginning, we arrive at July 2, 1942, the day of the fourth preceding month that corresponds with the beginning date, less one, which would make the time midnight July 2, 1942.

CONCLUSION

It is, therefore, our opinion that the last day for filing initiative petitions with the Secretary of State expires at midnight, July 2, 1942.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

ELECTIONS: Hours of opening and closing polls in 1942 governed by War Daylight Time; in cities of less than 25,000 close at sunset if after 7 p.m.

March 17, 1942

FILED
12

Mimeo Copies in Vault

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

We have your request of March 14, 1942, which is as follows:

"Question has been asked concerning time of closing the polls, since adoption of War Time.

Sec. 11487 R. S. Mo. 1939 provides that polls (except in cities of 25,000 or more) shall be closed at 7 o'clock in the evening, or sunset if the sun shall set after 7 o'clock.

Please favor me with your opinion, as to when such polls shall be closed during the existence of War Time."

Section 11487 R. S. Mo., 1939, provides as follows:

"The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven (7) c'clock in the evening, unless the sun shall set after seven (7) o'clock, when the polls shall be kept open until sunset, except in cities in the state of twenty-five thousand (25,000) inhabitants or upward, when the

polls shall be opened at six (6) o'clock in the morning and be kept open until seven (7) o'clock in the evening."

The Public Law of the 77th Congress in an act approved January 20, 1942, is as follows:

"(Public Law 403-77th Congress)

(Chapter 7-2d Session)

(S. 2160)

AN ACT

To promote the national security and defense by establishing daylight saving time.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning at 2 o'clock antemiridian of the twentieth day after the date of enactment of this Act, the standard time of each zone established pursuant to the Act entitled 'An Act to save daylight and to provide standard time for the United States', approved March 19, 1918, as amended, shall be advanced one hour.

Sec. 2. This Act shall cease to be in effect six months after the termination of the present war or at such earlier date as the Congress shall by concurrent resolution designate, and at 2

o'clock antemeridian of the last Sunday in the calendar month following the calendar month during which this Act ceases to be in effect the standard time of each zone shall be returned to the mean astronomical time of the degree of longitude governing the standard time for such zone as provided in such Act of March 19, 1918, as amended.

Approved, January 20, 1942. "

In the case of McComb v. Dutton reported in 32 Delaware Reports, l.c. 260 and 261, the court says as follows:

"'It seems clear to us that the provisions of a statute fixing the time of opening and closing the polls at an election are so far directory that an irregularity in this respect which does not deprive a legal voter of his vote, or admit a disqualified person to vote, will not vitiate the election. But if the departure from the provisions of the statute in regard to the time for opening or closing the polls was so great that it must be deemed to have affected the result, the election must be held invalid. People v. Lodi High School, 124 Cal. 694, 57 Pac. 560; Fry v. Booth, 19 Ohio St. 25; Pickett v. Russell, 42 Fla. 116, 634,28 South.764; Patton v. Watkins, 131 Ala. 387,31 South. 93,90 Am. St. Rep. 43; People v. Cook, 8N.Y. 67, 59 Am. Dec. 451; Holland v. Davies, 36 Ark. 446; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273.

The election in the case before us was held from two to five o'clock P. M., Daylight Saving Time; under such time the polls were opened and closed one hour earlier than they would have been under Standard Time; but should the election be held illegal and void because it was not held strictly in accordance with Standard Time? The statute under which the election was held provided that the polls should be kept open from two to five o'clock in the afternoon, but nothing is said about Standard Time or any other time; and there was no law of this state, at the time the election was held defining legal time or making Standard Time the lawful time.

It is not clearly shown in the case stated that Daylight Saving Time was the recognized and accepted time in the district where the election was held, although it was not denied at the argument. If Daylight Saving Time was the recognized and accepted time in the district, the time by which the people arose in the morning, conducted their daily affairs and retired at night, would there have been any better or more suitable time by which to hold the election? The election is presumed by law to be legal, and in order to rebut that presumption it must be shown that it was illegal. The mere fact that the election was held under Daylight Saving Time does not, in our opinion, rebut the presumption. To have that effect it would have to appear that the

time observed in opening and closing the polls was not the recognized and accepted time in the district.

The second exception,'The purposes for which said taxes were to be used were not school purposes'; and the third exception, 'The amount to be raised was set out as being $20,862.00. The amount they showed they intended to raise was $21,073.00,' will be considered together.

The statute provides that notice shall be given for such election stating the amount to be raised and the purposes for raising the same. Vol. 32, Delaware Laws, chap. 160, sec. 54. The notice given in this case was as follows:* * * * * * * * * * *"

In the case of Armstrong v. Tama County, reported in 34 Iowa Reports, l.c. 308 and 309 the court says as follows:

"* *Section 81, chapter 172, acts ninth general assembly, provides that no district township meeting or sub-district meeting shall organize earlier than 9 o'clock A.M., nor adjourn before 12 m., and in all independent school-districts the polls shall be open from 9 o'clock A.M. to 4 o'clock P.M. Section 85 provides for an election by ballot, in the Independent school district, upon the question of its organization. It was clearly an election contemplated in the other section just cited. It was an election held in the district, and it was by ballot. The polls

> should have been kept open as provided from 9 o'clock A.M. until 4 P.M. The language of the two sections cannot be misunderstood, and its obvious meaning is in harmony with reason. It cannot be supposed that the legislature would provide for more favorable opportunities for the expression of the will of the people in the ordinary election, than at the important one which determined the very existence of the district.
>
> The township trustees had no power to order an election to be held at a time not authorized by law, and it was therefore illegal. The action of the electors, deciding upon the organization of the district, being unauthorized and void, must be regarded for naught, and the district itself as having no legal existence. The tax in question cannot, therefore, be collected.* * *"

In the case of People v. Seale reported in 52 Cal. Rep. l.c.72 and 73, the court says as follows:

> "* * *In this case the notice was to the effect that the polls would be open only between the hours of one o'clock P.M. and six o'clock P.M., and in point of fact the polls were kept open only between those hours, and in this important respect the election, as held, was not 'in conformity with the general election law'—for that

> requires the polls to be open 'at one hour after sunrise on the morning of the election,' and to be kept open until sunset (Political Code, sec. 1160).
>
> Judgment reversed and cause remanded, with directions to dismiss the action."

In the case of Tebbe v. Smith, reported in 108 Cal. Rep. 111 and 112 the court says as follows:

> "* * The law provides that the polls must open at sunrise, and be kept open until 5 P.M., and that the ballot-box must not be removed from the polling-place or presence of the bystanders. (Pol. Code, secs. 1160, 1162.)
>
> It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed or the rights of the voters injuriously affected thereby. (Code Civ. Proc., sec. 1112; Russell v. McDowell, 83 Cal. 70.) But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compli-

ance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions.* *"

In the case of State ex rel. v. Hackman, reported in 75 Mo. Rep. l.c.697, the court said as follows:

" * * * * * It is urged that the opening of the polls at seven instead of six o'clock a.m. as required by the statute, constituted such an error as to invalidate the election. The force of this contention depends upon whether the statute is mandatory or directory. Ordinarily it is held to be directory, especially where the omission is unsubstantial and there was no evidence of resultant injury. For example, it has been held that a delay of an hour or an hour and a half in opening the polls will not affect the validity of an election, especially where there is no evidence that anyone was deprived of the right of voting. (People v. Prewett, 124 Cal. 7; Packwood v. Brownell, 121 Cal. 478; Pickett v. Russell, 28 So. (Fla.) 764; Graham v. Graham, 38 S.W. (Ky.) 1093; Marks v. Park, 7 Leg. Gaz. 70; Cleland v. Porter, 74 Ill. 76.) In the absence, therefore, of any injury resulting from a failure to open the polls at the time designated in the statute we hold the same as applied to the facts in this case to be direc-

tory and overrule respondent's contention.* * * * "

In the State ex rel. v. Ruark, reported in 34 Mo. App. Rep. l.c. 330, 331 and 332, the court said as follows:

" * *But the first objection made by relator presents a question of more difficulty. Section 2 of the local option law provides, that 'and election shall be held within forty days after the receipt of the petition,'etc. The facts in this case are 'that the board of aldermen, of the city of Neosho, received the petition for said election on the twenty-seventh day of June, 1887, and the election was ordered for August 9, 1887, being forty-three days after the receipt of the petition.' If this provision of the statute in regard to the time within which an election shall be held, is directory merely,then a failure to comply with it will not invalidate the election. But, on the other hand, if the statute is mandatory, then a failure, to strictly comply with the law in this respect, does invalidate the election. The question as to whether statutory provisions are directory or mandatory, has been the subject of much discussion and controversy, and without establishing any well-defined rule of general or universal application. In case of People v. Cook, 14 Barb. 259, the court undertook to formulate a general rule, as

follows: 'That the mode of procedure by a public officer in the holding of an election was merely directory, and not regarded as essential to the validity of the election, unless it be so declared by the statute.' The supreme court of Kansas in case of Jones v. State, etc., 1 Kansas, 273, in commenting on this rule said, 'that the intention of the legislature, to make such provisions essential, may appear as well by the general scope and policy of the statute, as by direct averment.'

We think the New York rule is too narrow, and that the law of statutroy interpretation, as declared by the Kansas court, is sustained by both reason and authority. The general rule is that the time and place of holding an election, and the legal qualification of the electors, are of the substance of an election, and a failure to observe the law, in respect to such matters, will invalidate an election, while the provisions of the statute touching the recording the legal votes, etc., are directory. (McCrary Elect. ((3 Ed.)) sec. 192.) In order that a ballot in any election shall have any force or effect, it must be cast at an election held at a time and place either fixed by law or by the order of someone having authority. After the vote has once been legally cast, then any irregularities on the part of those con-

ducting the details of the elections cannot deprive the citizen of the benefit of his vote. In discussing this question, the supreme court of California in case of Dickey v. Hurlburt, 5 Cal. 343, said in substance: that the time and place of holding every election are essential. When a statute itself did not fix the time for holding the election, but left it to be determined by an officer, who was disqualified under the constitution of said state from acting, that an election held, under the direction and authority of the person named, was null and void.

While the general rule is that the time for holding any election is essential, and that a failure to observe the requirements of the statute in this respect, would render the election invalid, yet if it appears, from the general scope and policy of the particular statute in question, that the contrary is intended, then the latter interpretation should prevail.

In the statute under consideration the legislature certainly had some good reason for embodying in it the provision that the proper authorities, when petitions were presented, should order elections within a certain time. We think that the legislative design was to prevent county courts and city councils from thwarting the

> operation of the law, either by failing to call an election, or fixing some day that would render the election invalid, because held within sixty days of some other state or municipal election. Therefore, we think, that the object was to place it within the power of the friends of the law to compel county and city officials to order the election within the time prescribed. To hold that this statute is merely directory is to put it within the power of officials to practically nullify the law. Under the view we have taken of this case, we are compelled to hold that the election was void, and that the circuit court erred in refusing to grant a peremptory writ of mandamus, compelling defendants to issue to relator a dramshop license.
> * * * * * * * * *"

CONCLUSION

It is therefore the opinion of this department that in all elections the closing of the polls is governed by Daylight Savings Time, commonly referred to as "War Time", and that in those elections within the purview of sec. 11487 R. S. Mo.,

1939, the polls should be kept open until seven (7) o'clock in the evening (Daylight Savings Time) unless the sun shall set thereafter, then until sunset.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

ELECTIONS: Stickers must be placed over identifying numbers on all ballots.

April 1, 1942

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "Sec. 11607 R. S. 1939 as amended in 1941 requires black sticker over number on back of ballot.
>
> "In the November election, there will be at least four separate ballots, as I understand the situation: (1) Blanket ballot with names of candidates, (2) Non-partisan judges' ballot, (3) constitutional amendments and initiated measures, (4) the question, shall there be a convention to amend and revise the constitution.
>
> "Question has been asked, whether a black sticker must be used on each of these four ballots?"

As noted in your request, the question involved in this opinion is whether a black sticker must be placed upon the identifying number on the four ballots to be used in the 1942 general election. We assume, in so far as this opinion is concerned, that these four ballots will be submitted to the people at this election.

Section 11607, R. S. Mo. 1939, as amended 1941, Laws of Missouri, page 363, provides as follows:

> "Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eights (3/8) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

Under the above section the identifying number on "every ballot" shall be concealed by a black sticker.

Section 11595, R. S. Mo. 1939, which is the general law providing for the form of the ballot to be used in the

elections in Missouri, states:

> "* * * On receiving the ballot from the voter the number of the ballot voted in the order in which it is received, but no other writing except the initials of two judges as provided for in Section 11602 of this chapter, shall be on the back of the ballot. * * * *"

Section 11680, R. S. Mo. 1939, provides for the form of the ballot to be used in a vote of whether or not a Constitutional Convention shall be held, and also as to the form of the ballot when constitutional amendments are submitted to the vote of the people. The latter part of this section provides as follows:

> "* * * In all other respects the law governing the printing, distribution of ballots, the number to be distributed, and the manner of voting ballots at a general election shall apply to 'constitutional ballots' where not in conflict with this article."

At the general election of 1940 the people of Missouri amended the Constitution by adding to Article VI seven new sections which were known as the "court plan." This plan provided that a judge of the Supreme Court of Missouri at the expiration of his term could submit his name to the voters of Missouri and they would vote whether or not he would be retained in office. Section 3 of this amendment provided that:

> "* * * the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office

> shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

The laws relating to "measures proposed by the initiative" provide in Section 12292, R. S. Mo. 1939, that:

> "The manner of voting upon the measures submitted to the people shall be the same as is now or may be required and provided by law; * * * * * * * * *."

It will be seen, therefore, that the four ballots listed in your request are all governed by the general law, relating to the form of the ballot and, as pointed out, this law, Section 11595, provides that an identifying number shall be placed upon the ballot by the judge. Since Section 11607, Laws of Missouri, 1941, page 363, provides that every identifying number shall be concealed by a black sticker, we believe it is apparent that the identifying numbers upon the non-partisan judges' ballot, the Constitutional Amendment ballot, and the Constitutional Convention ballot should all be concealed by a black sticker as required by Section 11607, supra.

CONCLUSION

It is, therefore, the opinion of this department that the identifying number upon the general ballot with the names of the candidates, the non-partisan judges' ballot, the Constitutional Amendment ballot and the Constitutional Convention ballot, to be voted in the general election in November, 1942,

shall be concealed with a black sticker as required by Section 11607, Laws of Missouri, 1941, page 363.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

SECURITIES COMMISSION: Deposit of Fidelity Investment Association not subject to law relative to deposits of State money.

April 20, 1942

4-22

FILE 12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 10, 1942, which is as follows:

"The Fidelity Investment Association, a West Virginia corporation, since about 1912 has been engaged in the business of selling its own securities in the form of investment contracts of various types and the investment of funds received from purchasers of such contracts so as to provide for their payment at maturity, according to their terms, or for the payment of specified cash values at various stages in the life of the individual contract, as required by the purchaser. This company by its charter operated under the provisions of what is now Article 9 of Chapter 33, of the Code of West Virginia relating to annuity contracts. These contracts are of a type commonly called 'face amount certificates' in that same promised the payment of a certain specified sum of money at maturity provided the purchaser paid all the installments of his contracts to maturity. The purchaser, if he completed his contract, received a net return on the money invested, which ranged from 1.55% to 3.09% depending on the type of contract. The cash values on such contracts were so fixed that it was not until the purchaser

had paid all of the first year's installments that his contract was given any cash value whatever. Thereafter, it acquired a cash value, which increased proportionately as the years passed; but the cash value did not equal the total amount paid in by the purchaser until the end of a period varying from six to nine years, again depending on the type of contract. The contracts were matured when monthly installments had been paid for a period of 10 to 11 years with a subsequent waiting period of three to 13 months. While the various types of investment contracts sold by said company differ in some respects, they are all alike in providing for monthly, semi-annual or annual payments of specified sums of which a sufficient portion was to be set aside in a reserve fund which was to produce the sum required to pay the purchaser the amount agreed upon in the contract. All such contracts provided that the reserve fund so set aside should 'be invested in approved securities and deposited in trust as required by the laws of the state of West Virginia.'

"Since about 1928 said Fidelity Investment Association from time to time has complied with the laws of the State of Missouri in that it has registered in the office of the Commissioner of Securities under the provisions of the Missouri Securities Act, now Chapter 41, Revised Statutes of Missouri, 1939, all of its various types of investment contracts sold to the public in this state. Under the terms of a contract entered into by and between the said Fidelity Investment Association and the Commissioner of Securities of the State of Missouri, said company agreed to

and did maintain a deposit of securities for the purpose of securing the payment of the net outstanding liability of said company on contracts sold in the State of Missouri. The amount of securities on deposit varied from time to time, but was always of an amount in value sufficient to pay the outstanding net liability of said company in this state by reason of contracts so sold. The deposit of securities was maintained with the Wheeling Dollar Savings & Trust Company at Wheeling, West Virginia and consisted largely of railroad, industrial and utility bonds.

"On June 6, 1941, said Fidelity Investment Association filed a voluntary petition in the United States District Court for the Southern District of West Virginia, for reorganization under the provisions of Chapter 10, of the Federal Bankruptcy Act. Immediately thereafter the Central Trust Company of Charleston, West Virginia was appointed trustee to take charge of all property, assets and business of the company and to conserve its assets and operate the business until such time as either a plan of reorganization was adopted or it be determined that reorganization is impossible and not for the best interest of the creditors of paid petitioner.

"At the time of the filing of said petition in said United States District Court for the Southern District of West Virginia, and the appointment of the said Central Trust Company as such trustee, there was on deposit in the Wheeling Dollar Savings & Trust Company of Wheeling, West Virginia, certain bonds as above stated of an aggrate value at the market of approximately $786,000.00. These bonds were so deposited in accordance with the terms of the contract

herein above referred to between the Commissioner of Securities of the State of Missouri and the Fidelity Investment Association.

"Subsequent to the filing of said petition and the appointment of the trustee, and on the 9th day of August 1941, the United States District Court for the Southern District of West Virginia made and entered an order of record in said cause by the terms of which order, the said Wheeling Dollar Savings & Trust Company was directed to surrender said securities to the Commissioner of Securities of the State of Missouri. Subsequent to entering of said order, the Wheeling Dollar Savings & Trust Company of Wheeling, West Virginia delivered said bonds to the Commissioner of Securities of the State of Missouri, which were deposited immediately by him with the Central Missouri Trust Company of Jefferson City, Missouri, for safekeeping. On August 9, 1941, the United States District Court for the Southern District of West Virginia, made a further order in said proceedings for corporate reorganization by the terms of which, it is adjudged and ordered that the Commissioner of Securities of the State of Missouri and all other persons and officials having in their possession, custody or control any property of any kind or character for the purpose of securing the creditors or contractholders of said Fidelity Investment Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, and their agents and employees, are enjoined and restrained from selling, assigning, concealing, encumbering, transferring or otherwise disposing of any of said property. From time to time since said bonds were de-

livered to the Commissioner of Securities of the State of Missouri pursuant to said order of court, the said Commissioner of Securities in accordance with the orders and directions of the court and the said Central Trust Company, Trustee in said proceedings for corporate reorganization, has sold or otherwise disposed of portions of said deposit of securities and has reinvested the proceeds as directed by said trustee. He also has collected the interest due on said bonds from time to time as same was payable. As a consequence of such sales and collections the said Commissioner of Securities from time to time has had in his possession substantial amounts in cash as a part of such deposit and has deposited same in an account with said Central Missouri Trust Company in his name as Commissioner of Securities of the State of Missouri.

"In view of the foregoing, will you kindly favor me with your opinion with respect to the following questions.

"1. - Are such deposits of moneys with said Central Missouri Trust Company, state funds within the meaning of Section 15, Article 10 of the Constitution of the State of Missouri, and are such deposits governed by the provisions of Article 2, of Chapter 87, Revised Statutes of Missouri 1939, relating to depositories of state moneys?

"2. - Is the Commissioner of Securities of the State of Missouri charged with any reaponsibility with respect to said deposits of moneys other than to follow the orders and directions of the

> United States District Court for the Southern District of West Virginia and of the Central Trust Company, Trustee in said reorganization proceedings, and if so, what additional duty, burden or responsibility is placed upon him by the laws of the State of Missouri with respect to such deposits?"

Section 43, Article IV of the Constitution provides:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, * * * * *."

In State ex rel. Thompson v. Board of Regents, 264 S. W. 698 (Mo. Sup.), the court in speaking of this section said, l. c. 700:

> "* * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * * * *."

Under this construction there can be no doubt that these funds are not required to be paid into the treasury under the above section. They are not for the support of the government, and therefore, are not included.

Supplementing Section 43, supra, is Section 15, Article X of the Constitution, which provides:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney General for the safekeeping and payment of such deposit, * * * * * * * * * *."

In State ex rel. Stevenson v. Stephens, 136 Mo. 537, the court, in dealing with this section and another, said at l. c. 547:

> "It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state within the meaning of the constitution. * * * * * * * *."

It is, therefore, clear that these funds are not comprehended within the language of Section 15, Article 10, be-

cause they do not belong to the state. The funds "belong" to the Fidelity Investment Association and have only been deposited with the State for the purpose of securing the payment of the contracts sold by said corporation in this state.

The provisions of Article II, Chapter 87, R. S. Missouri, 1939, apply only to those funds comprehended within the terms of Section 15, Article X of the Constitution. Therefore, what we have heretofore said as to that provision disposes of this inquiry.

Therefore, in answer to your first question, we are of the opinion that the deposits of money now in the Central Missouri Trust Company are not governed by the provisions of Section 43 of Article IV, or of Section 15 of Article X of the Constitution, or of the provisions of Article II of Chapter 87, R. S. Missouri, 1939.

On your second question, it appears that this corporation has applied for reorganization under 11 U.S.C.A. 501, et seq. on Corporate Reorganization. Section 511 of this Title provides:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, whenever located."

You advise that the Federal Court in which the petition for reorganization was filed has "adjudged and ordered that the Commissioner of Securities of the State of Missouri and all other persons and officials having in their possession, custody or control any property of any kind or character for the purpose of securing the creditors or contractholders of said Fidelity Investment Association against loss occasioned by default in the payment of the amounts payable under said contracts, or for any other purpose, and their agents and employees, are enjoined and restrained from selling, assign-

ing, concealing, encumbering, transferring or otherwise disposing of any of said property." That order, under 11 U. S.C.A. 511, is clearly within the authority of the Federal Court and it is apparent that said court has assumed full control over said fund.

Therefore, we are of the opinion that when the Securities Commissioner of Missouri complies with the orders of the Federal Court, with respect to this fund, he discharges all responsibility which the law places upon him with respect thereto. We are not aware of any other law of the State which attempts to place any duties or burdens upon the Securities Commissioner, with respect to such funds, and if such did exist we are of the opinion it would be inapplicable because these funds are now subject to the jurisdiction and control of the Federal Court.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

LLB/rv

APPROVED:

ROY McKITTRICK
Attorney-General

MISSOURI SCHOOL FOR THE BLIND: County court not authorized to pay expenses of students who are not sent by court order.

- -

April 22, 1942

5-1

FILE 12

Honorable R. Wilson Brown, Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Mr. Brown:

Under date of April 9, 1942, you wrote this office requesting an opinion, as follows:

> "The Revised Statutes of Missouri, 1939, Chapter 72, Article 25, Section 10856, provides that when a person is entitled to the advantages of the Missouri School for the Blind and the parents are unable to pay the expenses of such person at this school, the county court shall order him or her sent to the proper school, at the expense of the county for his clothing and traveling expenses.
>
> "There are two questions in our minds:
>
> "1. Does this provision of the law apply when the parents <u>voluntarily</u> send students to this school instead of the county court <u>ordering</u> the students sent? In other words, what if the student comes in without the order of the court but at the request of the parents and yet the parents cannot afford to furnish the child with such expenses as clothing?

"2. When county courts refuse to pay student expenses, or issue class 5 warrants which cannot be cashed, what is the procedure to be followed by this school in collection of accounts?"

Section 10856, Article 25, Chapter 72, R. S. Mo. 1939, referred to in your letter, is as follows:

"Whenever, upon petition of any person, and satisfactory evidence adduced to the county court of this state that there is a blind or deaf person residing in any county, and such person is entitled to the advantages of the Missouri school for the blind or the Missouri school for the deaf, and the parents or guardians of such persons are unable to pay the expenses of such person at his proper school, the county court shall order him or her sent to the proper school, at the expense of the county for his clothing and traveling expenses."

You will note this section only authorizes the expenditure of county funds after a petition has been filed, evidence produced and the finding of the court rendered on the petition and the evidence.

The powers of a county court are conferred upon it by statute and it must act within the power conferred. In the case of Steines et al. v. Franklin County, et al., 48 Mo. 167, l. c. 177, it is stated:

"As County Courts are only the agents of the county, with no powers except what are granted, defined and limited by law, like all other agents they must pursue their authority and act within the scope of their powers. (Wolcott v. Lawrence County, 26 Mo. 272; Ruggles v. Collier, 43 Mo. 353.)"

From the foregoing it is apparent a county court would have no authority to pay the expense of a student in the Missouri school for the blind until the provisions of Section 10856, R. S. Mo. 1939, had been complied with.

As to your second question, a county court acts in a ministerial capacity in auditing and paying claims against the county. Nodaway County v. Kidder, 129 S. W. (2d) 857. If the amount due was a definite, fixed amount then a proceeding in mandamus would compel the court to issue its warrants. However, if the amount due were in dispute it would require a suit against the court to determine the amount due before mandamus would issue.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

Roy McKittrick
Attorney-General

WOJ:CP

MISSOURI SCHOOL FOR THE BLIND: Resident defined.

- -

April 22, 1942

X-28

FILE 12

Hon. R. Wilson Brown, Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Mr. Brown:

Under date of April 9, 1942, you wrote this office requesting an opinion as follows:

> "We have in this school a student by the name of Renard Farrar, negro, age 18, who is the son of Mr. William Farrar of Kennett, Missouri; mother, Mrs. Tresia Farrar of Chicago, Illinois. The parents are separated. The mother is currently supporting the child and keeps him with her in Chicago during school vacations.
>
> "The question we place before you is whether or not this child is considered a resident of the State of Missouri and whether or not he should be re-enrolled in this school for the coming school year."

Section 10853 Article 25, Chapter 72, R. S. Mo. 1939, declares what persons may attend the Missouri School for the Blind, and is as follows:

> "All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of

> each pupil, shall be determined by the board of managers."

By this section it is required that a person attending must be a resident of Missouri.

At this point it is desired to call your attention to what is said about the word "resident" in Corpus Juris, volume 54, page 712:

> "Although there are many definitions to be found in the books, it is not easy to give a satisfactory definition of this term, for it is a flexible, somewhat ambiguous word, used in many and various senses, with the sense in which it should be used controlled by reference to the object, thus having different meanings according to the context, or the subject-matter under discussion. It has a great variety of meanings. It is difficult to give an exact definition of what is meant by 'resident' as used in particular statutes, for, although often construed by the courts, the term has no technical meaning, but is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. The construction is generally governed by the connection in which the word is used, and the meaning is to be determined from the facts and circumstances taken together in each particular case."

The first matter to be considered in connection with your question is what is the meaning of the word "resident" as used in Section 10853, supra. In Webster's New International Dictionary, second edition, the word is defined as follows:

> "resident, n. 1. One who resides in a place; one who dwells in a place for a period of more or less duration. Resident usually implies more or less permanence of abode, but is often distinguished from inhabitant as not implying as great fixity or permanency of abode."

The word "resident" is used in many different statutes and in some of its uses it has been defined but in the case we are considering it is used in a section of the statutes relating to schools and we fail to find where the word has been defined as used in this statute. In defining the word it is our duty to construe the statute liberally in order to open the doors of the schools to the children of the state and not to close them. State ex rel. Halbert v. Clymer, 164 Mo. App. 671.

In the case of State ex rel. v. Clymer, supra, a case where the Springfield Court of Appeals had before it the meaning of the word "resident" as used in Section 10785, R. S. Mo. 1909, now Section 10340, R. S. Mo. 1939, a boy who was making his home with his grandfather in the town of Steelville, but whose father resided in the City of Springfield, was considered as not a resident of the Steelville School District. And, in the earlier case of Binde v. Klinge, 30 Mo. App. 285, a girl who was living with her grandmother in Hermann and whose father and other members of the family resided in Montgomery County, was considered as not a resident of the Hermann School District.

From the foregoing it would seem that under the general school law a person of school age is a resident where the parents reside, for a minor is not in law considered as capable of establishing a residence except in exceptional circumstances.

Both of the cases mentioned above related to a school district while we are considering the Missouri School for the Blind which is for the blind children for the entire state. However, it is felt the same rule should apply and that "resident" as used in Section 10853, supra, would be a person whose parent or parents had a place of residence within the State.

Your letter states that the father of Renard Farrar resides in Dunklin County, Missouri, and that the mother is currently supporting the child and keeps him with her in Chicago during school vacations.

Section 1526, Article 3, Chapter 8, R. S. Mo., 1939, provides for the custody and control of minor children where the father and mother are living apart. Said section reads as follows:

> "The father and mother living apart are entitled to an adjudication of the circuit court as to their powers, rights and duties in respect to the custody and control and the services and earnings and management of the property of their unmarried minor children without any preference as between the said father and mother, and neither the father nor the mother has any right paramount to that of the other in respect to the custody and control or the services and earnings or of the management of the property of their said unmarried minor children, pending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control and to the services and earnings and to the management of the property of said unmarried minor children."
>
> (Underscoring ours.)

CONCLUSION

From these last two sections, the rights of the parents being equal, it would seem the son would be a resident where the parent with whom he makes his home has his or her residence.

However, if there has been an adjudication as to the custody by a court of competent jurisdiction, the boy would be a resident of the place where the parent to whom custody was awarded had his or her place of residence.

However, this office cannot determine whether or not the child should be re-enrolled for the coming school year for that is the province of the board of managers, since Section 10853, supra, provides:

> "* * * * All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

SCHOOLS: - Board of Managers may use discretion in employing teachers.

MISSOURI SCHOOL FOR THE BLIND:

April 27, 1942

5-1

FILE 12

Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Attention - Mr. R. Wilson Brown,
Superintendent

Dear Sir:

We are in receipt of your letter of April 23, 1942, in which you request an official opinion, as follows:

> "Inasmuch as the present school term will end on May 29 it is extremely important that your office give us an opinion upon the matter outlined in this letter as early in May as possible.
>
> "Chapter 72, Article 25, Section 10847, of the Revised Statutes of Missouri, having to do with the duties of the Board and Superintendent, salaries and wages, and employment of help, says, in part, 'The Board of Managers of each of said schools shall elect the superintendent and all teachers and officers of said school and prescribe the number to be employed therein, fix their terms of office and the amount of compensation for their services.'

"The questions in our minds are these:

1. May the Board of Managers use its own best judgment in selection of teachers and in refusal to reemploy teachers according to the best interest of the school rather than follow any prescribed rules or regulations?

2. May the Board use its own judgment in refusing to reemploy a teacher beyond the period of the original contract?

3. When the Board does not employ or reemploy an individual, is it necessary for the Board to state reasons?"

Section 10847 R. S. Missouri, 1939, reads as follows:

"The board of managers of each of said schools shall elect the superintendent and all teachers and officers of said school and prescribe the number to be employed therein, and fix their terms of office and the amount of compensation for their services. The superintendent shall have the power to employ all foremen, employees, supervisors, mechanics, servants and other persons not otherwise provided for and shall have the power to discharge the same at his pleasure: Provided, that the board shall have first designated the number of employees and their wages; and provided further, that nothing herein shall prohibit the

> board from discharging any employee when they may deem it for the interest of the school so to do. The salaries and wages due officers, teachers and employees of these schools shall be allowed and paid monthly. The superintendent and matron of each school shall reside therein."

This section of the statutes has not been construed by any of the appellate courts of this State, for the reason that it is unambiguous. Where language of a statute is plain, and unambiguous, it may not be construed, but must be given effect as written. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667.)

Under the above section the Board of Managers of the Missouri School for the Blind elects the Superintendent and all of the teachers and officers, prescribing the number to be employed and fees, terms of office and amount of compensation. Also, under the above section, the Board of Managers is not prohibited from discharging any employee when it may deem it for the best interest of the school. Of course, if the teacher, or employee, has a contract with the Board of Managers, the Board must recognize all of the terms of the contract.

A similar section which refers to schools other than the Missouri School for the Blind was construed to the effect that no limitations can be placed upon the director of a school district to employ, and to contract with, legally qualified teachers. It was so held in the case of Tate v. School Dist. No. 11 of Gentry County, 23 S. W. (2d) 1013, l. c. 1020, where the court said:

> "The legislative grant of power to the board of directors of a school district to employ, and to contract with, legally qualified teachers,

> is made general by the statute. No express limitation is put upon the grant of power by any language of the statute; nor is any limitation upon the power granted to be reasonably implied from the language and context of the statute. The statute does not limit, or undertake to limit, either expressly or impliedly, the period of employment of a teacher to the single and particular school year in which the contract of employment is made by the school district board of directors."

It has also been held that when under contract a teacher can be discharged when violating the rules and regulations of the school. It was so held in Strayhorn v. Blodgett Consol. School Dist. No. 35 of Scott County, 86 S. W. (2d) 374, l. c. 380, where the court said:

> "We therefore hold that in a contract of employment between a school board and a teacher, that the rules and regulations are a part of the contract, where the teacher has been furnished with the rules and regulations of the board, or has actual knowledge of such rules."

In your questions you do not refer to the discharging of teachers who are under contract, but only refer to the re-employment, or the making of new contracts with teachers now employed by the Missouri School for the Blind.

CONCLUSION

In answer to your first question, it is the opinion of this department that the Board of Managers may use its own best judgment in selecting teachers, and may refuse to re-employ teachers for the reason that Article 25, Chapter 72, of the Revised Statutes of Missouri, 1939, does not set out the qualifications required of a teacher employed by the Board of Managers of the Missouri School for the Blind.

In answer to your second question, it is the opinion of this department that the Board of Managers may use its own judgment in refusing to re-employ a teacher beyond the period of the original contract.

In answer to your third question, it is the opinion of this department that it is not necessary for the Board of Managers to give any reasons for not employing, or entering into a new contract with an individual, as a teacher, or employee, of the Missouri School for the Blind.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS: Names of Appellate judges must be published. Returns of result of vote on retention of judges and initiative questions must be separate.

- -

April 27, 1942

5-1

FILE
12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "Amendment to Art. IV, Constitution of Missouri, passed by vote of the people Nov. 5, 1940, known as 'Non-Partisan Court Plan' provides for filing with me, not less than 60 days prior to the November general election, of declarations by supreme judges or appellate judges who desire to succeed themselves. I am then required to certify their names to the county clerks, and a separate ballot must be provided by means of which the voters express themselves on the question of retaining said judges. The amendment recites: '.... and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."
>
> "May I be favored, please, with your opinion on the following problems, this being our first experience with the new law:

"1. Measures proposed by initiative in the past have been advertised in newspapers and placed on the separate ballot along with proposals to amend the Constitution submitted by vote of the General Assembly. It is required that names of candidates for office be advertised in newspapers. The question, Shall there be a convention to revise and amend the Constitution, must likewise be advertised in newspapers. (Sec. 11682RS"39; Sec. 11677.) Is it also my duty to include in such advertisements the question of the retention of supreme and appellate judges? If so, may I have your suggested wording and heading for such advertising?

"2. To avoid waste of paper, binding and filing space, may I prepare returns to this office, to be filled out by County Clerks, including on one return sheet, by precincts, the vote for and against each proposed constitutional amendment and initiated law, the vote for and against the question, Shall there be a convention to revise and amend the Constitution, and the vote for and against the retention of the judges whose terms expire Dec. 31, 1942, viz: Judge Tipton, Judge Leedy and Judge Hays, plus any circuit judges in Jackson County and in St. Louis City whose terms expire at the end of this year? In other words, may I have one sheet for the candidates' votes, and another sheet for the returns on these three separate ballots?"

1.

THE QUESTION OF THE RETENTION OF SUPREME AND APPELLATE JUDGES SHOULD BE ADVERTISED.

At the general election of 1940 the people of Missouri amended the Constitution by adding to Article VI seven new

sections which were known as the "court plan." This plan provided that a judge of the Supreme Court of Missouri and a judge of the Appellate Courts of Missouri at the expiration of his term could submit his name to the voters of Missouri and they would vote whether or not he would be retained in office. Section 3 of this amendment provided that:

> "* * * the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

Section 11676, R. S. Mo. 1939, provides as follows:

> "Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in section 11542."

While Section 11676, supra, is incorporated in Article IX which deals with constitutional amendments, still a research of the history of this section discloses that when it was passed in 1889 it was included in the general election

laws and, therefore, must be taken in its plain meaning as to apply to a constitutional amendment or "other question" to be submitted to the people of Missouri for a public vote. We believe it is obvious that a vote upon an initiative petition is included within this phrase. Under Section 3 of the constitutional provision quoted above, the ballot, on the question of whether a judge should be retained in office or not, is governed by the same law relating to measures proposed by the initiative.

Section 11542, R. S. Mo. 1939, referred to in Section 11676, supra, provides as follows:

> "At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election: Provided, that no higher rates shall be paid per inch, than is provided by section 14966, chapter 119, R. S. 1939, as amended."

We are, therefore, of the opinion, in view of the above authorities, that the names of those judges who are to be voted on in the general election as to whether they shall be retained in office or not, should be published in those newspapers designated in Section 11542, R. S. Mo. 1939, along with the other candidates and propositions.

2.

ELECTION RETURNS ON THE GENERAL VOTE, CONSTITUTIONAL AMENDMENTS AND CONVENTION, INITIATIVE VOTE, AND RETENTION OF JUDGES SHOULD BE SEPARATE.

Sections 11609 to 11615, R. S. Mo. 1939, provide in substance for the returning of the poll books by the judges and clerks of the election to the county clerk and the casting up of the votes by the county clerk and two justices of the peace sitting as a canvassing board.

Section 11681, R. S. Mo. 1939, provides as follows:

> "The election on such proposed constitutional convention, on the adoption of a new constitution, or on any constitutional amendment or amendments, shall be conducted and the returns made thereof to the several county clerks, and shall by them be certified to the secretary of state, as provided by law in cases of the election of state officers."

Section 12293, R. S. Mo. 1939, which deals with the returns of the vote cast upon initiative questions, which law governs the procedure to be followed in dealing with votes cast for the retention of judges, is somewhat different. This section provides as follows:

> "The votes on measures and questions shall be counted, canvassed and returned by the regular boards of judges, clerks and officers as votes for candidates are counted, canvassed and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets, in the manner provided for abstract of votes for state and county officers. It shall be the

> duty of the secretary of state, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure; and the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by majority of those voting thereon to be in full force and effect as the law of the state of Missouri from the date of said proclamation: Provided, that if two or more measures shall be approved at said election which are known to conflict with each other or to contain conflicting provisions, he shall also proclaim which is paramount in accordance with the provisions of section 12292."
>
> (Underlining ours.)

In 29 C. J. S. page 332, it is said:

> "The form of the statement of the result is prescribed by statute.
> *
>
> "As a rule, where an election has been honestly conducted, mere irregularities in the return will not necessarily be sufficient ground for rejecting it, statutes regulating the character of the return being regarded as directory and not mandatory. However, material irregularities such, for instance, as failure to state the offices for which votes have been cast for candidates, * * * * * * * * * * will require rejection of the returns."

Therefore, we believe that while the returns of the result of the vote on the constitutional amendments and the constitutional convention may be included in one return, still, since Section 12293, supra, provides that such abstract of the vote shall be separate, we believe that the returns of the vote on the initiative questions and the question of whether the appellate judges shall be retained in office should be separate.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

PRINTING: (1) Commission may adopt rule of Supreme Court as to briefs, where statute and rule do not conflict;
(2) may take bid on statutory basis of ems, tokens or quire on composition and presswork according to method employed and job to be done;
(3) may require contractor to obtain receipt from department which receives printing;
(4) on binding, Commission may cover price on press numbering and perforating by percentage discount from hand schedules.

April 30, 1942

5-4

Honorable Dwight H. Brown
Chairman
State Printing Commission
Jefferson City, Missouri

FILE ✓
12

Dear Sir:

By your letters of April 24 and 25, 1942, you have submitted the proposed specifications relative to the state printing and binding contracts. In connection with these specifications you call our attention to certain matters therein, requesting our opinion on the authority of the Commission to make such requirements. We shall set out hereafter what we consider necessary for an understanding of the question presented.

The printing contract.

I.

In Class Two printing it appears the specifications for bids require that:

> "All printing in class 2 shall be executed in small pica type in pages to contain as nearly as practical 2,000 ems to the page, six 6 inches x 9 inches, without any unnecessary leads, blanks or broken lines or pages.
>
> "Exception: -- State Supreme Court briefs, statements and abstracts shall be produced in conformity with the rules

> and regulations established by the court.
>
> "The rule and figure work, head notes and indexes printed in the laws, journals and all other printing in book form shall be in Brevier type."

You have directed our attention to the "Exception" above attached advising that it is new matter upon which you desire our opinion.

Section 14980, R. S. Missouri, 1939, is almost identical with the above specification, except, of course, as to the "Exception." That section provides:

> "The laws, journals and all other matters specified in the second class shall be executed in small pica type, in pages to contain two thousand ems, without any unnecessary leads, blanks or broken lines or pages."

Section 14982, R. S. Missouri, 1939, makes the identical requirement as to brevier type as does this specification.

The Supreme Court of Missouri has this rule:

> "Briefs and abstracts filed in the Supreme Court shall be nine and three-fourths inches in length and six and one-half inches in width. Must be printed in 10 or 11-point leaded type, the printed matter, 3 5/8 inches; pages numbered and matter properly indexed."

Comparison of the specification with the statutes discloses that they are essentially the same except the specification fixed the page sizes, while the statute makes no mention of the page sizes.

Comparison of the statute with the rule of the Supreme Court discloses no insurmountable conflict. The statute calls for small pica type and nothing more. The rule calls for 10 or 11-point leaded type. Small pica and 11-point type are the same, therefore, the court rule may be obeyed with no contravention of the statute.

The designation of the rule as to "leaded type" has nothing to do with the letter sizes and the statute only treats with letter sizes using the designation, "small pica". The court rule permits use of that size type, thus, there is no conflict. In this situation the question of what would be the rule in the event the court rule compelled use of something other than small pica is not presented and we shall not undertake to discuss such a situation.

It is, therefore, our opinion that the "Exception" inserted into the specification is proper for the reason that adoption of the Supreme Court rule as to page sizes, leaded type and length of the printed line, where the rule permits use of the type size demanded by statute, is solely a matter addressed to the discretion of the Commission.

II.

Our attention is directed to a part of "Instruction 2" of the printing specification. That part is as follows:

> "If separate prices per quire are quoted for printing envelopes, envelope sizes should be specified."

This instruction clearly contemplates that there be a bid on envelopes apart from other composition and presswork

printing, and consequently, raises the question of whether the Commission may break down composition and presswork into various classes or kinds and receive bids and let its contract on such separate classes.

Section 14977, R. S. Missouri, 1939, provides, in part:

> "* * * said contracts shall distinctly and specifically state the price per thousand ems for the composition of all matter and embraced in the three classes of printing, the price per token for all presswork embraced in the second class, and the price per quire for the presswork contained in the first and third classes * *: * * * * * *."

This statute requires the contract price on composition to be based on the one thousand ems, and, on presswork it is to be based on the token or quire, but there is nothing in the above language that requires everything to be lumped in one figure. We cannot conceive a construction that demands the bid and contract to be "all composition per 1000 ems $0.00" and 'all presswork, per (token) quire $0.00," when there may be dozens of methods and kinds of composition and presswork, some more and some less expensive than the ordinary type setting and printing therefrom. We think that all the statute compels is that the price be distinctly and specifically stated on all such items that constitute composition and presswork. There are three ordinary kinds of composition, hand, linotype and monotype, and if the bid and contract placed a different price per thousand ems on each type of composition, according to the job being done, we think the terms of the statute are met. For example, it might be provided in the bid and contract about as follows:

Composition: Linotype method.

On Journals per thousand ems	$0.00
On Laws per thousand ems	0.00

On pamphlets per thousand ems	$0.00
On briefs per thousand ems	0.00
On stationery per thousand ems	0.00
On envelopes per thousand ems	0.00

Or the same thing might be done, based on hand or monotype composition, or all three methods, until all methods of composition had been named and a specific price made for each method of composition on each item of composition work comprehended in the three classes. If this is done, would not the bid and contract distinctly and specifically be stating the price for all composition on the one thousand ems basis? We clearly think it would, and that is all that the statute requires.

The above would also apply to the presswork, so that, if the Commission desires, it may take bids for presswork on the same theory. That is, according to the press method used and nature of the job, such as envelopes or any other items, as a separate item apart from other press methods and items of presswork.

III.

Our attention is directed to Instruction No. 8, which is as follows:

> "8. The contractor for any class of printing shall deliver to the Commissioners of Public Printing with his bill for printing, a copy of each document or other matter charged for in his bill, and a receipt or receipts for the item or items covered, signed by or for the officer, department, board, commission, institution, bureau or agency of the State. The bill shall show the printing requisition number of each job and shall itemize each operation and charge therefor."

You particularly call out attention to the underlined portion of this instruction, stating that it is new matter and that, "This practice has been in effect for many years."

We think this requirement is clearly within the power of the Commission. Section 14992, R. S. Missouri, 1939, provides:

> "* * * It shall be the duty of the Commissioners to see that the full number of copies of each job is received from the printer and delivered to the proper department * * * * * *."

The receipt, which is required under the above instruction, will properly aid the Commission in performing their duty of "seeing" that the full number of copies are delivered to the proper department. Under the general rule that a governmental agency has, by implication, all power necessary to render effective its express powers and duties this requirement of a receipt is reasonable and proper.

The binding contract.

The particular specifications to which our attention is called are as follows:

> NUMBERING
> BLANKS, CERTIFICATES, DRAFTS, WARRANTS, VOUCHERS AND CARDS
>
> Quote price per M numbers, hand numbering, In quantities of 1 to 5M, 6 to 10 M, 11 to 25 M, 26 to 50 M, 51 to 100 M, 101 to 250 M and over 250 M.
> When it can be used and is specified, press numbering shall be used. The bidder shall

bid covering press numbering by percentage discount from above hand numbering schedule.

PERFORATING - (Round Holes)

Sizes: 12x12, 17x17, 22x22 and 28x28 inches, with 1, 2, 3, 4 and 5 perforations, one way.
In quantities of 250, 500, 750, 1 M, 2 to 5 M and price per M over 5 M.
Additional for struck-in perforations.
When it can be used and is specified, press perforating shall be used, The bidder shall bid covering press perforating by percentage discount from above hand perforating schedule.

The particular additions here appears underlined in the above.

Section 14986, R. S. Missouri, 1939, is very liberal respecting the binding contract. It provides:

"The commissioners of printing shall provide for the necessary binding for the state in such manner as they deem best, and upon such terms as shall be most advantageous to the state, * * * * * * * * * *."

Under this blanket grant of authority the commission may adopt this discount system or any other method of fixing the price on binding, that, in their judgment, is most advantageous to the State.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

LLB/rv

ADMINISTRATION:
PROBATE COURTS: Personal estate of non-resident decedent may be administered by the Probate Court in which the estate is settled.
Probate Courts not required to turn over to domiciliary administrator the personal estate of a non-resident decedent, after the payment of all debts, if, under the circumstances, such distribution may be best accomplished by administration in this state.

June 5, 1942

6-5

FILE
12

Honorable William H. Bruder
Probate Judge, Jasper County
Carthage, Missouri

Dear Judge Bruder:

This is to acknowledge your letter of recent date requesting an opinion from this department, relative to estates of non-resident decedents. Your request reads as follows:

"I would like an opinion on the following propositions which have come up in my Court.

"First: whether or not it is mandatory for an ancillary administrator to return all funds after the payment of Missouri creditors, administration expenses, and inheritance tax to the domiciliary administrator of another state for distribution to the heirs and legatees even though some are residents of this state. Or, whether the funds may be distributed direct from this Court.
Second; If the funds may be distributed from this Court, whether or not funds of the estate in the hands of the Administrator of the domiciliary administration may be taken into account and Missouri beneficiaries paid on the basis of the funds in this state plus funds in the hands of the domiciliary administrator.
Third: Is it mandatory that funds always be returned to the Court having domiciliary jurisdiction in another state after payment of creditors and Missouri expenses.

"Your opinion on the above propositions would be greatly appreciated at your earliest convenience."

The answer to your inquiries depends upon a consideration of Sections 253 and 254 of R. S. Mo., 1939. In this respect, it is assumed from your questions that there is only personal property involved. Hence, our opinion will be based upon that premise.

Section 253 of R. S. Mo., 1939 reads as follows:

> "When administration shall be taken in this state on the estate of any person, who at the time of his decease was an inhabitant of any other state or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any, duly executed according to the laws of this state, and his personal estate according to his last will, if he left any, duly executed according to the laws of his domicile; and if there should be no such will, his real estate shall descend according to the laws of this state, and his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant."

Section 254 of R. S. Mo., 1939 reads as follows:

> "Upon the final settlement of such an estate, and after the payment of all debts for which the same is liable in this state, the residue of the personal estate, if any, may be distributed and disposed of in the manner aforesaid, by the court in which the estate is settled; or it may be transmitted to the executor or administrator, if there be any in the state or country where the deceased had his domicile, as the court, under the circumstances, shall think best."

It is apparent to us from a consideration of these statutes, that the personal property of a non-resident who has left no will shall be administered in accordance with the laws of the state of which the non-resident was an inhabitant. In the event of a will of a non-resident, duly executed under the laws of the state of which he was an inhabitant, the personal property shall be distributed in accordance with the will. This, of course, follows after the payment of all debts for which the property may be chargeable in this state.

Distribution of personal estate of a non-resident may be administered by the court in which the estate is settled or transmitted to the foreign executor or administrator, if any there be. It should be observed in this respect, however, that the statute invests in the court a discretion. Hence, if the court believes, under the circumstances involved in the particular case, that administration of the personal estate of a non-resident may be best administered in this state, the court may exercise its discretion. This is a matter entirely for the decision of the court.

Our views in the above respects are fortified by a consideration of cases which have considered these statutes. In this respect your attention is directed to the very early case of Naylor's Administrator v. Moffatt, 29 Mo. 126. In that case the court said at page 128:

> " * * * If the plaintiff is an administrator regularly appointed, as the demurrer admits, then his right to all the personal property of the deceased found here is unquestionable; and of course his right to sue is exclusive of the foreign executor, distributees, and of all others whomsoever. The grant of administration to plaintiff vests in him the legal title to the property; and he is to all intents and purposes the legal owner, although he is so in the character of trustee. The letters of the foreign executor have no extra territorial force, and give him no title to property of the testator in this state; and he could not bring or maintain an action in his official capacity in this state to recover it. His title does not extend beyond the limits of the state of the testator's domicil, and the movable property therein. (Sto. Conf. of Laws, Section 512.) Whatever right he as executor may acquire to the property in question is by virtue of our own law. So that as a question of law arising upon the facts averred in the petition, there can be no doubt of the plaintiff's right of action to recover the property in question, irrespective of the state of the primary examination in Virginia, whether it is closed or not. The administration

> here is ancillary to that in the state of Virginia, and the rights of heirs and legatees are as effectually secured under it as under the primary administration there. If there are no debts, the property will be disposed of according to the will of the testator, or it may be transmitted to the executor in Virginia."

Attention is also directed to the case of McPherson's Administrator v. McPherson, 70 Mo. App. 330. In that case, the court, in speaking of the statute here under consideration, said at page 336:

> " * * * The statutes in question were made for the purpose of authorizing administration upon the property and effects of nonresidents which at the time of their decease were found in this state. These statutes do not relate to property and effects not within the jurisdiction of our courts. They also contemplate that the administration had here shall be ancillary to one had at the domicile of the nonresident. Hence they provide for the transmission to the primary administration of the residue of the personal estate left after the winding up of the auxiliary administration conducted in Missouri." (Under-scoring ours.)

Your attention is particularly directed to the underlined portion of the quotation of the court in the above styled case, with respect to property or effects not within the jurisdiction of the courts of this state.

CONCLUSION.

In view of the above, it is the opinion of this department that it isn't mandatory for an ancillary administrator to pay over to a domiciliary administrator the proceeds of the personal estate of a non-resident decedent, unless required so to do by the Probate Court.

(1) Probate Courts are without authority or control over the personal property or effects not within the jurisdiction of this state. In other words, if an ancillary administrator has a thousand dollars ($1,000.00) in his hands to be distributed and the domiciliary administrator has one thousand dollars ($1,000.00) in his hands to be distributed, in making such distribution, under the laws of this state, the Probate Court, shall not consider the amount which the domiciliary administrator has under his possession and control, as that property passes by force and effect of the laws of the estate of the non-resident decedent of which he is an inhabitant.

(2) If in the opinion of the Probate Court, it is believed best that the personal estate of a non-resident decedent be distributed in this state to persons lawfully entitled thereto, such may be done. In other words, it is not mandatory that the personal estate of a non-resident decedent, after the payment of all debts for which the personal estate may be liable to turn over to the domiciliary administrator the personal estate of such non-resident decedent.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCS:ww

ELECTIONS:
PRIMARY: It is not necessary to print names of minor party candidates on primary election poll books, tally books and other supplies: Minor parties having failed to cast more than 5% of votes at last election for Governor.

June 20, 1942

6-20

FILED
12

Hon. Dwight H. Brown
Secretary of State
State of Missouri
Jefferson City, Missouri

File No. M-13a

Dear Mr. Brown:

This is to acknowledge receipt of your letter of June 17, 1942, containing an opinion request which is as follows:

"In the past it has not been the practice for this Department to certify candidates of minor parties to the County Clerks and Boards of Election Commissioners, 55 days before the primary, in accordance with Sec. 11554 R. S. Mo., 1939.

"In view of the amendments to the election laws passed at the 1941 session of the General Assembly, prohibiting party committees from filling vacancies except where such vacancies are caused by death or resignation, I certified four minor party candidates to the County Clerks and Boards of Election Commissioners on June 8th, copy attached.

"Letter from Buxton & Skinner of St. Louis inquires:

'Our understanding is that, under Section 11531, neither of these parties (Socialist, and Prohibition) will be on the primary ballot, and in that case no provision need be made for these parties in the poll books, tally books, and other supplies for the primary election and we are proceeding on that basis. If

we are in error, will you please telegraph us or call the writer (R. M. Kendrick) on the telephone, on receipt of this letter.'

"Neither the Socialist nor the Probition party cast as much as 5% of the votes in last election. It is my understanding that these parties are not to appear on primary ballot unless more than one candidates files for an office in such party. Only one candidate has filed for state offices which file in this office, but I do not know whether more than one candidate of such parties has filed for offices which file in the local County Clerk's office or Board of Election Commissioners.

"May I be favored with your opinion as to necessity of including these minor parties on primary election poll books, tally books and other supplies?"

We also acknowledge receipt of a copy of the certification of files by candidates, which on page eight (8) contains the following:

"SOCIALIST CANDIDATES FOR NOMINATION

For State Superintendent of Public Schools:

Doris Bausch Preisler, 3420 Longfellow Blvd., St. Louis.

For Representative in Congress:

5th District: W. F. Rinck, 5514 Brooklyn, Kansas City.

PROHIBITION CANDIDATES FOR NOMINATION

For Representative in Congress:

9th District: Elmer E. Morrow, Box 384, Troy.

For State Senator:

10th District: C. E. Cowen, 911 W. Ash, Columbia."

Section 11561, R. S. Mo., 1939, provides that ballots shall not be printed for nomination upon the party ticket where, in the last preceding election, the party failed to cast as much as five percent (5%) of the total vote cast for Governor and when there is not more than one person filed as a candidate for any office on said ticket and where a petition signed by at least ten percent (10%) of the voters voting in the county have filed a petition asking for a ballot. That section is as follows:

"Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less

than 5 per cent of the vote of the state."

According to the official returns in the last election for Governor, the total vote was 1,821,207. Of this amount the Socialist Party cast 1,555, being a percent of just a little less than 1%. The Prohibition Party did not have a candidate. According to the certification set out above there is not more than one candidate for any office of either of these parties. Further, there is no showing that a petition has been ~~entitled~~ signed by more than ten percent (10%) of the voters in the last gubernatorial election. Hence, it can be seen that the candidates of the Socialist and Prohibition Parties are not entitled to have a printed ballot at the primary election.

It then becomes a question of whether or not these minor parties should be included on the primary election poll books, tally books and other supplies. Section 11565, R. S. Mo., 1939, provides that the challenger at an election shall have the duty of challenging any person who attempts to vote a ticket of a party of which he is not affiliated. That section is as follows:

> "It shall be the duty of the challenger to challenge and the duty of the judges of election to reject the ballot of any person attempting to vote other than the ticket of the party with which he is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation, administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All judges of the election shall have authority and are empowered to administer such oath, or affirmation, and any person offering to vote who shall fail or refuse to take or make such oath or affirmation when demanded by such challenger, or required by any judge, shall not be

allowed to vote at such primary election."

CONCLUSION

It is, therefore, the opinion of this office that, inasmuch as the Prohibition and Socialist Parties are not entitled to a printed ballot in the primary election; that candidates certified are automatically nominated as the nominees on their respective tickets; that there is no provision made for the placing of such party names on the poll books, tally books and other supplies; with the further provision that a challenger would have the right to challenge any person who is known to be affiliated with another party:- it follows that that person would have to swear to be either a Democrat or a Republican or there would be no necessity for his voting. In view of the above, we believe there is no necessity for the printing of the names of the Socialist and Prohibition Parties on the poll books, tally books and other supplies for the primary election.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

ELECTIONS: The Act of 1941 deprives the party committee from filling vacancies on the ballot except in cases where the nominee dies or resigns. - - No write-ins on primary ballot except for committeeman or committeewoman.

July 2, 1942

7-3

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of the 1st wherein you request an opinion from this department on whether or not the Act of the General Assembly of 1941 prohibits the party committee from filling the ticket where no person shall offer himself as a candidate before the primary, and also whether or not this Act has changed the previous rules that write-ins on the primary ballot are invalid and must be disregarded as nullities.

Section 11562, R. S. Missouri 1939, which was amended in 1941, provides as follows:

> "Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

This section, as amended, Laws of Missouri 1941, page 353, provides as follows:

> "Vacancies occurring after the holding of any primary and resulting from the death or resignation, and not otherwise, of the nominee of a party at such primary, shall be filled by the party committee of the district, county, or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

It will be noted that the 1941 Amendment removes from the old Act the part of the section which authorizes the party committee to fill the ticket where no person shall offer himself as a candidate before such primary.

According to the views expressed in our opinion under date of August 10, 1938 to Mr. Allison, Clerk of the County Court of Buchanan County, and to which you refer in your letter, voters at primary elections cannot write in names of nominees on the ballot except for committeeman. This opinion, on page 3 thereof, refers to Section 11562, supra, and holds that the party committee may fill in the ticket where no person has offered himself as a candidate before the primary. The 1941 Amendment does not change the status of the voter with respect to writing in names on the ballot at the primary. As the law now is, it seems that if no one files for an office in the primary that no voter is permitted to write in names on the ballot nor is the party committee authorized to fill in the ballot.

CONCLUSION

It is, therefore, the opinion of this department that the action of the General Assembly of 1941 has not changed the previous rule that write-ins on primary ballots except for committeemen and committeewomen are invalid and must be disregarded.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:DA

ELECTIONS: Powers and duties of party committees in filling vacancies after the primary.

July 3, 1942

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following statement of facts:

> "Amendments to election laws passed at the 1941 session of the General Assembly seem to prevent a party committee from filling its ticket, except when vacancies are caused by death or resignation.
>
> "Today I am in receipt of inquiry from Mrs. J. W. Shankland, Chairman Missouri Prohibition Committee, asking:
>
> "'Would it be possible for the Prohibition Party committees, state, city and county to fill in vacancies on the Prohibition ticket after the primary, if so what would be the procedure?'
>
> "In view of the recent amendments, I am in doubt. May I be favored with your opinion in order that I may answer the question above quoted?"

The primary election laws to which you refer, as amended in 1941, provide as follows: (Section 11562, page 353, Laws of Missouri, 1941)

> "Vacancies occurring after the holding of any primary and resulting from the death or resignation, and not otherwise, of the nominee of a party at such primary, shall be filled by

> the party committee of the district, county, or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Prior to this amendment it seems that the law authorized the party committees to fill the ticket in cases where no person offers himself as a candidate before the primary. This statute, as amended, withdraws from party committees the authority to make such nominations. The only instance in which the committee has power to place a name on the ticket is when the nominee or the person who filed dies or resigns.

In Volume 20 Corpus Juris at page 115, par. 113, the general rule as to conditions imposed on candidates for primary elections is stated as follows:

> "The primary election laws of the various states impose certain requirements on a candidate at a primary election, such as filing with a designated official, a certain number of days before the primary, a paper in some prescribed form announcing his candidacy, swearing that he is qualified, making a statement of his membership in, and support of, the party whose nomination he seeks, causing his name to be printed on the official ballot as a candidate for the nomination, and filing the names of persons selected as his campaign committee. Such requirements are mandatory, and compliance with them is essential to enable the candidate to be voted for at the primary election and to have his name printed on the official ballot at the general election as the nominee of one of the principal political parties. A person who does not comply therewith does not become the nominee of a political party by the writing or pasting of his name on the printed ballot, although he receives a larger

number of votes than his opponents;
* * * * * * * * * * * * * * * * * * * *"

By a review of the primary election laws of this state and particularly the Amendment of 1941, we think the duties imposed on the candidate who seeks nomination comes within the foregoing rule.

CONCLUSION

From the foregoing it is the opinion of this department that no party committee would be authorized to fill a vacancy on its ticket after the primary, except in a case where a vacancy occurs after the holding of the primary and such vacancy must be caused by death or resignation of the candidate who has complied with the statute in filing.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:DA

ELECTIONS - REPRESENTATIVES AND SENATORS - UNEXPIRED TERMS:

Mode of electing senators and representatives for unexpired terms, and mode of nominating them.

July 7, 1942

FILED 12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this Department upon the following question:

> "May I be favored with your opinion as to how candidates in 1st and 26th senatorial districts may get their names on the special election ballot? Also candidates for the lower house? What duties has the secretary of state in connection with these special elections? How is the senatorial district party committee in 1st and 26th districts made up?"

Section 10, of Article IV of the Constitution of Missouri, provides that senators and representatives shall be elected certain years.

Section 14 of said Article IV provides as follows:

> "Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

According to your request it seems that some candidates have the idea that their names may be placed on the primary ballot, under the primary law. It also appears from your letter that the Governor, following the provisions of said Section 14, of Article IV of the Constitution of Missouri, has issued writs of special elections in two senatorial districts and provided that the election shall be held on August 4th, which is the same day as the holding of the primary. Apparently, the reason for the Governor issuing his writs of special elections in these districts is that the present incumbents have resigned. We assume that the provisions of Section 12858 R. S. Missouri, 1939, applies. This section provides, in part, as follows:

> "If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; * * * * * * * ."

Section 12859 R. S. Missouri, 1939, which relates to the same subject matter, provides as follows:

> "Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

Under the provisions of Section 12860 R. S. Missouri, 1939, the writ of election is directed to the sheriff of the county first named in the senatorial district, in districts which contain more than one county. Then, under the provisions of Section 12861 R. S. Missouri, 1939, the sheriff is directed to carry out the directions of the writ of election. This section reads as

follows:

> "The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

Said Sections 12858 to 12861, R. S. Missouri, 1939, inclusive, are special statutes referring to elections to fill vacancies in either house of the general assembly. Under said Section 10 of Article IV of the Constitution of Missouri, elections for senators and representatives are held only in certain years. In case of a vacancy in such office then the provisions of said Section 14, of Article IV of the Constitution of Missouri apply.

The special election provided for under the foregoing statutes is separate, and distinct, from the primary, even though it may be held on the same day. This rule is announced in Vol. 20, C. J., p. 57, in the following language:

> " * * * Also the fact that an election on a proposition is set for the day of the holding of a state primary does not alter its status as a special election held at a time selected by certain public officials as distinguished from a general election held at a time designated by statute."

Section 11492 R. S. Missouri, 1939, provides as follows:

> "When the governor issues a writ of election to fill any vacancy, he shall mention in said writ how many days, to be not less than ten, the sheriff shall give notice thereof."

Section 11516 R. S. Missouri, 1939, provides as follows:

> "Such special election, except as provided in the preceding section, shall, as near as possible, be conducted in the same manner, and be governed by the same laws, as a general election."

From these sections it would appear that a special election is conducted in the same manner and governed by the same law as a general election is, in so far as it is possible to do so, and so long as it is not in conflict with some other statutory provision.

We fail to find any statutory provision, pertaining to special elections, except those set out in said Sections 12858 to 12861, supra. That being the case it would seem that the Secretary of State would perform the same functions in regard to a special election that he does in regard to a general election.

Taking up your question as to how a candidate for the senate or house of representatives may get his name placed on the ballot for the special election, we note that Section 11537 R. S. Missouri, 1939, deals with nominations for office and with reference to the certification of the names of candidates nominated at a primary. It provides that no certificate shall contain the name of more than one candidate for each office. We think this refers to the nomination of candidates for the general election.

Section 11595 R. S. Missouri, 1939, pertaining to the form of ballot for use in general elections, provides, in part, as follows:

> " * * * The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, * * * ."

This leads to the conclusion that at an election to be held where an official is to be selected by ballot, the name of only one person can appear on such ballot as the candidate of any political party or a candidate of any group, or groups of petitioners, according to the number of petitioning groups.

There is a well recognized and defined theory, philosophy and principle of law that the citizens of our Nation or a State thereof have the qualified right to express their allegiance to certain principles as adopted by an existing political party or as may be declared by certain allowed petitioning groups. See State ex rel v. Kortjohn, 246 Mo. 34. As a practical matter this expression can only be given force and effect, and the voter could select among the various and contending single candidates representing the various and contending political views and creeds, where each party or group was represented by but one candidate.

At the special election to be held on August 4th, next, voters are entitled to choose between a candidate selected by each of the political parties, as well as the candidate, or candidates selected by such petitioning group or groups, as may lawfully procure the name of a candidate or candidates on the ballot and the ballot shall contain no other name or names than the representative candidate of the existing political parties, group or groups, as may have been selected or nominated, and, according to Section 11595, supra, the party name shall be printed above the name of the representative candidates, and the party candidates shall be in separate columns with a heavy line between the names of each party list or lists of each petitioning group, or groups.

Section 11546 R. S. Missouri, 1939, dealing with primary elections, specifically provides that the provisions of Article 5, of Chapter 76, of which this Section is a part, shall not apply to special elections.

Therefore, the nominations provided for under the general primary election law would not be applicable here.

Section 11562, as amended in Laws of Missouri, 1941, P. 353, provides as follows:

> "Vacancies occurring after the holding of any primary and resulting from the death or resignation, and not otherwise, of the nominee of a party at such primary, shall be filled by the party committee of the district, county, or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Section 11538, Laws of Missouri, 1941, P. 354, provides, in part, as follows:

> "Certificates to be filed, when. - Certificates of nominations filed with the secretary of state shall be filed not more than sixty and not less than thirty days before the day fixed by law for the election of the person in nomination. Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than sixty days and not less than fifteen days before election: Provided, that in case of any vacancy in said nomination, by resignation or death and not otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk of board of election commissioners the name or names of candidates to fill such vacancy; Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clerk not later than ten days before such election: * * * * ."

Apparently the lawmakers by the 1941 amendments to Sections 11562 and 11538, R. S. Missouri, 1939, provided that the party committee could only fill a vacancy on a ticket nominated, and, after the primary, when the vacancy on such ticket is caused by death or resignation. It will be noted by reference to these sections that they provide for the filling of a vacancy in case of the death or resignation, and not otherwise. Since the vacancy in the office of state senator occurred before the primary, and, since the primary law, Section 11546, R. S. Missouri, 1939, provides that it shall not apply to special elections, we do not think the provisions of said Sections

11562 and 11538, R. S. Missouri, 1939, as amended, could apply here.

In discussing the provisions of Section 4823 R. S. Missouri, 1919, which is Section 11546 R. S. Missouri, 1939, the Supreme Court, in State ex rel Kimbrell v. Becker, 291 Mo. 409, at l. c. 427 said:

> "By virtue of Section 4823, Revised Statutes 1919, all nominations for elective office must be made by primary election, except that this provision does not apply to special elections to fill vacancies, nor to county superintendents of schools, nor to city officers not elected at a general state election, nor to town, village or school district officers. Neither is it applied to the nomination of candidates for presidential elector. The effect of these exceptions is that there still exist several classes of officers who lawfully may be and frequently are nominated by conventions of delegates.
> * * * * * * * * * * * * "

It will be noted by this statement that the courts then recognized the fact that officers in some cases are nominated by conventions of delegates.

It might be contended that the provisions of Sections 11525 and 11534, R. S. Missouri, 1939, are applicable here. Said Section 11525, supra, states that nominations to public office may be made by primary election, or by certificates of nomination made by elector. Section 11534, supra, speaks of such a certificate of nomination otherwise than by primary, and provides that such nomination may be made by a certificate of nomination signed by a certain number of voters.

In speaking of the application of these statutes to such a nomination, the court, in State ex rel v. Seibel, 246 S. W. 288, at l. c. 293, said:

> "This authorizes electors to act independently of all political parties. In other words, a ticket so nominated would be a nonpartisan or nonpolitical ticket. The only restriction upon such nomination is that the electors so signing a certificate of nomination must declare in the certificate that they are bona fide supporters of the candidates sought to be nominated, and have not aided and will not aid in the nomination of any other candidate for the same office."

This principle is also stated by the court in State ex rel v. Kortjohn, 246 Mo. 34.

Since our statutes are silent as to nominations for special elections, we think the principle as set out in 20 C. J., p. 104, sec. 90, is applicable. This section reads as follows:

> " * * * * In the absence of constitutional or statutory provisions to the contrary, the authorities of a political party, such as state and county executive committees may, in accordance with party usage, make and enforce reasonable regulations relating to nominations within the party; and some statutes regulating the mode of nominations, except nominations for certain local offices, provide that they shall be made in the manner prescribed by party committees. Some statutes are construed to provide an exclusive method or methods for making nominations for certain offices, but statutes prescribing an exclusive mode of making

> original nominations are construed to apply only to nominations of candidates to be voted for at general elections, and to leave the nomination of candidates to be voted for at special elections subject to existing laws or future legislation."

Applying this rule here, in the absence of statutory provisions, the nominations of candidates for special elections remain subject to existing law or future legislation. Prior to the enactment of our primary laws, nominations were made by political conventions.

The lawmakers in 1941 (Laws of Missouri, 1941, page 355, Sec. 11539) recognized the fact that a political party may make a nomination by its central committee. In that statute it authorized its central committee to make a nomination to fill a vacancy on a ticket previously nominated. However, this Section applies only to primaries, but, as stated in the Becker case, supra, there still exists cases where officers may lawfully be nominated by conventions of delegates.

CONCLUSION

We are, therefore, of the opinion that candidates for the office of state senator, to be elected at a special election, may be nominated by the senatorial party committees of the senatorial district, or, if a person desires to run on an independent or non-political ticket, he may comply with the provisions of Section 11534 R. S. Missouri, 1939, and get his name placed on the ticket in that manner.

After the nominations are made by the political committee, or by the certificate, the names of the nominated candidates should be certified to the secretary

of state, in accordance with the provisions of Sections 11526 and 11527, R. S. Missouri, 1939. It will also be noted that by the provisions of Section 11527, this certificate of nomination should be executed with the formalities prescribed for the execution of an instrument effecting real estate.

On your last question, as to how the senatorial district party committee of the first and twenty-sixth senatorial districts are made up, we refer you to Section 11576 R. S. Missouri, 1939, which provides as follows:

> "In all counties of this state now, or hereafter, having more than one legislative district, in addition to the county chairman and vice-chairman, as provided in section 11575, there shall be elected a chairman and a vice-chairman, one of whom shall be a woman, for each such legislative district, and the county committee and legislative district committees shall each at the same time elect a secretary and a treasurer, one of whom shall be a woman, but who may, or may not be, members of said committee, and the chairman and the vice-chairman so elected shall by virtue thereof become members of the party congressional, senatorial, and judicial committees of the district of which their county is a part: Provided, that if any such congressional, senatorial or judicial district shall consist wholly of one county, then the members of such county committee shall constitute the congressional, senatorial, and judicial committee, of the district composed of such county: * * * * * * * * * "

Therefore, according to the provisions of this section, the senatorial district party committee of a senatorial district is composed of the chairman and

vice-chairman of each county committee of the counties which make up such senatorial district.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

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VANE C. THURLO
Acting Attorney General

TWB:RW

CONSTITUTIONAL AMENDMENT: Title for Old Age Pension and Aid for Dependent Children.

- -

July 10, 1942

7-10

FILED

12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Re: Proposed constitutional amendment relative to old age pensions and aid for dependant children.

Dear Sir:

In accordance with your request of June 27, 1942, there is hereinafter set forth the ballot title with reference to the above subject:

"Making an annual standing appropriation of $29,000,000.00 to pay grants to persons over sixty-five, and to pay grants for the aid for dependent children."

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

LLB/rv

CONSTITUTIONAL AMENDMENT: Title for Unicameral Legislature.

- -

July 10, 1942

7-10

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Re: Initiative petitions for proposed constitutional amendment on Unicameral Legislature.

Dear Sir:

In accordance with your request of July 3, 1942, there is hereinafter set forth a ballot title for the above proposed constitutional amendment:

"Creating unicameral legislature, 50 to 75 members, total yearly salaries not exceeding $90,000.00, plus $6.00 daily during sessions; may authorize supplementing statutes by departmental ordinances."

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

LLB/rv

SUPPLEMENTAL OPINION

ELECTIONS - REPRESENTATIVES AND SENATORS - UNEXPIRED TERMS:

Mode of electiong (sic) senators and representatives for unexpired terms, and mode of nominating them.

July 13, 1942

FILED
12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

Under date of July 7, 1942, this department rendered an opinion to you upon the following request:

> "May I be favored with your opinion as to how candidates in 1st and 26th senatorial districts may get their names on the special election ballot? Also candidates for the lower house? What duties has the secretary of state in connection with these special elections? How is the senatorial district party committee in 1st and 26th districts made up?"

It has been suggested that the question relative to members of the lower house was not definitely answered in such opinion.

To the end that the above question may be specifically ruled, it is again considered, and the following conclusion is the opinion of this department:

CONCLUSION

It is the opinion of this department that the conclusion reached in the opinion of this office on July 7, 1942, applies to the nomination of candidates for the House of Representatives, as well as candidates for the Senate, with the exception that the county central committee would perform the functions for House of Representative nominations possessed by the senatorial party committees in the senatorial nominations. In other words,

with reference to candidates for the lower house the county central committee should be substituted in such opinion for the senatorial party committee.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

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VANE.C. THURLO
Acting Attorney General

INITIATIVE PETITIONS: Secretary of State shall allow the withdrawal of initiative petitions when requested so to do by a representative of the petitioners.

August 17, 1942.

8-19

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Senator Brown:

The Attorney-General wishes to acknowledge receipt of your letter of August 12, 1942, requesting an opinion of this department. Said request, omitting caption and signature, is as follows:

> "Honorable Charles A. Lee, State Chairman, and Honorable William F. Fahey, Counsel, for the Missouri Committee for a One-House Legislature, through Fred H. Switzer, Jr., of the law firm of Polk, Fahey & Switzer, St. Louis, on July 16, 1942, filed a document dated July 15, 1942, in substance questioning the sufficiency of petitions filed July 2, 1942, with the Secretary of State in the presence of His Excellency the Governor of Missouri, Honorable Forrest C. Donnell, submitting a proposal to amend the constitution by a provision establishing a unicameral General Assembly, and seeking to withdraw the request for the submission of the question. This request reads:
>
> > "'Therefore, the undersigned, on their own behalf and on behalf, and at the request, of the Missouri Committee for a One-House Legislature, respectfully request that you refuse to accept and file said above described petition for the initiative, and that you refuse

to certify said aforementioned proposition to be voted upon at the next general election, and we further withdraw our offer to file said petition and our demand that said proposition be submitted to the legal voters for their approval or rejection at the regular general election to be held on the 3rd day of November, 1942.'

"A copy of the communication above mentioned was placed in the hands of your office on the date of its receipt, and, therefore, is not included in this communication.

"The action of the Missouri Committee for a One-House Legislature through Honorable Charles A. Lee and Honorable William F. Fahey apparently presents a new legal question in connection with the initiative and referendum. The Secretary of State is mindful that the questioning of the sufficiency of the petitions because of alleged fraud, forgeries, or hermetic illegality is not an issue here. The office has long accepted the doctrine advanced by the appellate courts of this state, and Attorneys General, that the Secretary of State in handling initiative and referendum matters is a ministerial officer in whom the constitution and assembly have vested no judicial discretion, and that all such questions are for the courts. The proposed withdrawal of the 'offer to file said petition and demand that said proposition be submitted' presents a question in law, in our opinion, and we therefore respectfully ask your ruling on the question as to the duty and authority of the Secretary of State in the premise."

The petitions submitting the question of a One-House Legislature were signed and filed in your office by Charles A. Lee, State Chairman of the Missouri Committee for a One-House Legislature, and William F. Fahey, Counsel for such organization. The document set out in your letter requesting the withdrawal of such petitions was also signed by Charles A. Lee and William F. Fahey, aforesaid, and filed in your office by Fred M. Switzer, Jr., a member of the law firm of which William F. Fahey is a partner. We find that your department accepted the petitions as originally filed by Lee and Fahey and thereby recognized the agency of such individuals for the large number of people who signed the petitions. Of course it would be impracticable and in fact impossible for each and every individual signer of such petitions to be present at the time such petitions were filed in your office. Therefore, as stated above, your department accepted such petitions when offered by Lee and Fahey. In the effort to withdraw these petitions it would have been likewise impossible for each and every signer of the petitions to be present, and therefore it became necessary if such withdrawal was desired for your department to recognize the agency in the person who has made an attempt to withdraw such documents.

In Section 12287, R. S. Mo. 1939, the statute infers that some person must appear to file such petition and in doing so acknowledges the agency of such person on behalf of the five per cent or more of the voters of the State who have filed such petition. Excluding parts of the statute which are not applicable, we will cite the following:

> "When any such initiative or referendum petition shall be offered for filing, the secretary of state, in the presence of the governor and the person offering the same for filing, shall detach the sheet containing the signatures and affidavits, and cause them all to be attached to one or more printed copies of the measure so proposed by initiative or referendum petition; the detached copies of such measure shall be delivered to the person offering the same for filing."

Again in Section 12290, R. S. Mo. 1939, we find "the person offering or filing such initiative or referendum petition." Again omitting the inapplicable portion of the section, we will cite as follows:

> "No appeal shall be allowed from the decision of the attorney-general on a ballot title unless the same is taken within ten days after said decision is filed. A copy of every such decision shall be served by the secretary of state or the clerk of the court, upon the person offering or filing such initiative or referendum petition or appeal."

After considering such excerpts we feel that the statutes recognize the agency of such persons on behalf of their respective organizations. It strikes us that the relation between the persons filing petitions of this sort and also withdrawing petitions of this sort and their organations, can be likened to the relation existing between attorney and client. In fact, at both the time the petitions were filed and the time the withdrawal was requested an attorney was present representing the Committee for a One-House Legislature and such attorneys in both instances were members of the same firm.

In Missouri the courts presume that an attorney of record has the right to act for his client. In the recent case of Kahn v. Brunswick-Balke-Collender Co., 156 S. W. (2d) 40, l. c. 43, the court said:

> "It is the law that without authority from the client an attorney cannot compromise the client's case; however, this general principle must be considered in connection with the further principle that the authority of an attorney of record to perform an act for his client is presumed, prima facie at least, and the burden of showing his want of authority rests on the party who questions it, unless such authority be denied by the client. Parr v. Chicago, B. & O. Railroad Co., 194

Mo. App. 416, 184 S. W. 1169. In this case the authority has never been denied by the plaintiff. * * *"

In our instant matter the agency or right to represent the organization has never been questioned and we think that in view of the fact that the representative capacity of Lee and Fahey was recognized at the time of the filing of the petitions, it now becomes the duty of your department to recognize such capacity and allow these petitions to be withdrawn. We further feel that in order to prevent the petitions being withdrawn it will be necessary for some person who has signed the petitions to deny the agency or representative capacity of the parties asking the withdrawal. As stated above, this denial of agency or representative capacity has not been made.

Conclusion

Therefore, it is our opinion that your department shall permit the withdrawal of the petitions for the One-House Legislature which have been filed heretofore in your office by Messrs. Lee and Fahey.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ELECTIONS: The official judicial ballot shall be published by the clerks of the county courts of each county in the State of Missouri.

September 10, 1942.

9/11

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Senator Brown:

The Attorney-General wishes to acknowledge receipt of your letter of September 8, 1942, relative to the advertising of the judicial ballot. Your letter, omitting caption and signature, is as follows:

> "Referring to telephone conversation Saturday morning:
>
> "Question has been raised concerning how the judicial ballot is to be advertised.
>
> "The amendment to Art. VI of the Constitution of Missouri, adopted Nov. 5, 1940, provides that until legislation is enacted, the judicial ballots shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative.'
>
> "The voters are informed of matters proposed by the initiative, in advance of the general election, by means of newspaper advertising which the Secretary of State is directed to publish in newspapers in every county.

> "May I be favored with your opinion whether I should include the judicial ballot as provided in the constitutional amendment of Nov. 5, 1940 to Art. VI of the Constitution, in the proposed constitutional amendments advertisement?"

In order to arrive at a conclusion on this matter we will first cite you to Amendment No. 3, Section 3, page 724, of the Session Acts of 1941. In view of the fact that this section is rather lengthy, only that part pertinent to the current question will be quoted, that is, as follows:

> "Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the Secretary of State shall not less than thirty (30) days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

As can be seen from a reading of the constitutional amendment quoted above, the judicial ballot shall be prepared, printed,

published and distributed as is now provided by the statutory law governing voting on measures proposed by the initiative. Therefore, we should look into such laws to see if any provision is made for the publication of these ballots.

After a careful reading of the entire chapter referring to "initiative and referendum" (which is Chapter 77, R. S. Mo. 1939), we fail to find any specific provision which will help us in determining who shall publish the proposed judicial ballot. In view of that fact, we must refer to Article 9, Chapter 76 of the Revised Statutes of Missouri for 1939, which refers to "constitutional amendments." See State ex rel. v. Westhues, 9 S. W. (2d) 612, l. c. 617.

We will next cite you to Section 11676, R. S. Mo., 1939, which prescribes the following:

> "Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in section 11542."

As can be seen from reading the above section, we find the following phrase, to-wit, "Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state * * *." We are of the opinion that the underlined portion of the preceding sentence brings the present question of the publication of the judicial ballot within the provisions of this chapter. Further quoting Section 11676, cited above, we find the following:

> "The Secretary of State shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, and the clerk of each county court shall include the same in the publication provided in Section 11542."

In other words, the publication of the judicial ballots seems to be governed by two sections, namely, Section 11676, R. S. Mo. 1939, and also Section 11542, R. S. Mo. 1939, which is referred to in the former section. Therefore, we wish to cite you to Section 11542, R. S. Mo. 1939, which reads as follows:

> "At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election: Provided, that no higher rates shall be paid per inch, than is provided by section 14966, chapter 119, R. S. 1939, as amended."

Under the provisions of the two sections cited immediately above, we believe it is the duty of the county clerk to publish the official judicial ballot. In the case of constitutional amendments proposed by the General Assembly, Article XV, Section 2, of the Constitution of Missouri, provides that a publication of such amendment shall be made once a week for four consecutive weeks next preceding such election in at least one newspaper in each county of the state where a newspaper is published. We believe that such a provision of the Constitution was enacted in order that the people in the State of Missouri would be informed as to the full content of the amendments for which they are to cast their ballots. In fact, no other provision of the Constitution or of the statute provides for the publication of the entire text of the constitutional amendments proposed by the General Assembly.

In State v. Westhues, 9 S. W. (2d) 612 (Mo. Sup.), the court held that in the publication of amendments proposed by the initiative such publications should be made in the same manner as is provided by statutes for the publications of amendments proposed by the General Assembly of the State of Missouri. However, we do not feel that the judicial ballot should be published in the same manner as the constitutional amendments by the Secretary of State in viewof the fact that the official judicial ballot if published by the Secretary of State would be practically identical to that which is published by the clerk of the county court of each county. In fact, the publication by the Secretary of State would contain the names of judges for certain courts which would not be voted on except by the local electors in the district for which the judge is to be elected. In other words, it would be mere surplusage for the Secretary of State to publish such judicial ballot when Sections 11676 and 11542 of the Revised Statutes of Missouri for 1939, specifically provide that such ballots are to be published by the clerk of the county court in each county.

Section 12290, R. S. Mo. 1939, which is a statutory enactment under the initiative and referendum, provides that when any measure shall be filed with the Secretary of State to be referred to the people thereof by the referendum petition and when any measure shall be proposed by the initiative petition, the Secretary of State shall forthwith transmit to the Attorney-General of the State a copy thereof and within ten days thereafter the Attorney-General shall provide and return to the Secretary of State a ballot title for such measure. We are of the opinion that under this particular section the Secretary of State shall request the Attorney-General's department of this State for a ballot title for the judicial ballot in question. It then becomes the duty of the Attorney-General to furnish such ballot title and return same to the Secretary of State. After receipt of such ballot title from the Attorney-General the Secretary of State shall then certify same to the clerk of the county court of each county and such clerk shall then proceed as provided by Sections 11676 and 11542, R. S. Mo. 1939.

Conclusion

It is therefore the opinion of this Department that the Secretary of State should not include the judicial ballot

as provided for in the Constitutional Amendment of November 5, 1940, to Article VI of the Constitution in the proposed Constitutional Amendment advertisement since the publication of such judicial ballots shall be made by the county clerk of each county of this State as provided by Sections 11676 and 11542, R. S. Mo. 1939.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ELECTIONS: Judicial ballot title;
Constitutional Convention ballot title

September 14, 1942.



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

The Attorney-General wishes to acknowledge receipt of your letter of September 11th requesting an opinion. This request, omitting caption and signature, is as follows:

> "Thank you for your ruling of September 10th, to the effect that the judicial ballot will not be advertised with the complete text of the constitutional amendments, but will be advertised by the county clerks along with the blanket ballot, constitutional amendment ballot titles, and 'shall there be a constitutional convention' question.
>
> "I am attaching hereto a typewritten copy of the proposed judicial ballot. Of course, I shall certify only the two supreme judges in 113 counties, and will add the circuit and probate judges at Kansas City and Independence to the Jackson County certificate, and will add circuit and probate judges to the St. Louis City certificate. Will you please provide a ballot title for use by county clerks and boards of election commissioners in advertising the judicial ballot?

> "Also please find attached one of the 'Shall there be a convention' ballots, used in special election a little over twenty years ago. I don't know whether the law required or permitted the subheading, 'Proposition No. 1'. Will you please give me a ballot title for use by county clerks and boards of election commissioners in advertising this question, and also rule as to the inclusion of the subheading, 'Proposition No. 1.'"

Your first request, as shown above, is that this Department provide a ballot title for use by county clerks and boards of election commissioners in advertising the judicial ballot. We hereby submit the following as a ballot title for the judicial ballot:

JUDICIAL BALLOT

> Submitting to the qualified voters whether the Judges hereinafter named whose terms expire December 31, 1942, shall be retained in office.

You further request that we furnish you an opinion on the proposition set out above in paragraph three of your letter.

In answering this proposition we will first cite you to Article XV, Section 4, of the Constitution of Missouri, which provides as follows:

> "The question 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the electors of the state at a special election to be held on the first Tuesday in August, one thousand nine hundred and twenty-one, and at each general election next ensuing the lapse

> of twenty successive years since the last previous submission thereof, and in case a majority of the electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in the preceding section."

We would then like to cite you to Article XV, Section 3 of the Constitution of Missouri, which directs the following:

> "The general assembly may at any time authorize by law that a vote of the electors of the state be taken upon the question, 'Shall there be a convention to revise and amend the Constitution?' which shall be submitted to the electors on a separate ballot without party designation of any kind, at either a special or general election, as the general assembly may provide, and if a majority of the electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates to the convention, on a day not less than three nor more than six months after that on which said question shall have been voted on. The electors of each senatorial district of the state, as then organized, shall elect two delegates as herein provided at such election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large, such election to be conducted as provided by law; and each delegate shall possess the qualifications of a senator; and no person holding any other office of trust or profit

(national guard officers, school directors, justice of the peace and notaries public excepted) shall be eligible to be elected a delegate to the convention nor during the term for which he shall have been elected or appointed. In order to secure representation from different political parties in each senatorial district, each political party as then authorized by law to make nominations for the office of state senator in each senatorial district shall nominate only one candidate for delegate from such senatorial district, and such candidate shall be nominated in such manner as may be prescribed by the senatorial committee of the respective parties, and a certificate of nomination shall be filed in the office of the secretary of state at least thirty days before such election, and such candidate shall be voted for, each on a separate ballot with emblem or party designation, and each elector shall have the right to vote for one of such candidates, and the two candidates receiving the highest number of votes in each senatorial district shall be elected; and all candidates for delegates-at-large shall be nominated by nominating petitions only, which shall be filed in the office of the secretary of state at least thirty days before any such election and shall be verified in the same manner as may be provided by law for initiative petitions, and until otherwise provided by law such petitions shall be signed by electors of the state, equal in number to at least five per centum of the entire vote cast for governor at the last general election in the senatorial district in which such candidates reside; and all candidates for delegates-at large shall be voted for upon one independent and separate ballot without any

emblem or party designation whatever, and the fifteen candidates for delegates-at-large receiving the highest number of votes shall be elected. Not less than fifteen days before the election, the secretary of state shall certify to the county clerk of the county the name of each person nominated for the office of delegate from the senatorial district in which the county, or any part of it, is included, and the names of all persons nominated for delegates-at-large. The delegates so elected shall be convened by proclamation by the governor within six months after their election at the seat of government. Upon the convening of the convention all delegates shall take an oath or affirmation to support the Constitution of the United States and of the state of Missouri, and to faithfully discharge their duties as delegates of the convention, and shall receive for their services the sum of ten dollars per diem and mileage as provided by law for members of the general assembly. A majority of the delegates of the convention shall constitute a quorum for the transaction of business, and no Constitution or amendment to this Constitution shall be submitted for approval or rejection to the electors of the state as herein provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation, and to provide for the printing of its documents, journals, proceedings and a record of its debates, and to appropriate money to pay for the expenditures incurred. The sessions of the convention shall be held with open doors, it shall determine the rules of its own proceedings, choose its own officers, and be the

> judge of the election, returns and qualifications of its delegates. In case of a vacancy, by death, resignation or other cause, of any delegate elected to the convention, such vacancy shall be filled by the governor by the appointment of another delegate from the same political party to which the delegate causing the vacancy belonged. Any proposed Constitution or constitutional amendments which shall have been adopted by such convention shall be submitted to a vote of the electors of the state in such manner and containing such separate and alternative propositions and on such official ballot as may be provided by such convention, at a special election, on a day to be therein fixed, not less than sixty days nor more than six months after the adjournment of the convention. Upon the approval of such Constitution or constitutional amendments in the manner provided in the last preceding section such Constitution or constitutional amendments shall go into force and effect at the end of thirty days after such election. The result of such election shall be made known by proclamation by the governor."

As can be seen from reading the above two sections of the Constitution, such Constitution provides that the question, "Shall there be a convention to revise and amend the Constitution?" shall be submitted to the electors of the State of Missouri at least once every twenty years and that there must be a lapse of twenty years between the successive submissions of such question.

We further wish to cite you to Section 11680, R. S. Mo. 1939, which section is as follows:

> "The vote on a proposition to call a constitutional convention, or on the adoption of a new constitution, or on any proposed constitutional amendment, shall be taken by ballot. If a proposition to call a constitutional convention is submitted, each ballot shall have printed

thereon the words 'CONSTITUTIONAL CONVENTION,' with 'YES' and 'NO' to the right thereof, one above the other. If the adoption of a new constitution is submitted, each ballot shall have printed thereon the words 'NEW CONSTITUTION,' with 'YES' and 'NO' to the right thereof, one above the other. If but one constitutional amendment has been proposed, each official constitutional ballot shall have printed thereon the words 'CONSTITUTIONAL AMENDMENT NO.1' followed by the official ballot title as provided for in this article, and to the right thereof at right angles with the length of the ballot, the words 'YES' and 'NO' one above the other. But if more than one constitutional amendment has been proposed, then each ballot shall have printed thereon the words 'CONSTITUTIONAL AMENDMENT NO. I,' and so on, setting out the official title of each proposed amendment thereunder and to the right thereof at right angles with the length of the ballot the words 'YES' and 'NO,' one above the other, designating in numerical order each proposed constitutional amendment as arranged by the secretary of state. The official ballot title shall be printed with the number of the proposed constitutional amendment on the official ballot and the words 'YES' and 'NO' in bold, black-faced type. The secretary of state shall certify to the different county clerks or other proper officers the form of the official constitutional ballot, containing the numerical numbers and the official ballot title of all proposed constitutional amendments, as provided for in this article, which shall be printed upon a separate official ballot to be designated 'CONSTITUTIONAL BALLOT.' Ballots not printed or prepared as herein required shall not be counted on the proposition thereby submitted. The constitutional ballot shall not be less than four inches wide and ten

> inches long, of the same kind of paper, color and of equal size. Every other proposition to be submitted at the general election shall be proposed and submitted on the 'constitutional ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots. To vote for or against proposed constitutional amendments, or other subjects, if any are submitted, the voter shall erase or strike out the word 'NO' if he is in favor of the particular proposed constitutional amendment or proposition, and the word 'YES' if he is opposed to the same. In all other respects the law governing the printing, distribution of ballots, the number to be distributed, and the manner of voting ballots at a general election shall apply to 'constitutional ballots' where not in conflict with this article."

As can be seen from this section of the statute, constitutional amendments which are to be referred to the people are to be numbered. It seems clear also that the Legislature intended that the question on the holding of a constitutional convention is also to be numbered. This section provides the manner in which constitutional amendments shall be numbered but we cannot consider the question of voting on the advisability of a constitutional convention "a constitutional amendment." In view of that fact we feel that it should be designated other than "a constitutional amendment," although we feel it should clearly be numbered. Therefore, the term "Proposition No. 1" would be entirely appropriate and since we believe the intention was for each question to be numbered we think that such designation is permitted and in fact required by the statute.

Therefore, it is the conclusion of this Department that the sub-heading "Proposition No. 1" on a ballot for the

determination of the holding of a constitutional convention, is permitted and required by law.

You further request that we furnish you a ballot title for the proposition involving a constitutional convention. In both Section 3 and 4 of Article XV of the Constitution of Missouri, we find reference to a certain question. Such question is, "Shall there be a convention to revise and amend the Constitution?" In view of the fact that that is the question that is to be considered, it is our opinion that the phrase referred to above would make a sufficient ballot title if we add at the end of the phrase the following words, "of the State of Missouri." Therefore, we submit to you the following ballot title for the question concerning a constitutional convention:

> Shall there be a convention to revise and amend the Constitution of the State of Missouri?

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ELECTIONS:
ABSENTEE
BALLOTS:
PERSONS IN
MILITARY
SERVICE:

Persons in military service in making an application for absentee ballot are not required to reveal their location, unit or rank

- -

September 16, 1942

9-22

FILED
12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is in reply to yours of recent date wherein you requested an opinion from this department on the question of whether or not a person in military service when making application for absentee ballot is required to reveal his location, the unit and rank of service in which he is.

Under Section 11517 R. S. Mo., 1939, the Missouri voter who is absent from the state on election day in military or naval service may vote in the general election. Under Section 11518 R. S. Mo., 1939, such person, if he resides in a district which requires registration, may make and sign an affidavit on a form procured from the board of election commissioners or other body having charge of registration of voters. In this affidavit he must state his reasons for being unable to register and also make the same statements which a voter is required to make when registering in person in the precinct.

In our research through the laws pertaining to registratrion we failed to find where the registration officials, under the statutes, are required to compel the persons in military service when making application for an absentee ballot to

reveal their location, unit or rank of service.

Under Section 11519 it is provided that such persons may make application in person or by mail for an absentee ballot. This section does not require that such person reveal his location, unit or rank of service.

Under Section 11520 the clerk, upon receipt of the application, shall send the ballot to the address indicated by the applicant. This section does not compel the applicant to reveal his location, unit or rank of service.

Under said Section 11520 the official envelop for the return of the ballot to the election officials contains an affidavit in the following language:

"AFFIDAVIT.

State of _____,)
County of _____,) ss.

I, _____, do solemnly swear that I have resided in the state of _____ for one whole year next before making this affidavit, and have resided in _____ county (or city as the case may be) for more than sixty days prior to this date and that I am in all respects a duly qualified elector of _____township(or ward); that I reside at _____; that I am a _____, and that because of my duties I am required to be absent from my voting precinct in my said county (or

city as the case may be) on the day of election to be held _____, 19____, and have had and will have no opportunity to vote thereat and that I have not voted and will not vote elsewhere at this election.

Subscribed and sworn to before me _____, this _____ day of _____, 19___.

_____, Notary."

Referring to said Section 11520 it will be noted that the lawmakers have stated that the affidavit quoted above shall be substantially in that form. Of course, if the affidavit is made before a civil officer then a strict compliance with said Section 11520 would require the affiant to reveal the state and county in which the affidavit is made. Since the State permits and since this department has ruled that the affidavit may be made before any army officer with the rank of captain or above or any navy officer with the rank of ensign or above, then we think that this said Section 11520 would be substantially complied with by the affidavit showing that it is taken before one of the aforesaid officers.

CONCLUSION

From the foregoing it is the opinion of this department that persons in military or naval

service may make application for and vote an absentee ballot by going before an army officer with the rank of captain or above or any navy officer with the rank of ensign or above for the purpose of swearing to the affidavit on the envelop containing the absentee ballot and in compliance with the provisions of Section 11520. We further believe that this section is substantially complied with when it is sworn that the oath is administered before the above mentioned military or naval officers.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:FS

ELECTIONS:
CONSTITUTIONAL CONVENTION:
BALLOTS:
STICKERS:

Stickers should be placed on ballots voted for delegates to Constitutional Convention.

- -

November 19, 1942

11-25

FILED
12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which is as follows:

> "Inquiries have been received concerning the amendment to Sec. 11607 (Laws 1941, p 364) which requires black stickers over numbers on ballots. It is asked whether these stickers are required in all the city, school and township elections, as well as the county elections? Also, whether they will be required on ballots cast for delegates to the constitutional convention at special election which will be called for the purpose.
>
> "May I be favored with your ruling?"

On the question of whether stickers are required in the city, school and township elections, I am enclosing a copy of an opinion under date of March 6th, 1942, to Mr. Teters, Assistant Prosecuting Attorney of Jasper County, Missouri. I think this opinion answers that portion of your request.

Laws of Missouri 1941, Section 11607, which relates to stickers on ballots is as follows (p. 363):

> "Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the elec-

> tion judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eights (3/8) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

Section 11683, R. S. Mo. 1939, which relates to election of delegates to a Constitutional Convention, provides in part as follows:

> "Whenever an election shall be called to elect delegates to a constitutional convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results pro-

> claimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election: * * * *"

It will be noted that this section provides that the election for these delegates shall be conducted in the manner provided by law for general elections. Since the general election law requires the stickers to be used, then it would naturally follow that these stickers should be used for the election of delegates to the Constitutional Convention.

CONCLUSION

It is, therefore, the opinion of this Department that stickers should be used on the ballots which are voted for delegates to a Constitutional Convention.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

ROY McKITTRICK
Attorney-General

COUNTY SUPERINTENDENTS OF SCHOOLS: Entitled to receive additional compensation for added duties.

January 2, 1942

FILED
13

Hon. Charles B. Butler
Attorney at Law
Bank of Doniphan Building
Doniphan, Missouri

Dear Mr. Butler:

Under date of January 1, 1942, this office received from you a request for an opinion as follows:

> "The Superintendent of Schools here requested me to get your opinion as to whether he is entitled to the increase of salary provided by the last legislature for this year. It was included in the budget."

House Bill No. 231, enacted by the 61st General Assembly provided for, and approved on August 9, 1941, the adding of Section 10327A and 10327B to Article 2, Chapter 72, R. S. Mo. 1939, placing upon the County Superintendent new and additional duties in connection with the supervising of transportation for rural schools, and provided compensation for such duties.

Section 8 of Article 14 of the Constitution prohibits the increasing of the compensation of any state, county or municipal officer during his term of office. This constitutional prohibition has been held not to apply to additional compensation provided for additional duties. State ex rel. Harvey v. Sheehan, 269 Mo. 421, l.c. 429. In this case, a law had been enacted placing upon the Circuit Attorney of the City of St. Louis, an additional duty and providing for added compensation. Payment of the added compensation was refused and suit was brought to compel payment of the additional compensation. The Supreme Court of Missouri, in ruling upon the question, used the following language:

> "Another contention made is that since the appellant was an officer at the time of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 165 Mo. 270; State ex rel. v. Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 89; State ex rel. v. McGovney, 92 Mo. 428; County v. Felts, 104 Cal. 60; State ex rel. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Purnell v. Mann, 105 Ky. 87; Lewis v. State ex rel., 21 Ohio C.C. 410.

The above ruling is still in force and has not been criticized. It was cited with approval in the case of Little River Drainage District v. Lassater, 325 Mo. 493, l.c. 502.

CONCLUSION

It is the conclusion that the duties of supervisors of school transportation are added duties and the Superintendents of Schools are entitled to receive the compensation provided therefor.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BONDS: BOARD OF ELECTION COMMISSIONERS: COUNTY COURTS: Governing body liable for payment of premiums on surety bonds where the public official elects to give surety bond and the public body protected consents and approves same.

February 9, 1942

FILE
13

Hon. Hilary A. Bush
County Counselor
County Court of Jackson County
Kansas City, Missouri

Dear Mr. Bush:

This is to acknowledge receipt of your letter of February 4th, in which you request the opinion of this department. Your letter of request is as follows:

> "Judge George S. Montgomery, Presiding Judge of the Jackson County Court, has instructed me to ask your opinion on the following question. A. E. Garvin has for the past four years been a duly appointed, qualified and acting Election Commissioner of Jackson County. During each of the last four years he has purchased a surety bond and posted it pursuant to the provisions of Section 11884, Revised Statutes of Missouri, 1939, and he has paid the premium out of his own pocket.
>
> "He has now presented his bill in the total sum of $100.00, covering the four years' premium, to the County Court of Jackson County, for payment. Is this a proper obligation of our County? It is my understanding that the other Election Commissioners will also present their bills in similar amounts if this one is paid."

The question, as we understand it, is whether the County Court of Jackson County is liable for the premium on the official bonds of the members of the Board of Election Commissioners of Jackson County for the four years last past.

Under the provisions of Section 11884, R. S. Mo. 1939, the Governor, by and with the advice and consent of the Senate, appoints a Board of Election Commissioners for Jackson County, composed of four members. Said section further provides:

> "* * * Each Commissioner to give bond to the State in the sum of $10,000 with security to be approved by the governor, conditioned for the faithful and honest performance of the duties of said office and the care and preservation of the property thereof. Said oath of office and the bond to be filed at the office of the secretary of state. * * * "

No doubt it is the contention of the members of the Board of Election Commissioners of Jackson County that the County Court should pay the premiums on the bonds which they are required to give under the above statute.

Section 3238, R. S. Mo. 1939 (Mo. Stat. Ann. Sec. 285la, p. 734) provides:

> "Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this state or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

We think that the members of the Board of Election Commissioners come under the provisions of Section 3238, supra, and the County Court would be authorized to pay the premiums on their bonds provided the members of the Board and the County Court follow the terms thereof. We particularly call your attention to that part of Section 3238 which provides that where the official is required to enter into a bond, "he may elect, with the consent and approval of the governing body of such state, * * * county, * * * or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, * * * the cost of every such surety bond shall be paid by the public body protected thereby." Unless the above provisions are complied with, there is no obligation upon the public body protected thereby to pay the premium on the bond.

From your letter, we do not understand that the elected official in question has complied with that part of Section 3238 referred to above. Neither has the County Court consented and approved the payment of the premium. Under these circumstances the County Court would not be authorized to pay the premium without a compliance with said section. The official in question, having voluntarily paid the premium, if such is a fact, cannot be reimbursed by the County Court.

The election by the one required to give the surety bond, and the consent and approval for the officer to purchase such a bond at public expense, must be given in advance by the public body protected.

Section 3238, supra, was enacted at the 1937 Session of the General Assembly and gave authority to public bodies to pay the premiums on official bonds, but left it discretionary with said bodies whether or not they paid the premiums on such bonds. The constitutionality of this section was attacked in the case of Motley et al v. Callaway County, 149 S. W. (2d) 875, "for the reason it is taking public funds for private purposes and in conflict with Section 3, Article X, of the Constitution of the State of Missouri." The court in this case held that said Act was Constitutional, and further in said opinion, l. c. 877, it said:

> " * * * It is also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. So when consent and approval for the officer to purchase such a

bond at public expense was given in advance by 'the public body protected,' it was required to pay the cost. No one has ever contended that payment of salaries to officers, instead of requiring them to collect fees from those to whom they render service, is not a public purpose. We see no difference in principle between the use of public funds in payment of officers' salaries and authorizing their use to pay bond premiums, instead of requiring the officer to pay these himself; or to beseech other private citizens to personally guarantee his faithful performance. It will not always be in the public interest to create a situation in which a public officer may be placed under greater obligations to certain private citizens (who furnish his bond) than to the public generally. At least, we think it is within the discretion and authority of the Legislature to say which is the best public policy. * * * * * *"

CONCLUSION

It is therefore our opinion that, under the facts set forth in your letter, the County Court of Jackson County would not be liable for the premiums paid by the member of the Board of Election Commissioners, because he did not elect in advance , with the consent and approval of the County Court, to purchase such bond at public expense. However, if the official desires to give a surety bond in the future, and secures the consent and approval of the County Court to do so, the County Court should pay, and is obligated to pay, the premium on same.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRH:NS

COUNTY CLERKS: County Clerk not entitled to fee for filing
FEES: declaration of candidacy.

May 21, 1942

FILE
13

Honorable Chas. B. Butler
Prosecuting Attorney
Doniphan, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of May 19, 1942, as follows:

> "County Clerks here have been charging justices of the peace and constables fifty cents for filing their declarations as candidates for township offices in the primary elections.
>
> "I am unable to find any justification for such charges and would like to have your opinion in the matter."

The declarations referred to by you, which must be filed by justices of the peace and constables, are required by Section 11550, R. S. Mo. 1939, which is as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

> I, the undersigned, a resident and qualified elector of the (____ precinct of the town of _____), or (the_____ precinct of the _____ward of the city of_____), county of_____ and state of Missouri, do announce myself a candidate for the office of_____on the _____ticket, to be voted for at the primary election to be held on the first Tuesday in August, ____, and I further declare that if nominated and elected to such office I will qualify.
> (Signed) _____."

Section 11553, R. S. Mo. 1939, requires the declaration to be filed in the office of the county clerk, or in the office of the election commissioners of the City of St. Louis when the candidates are competing for an office to be voted for by electors wholly within the County or City of St. Louis.

We are unable to find either in the provisions of our statutes relating to elections or in those provisions relating to fees to be charged by county clerks for the performance of their official duties any mention of a fee which may be charged for filing the declaration above described. We are also unable to find any provision granting the secretary of state a fee for the performance of a similar service in the case of candidates for state offices, representatives in congress, ccurts of appeals, circuit judges, and those members of the general assembly whose districts comprise more than one county.

The rule in a case of this kind is well recognized and has been recently expressed by our Supreme Court in Nodaway County v. Kidder, 129 S. W. (2d) 857, as follows:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to

any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 495, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

It is, therefore, the conclusion of this department that the county clerks of the various counties of the state are not entitled to any fees for filing the declarations of candidates for township offices in the office of the county clerk as required by Section 11550, R. S. Mo. 1939.

Respectfully submitted

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

SCHOOLS: Board of education in town, city and consolidated districts does not have authority to accept anything but cash at sale of school property.

September 2, 1942

9/3

FILED
13

Honorable Charles B. Butler
Prosecuting Attorney
Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads as follows:

> "Quite a controversy has arisen here over the sale of the gymnasium by the school board. Doniphan is a consolidated school district. I enclose you a copy of the advertisement of sale.
>
> "They are selling under section 10471. The only question involved, as I presume the board can say when the property is no longer needed for school purposes, is, can the School Board sell the property on time payments and not put the money for the sale in the building fund as the statute requires. Will you please give me the opinion of your office in the matter. I expect to be in Jefferson City the first of next week and will drop in and see you. I would like to have this opinion before the sale."

The portion of Section 10471, R. S. Mo. 1939, which is applicable to your question reads as follows:

> " * * * and whenever there is within the district any school property that is no longer required for the use of

> the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

It has long been held by the courts in this state that directors of school districts have only such authority as is expressly granted them by statute and such as is necessarily implied in the powers expressly granted. In the case of State v. Kessler, 136 Mo. App. l. c. 240, the court said:

> " * * * The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. * * *"

Likewise, in the case of Consolidated School District No. 6 v. Shawhan, 273 S. W. l. c. 184, the court said:

> "Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. Armstrong v. School District, 28 Mo. App. 169. * * *"

Again, in the case of Wright v. Board of Education, 295 Mo. l. c. 476, the Supreme Court said:

> "The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of con-

> struction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication, regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. (Watson Seminary v. County Ct. Pike Co., 149 Mo. l. c. 70, and cases, 45 L. R. A. 675; Armstrong v. School Dist., 28 Mo. App. 180; 25 R. C. L, p. 1091, sec. 306 and notes.)"

Applying the rules announced by the courts in the foregoing cases to Section 10471, we believe it is evident that the board does not have authority to accept anything but cash at the sale of the school property. The statute does not expressly give the board the right to sell on terms and take security for the balance of the purchase price. The statute says that the proceeds shall be placed in the building fund of the district, and we think this clearly contemplates cash. The acceptance of security for the balance of the purchase price, in effect, amounts to an investment of the funds of the district. The board is not given express authority to make such investment. Had the Legislature intended that the board could accept security for the balance of the purchase price, the law would no doubt have specified the nature of the security, the length of time which might be extended, and the rate of interest which should be charged on such deferred payments. In other cases where officers are authorized to invest public funds, the law sets out the terms and conditions under which they may make such investments.

Since no terms or conditions are set forth in Section 10471, in order to hold that the board had the right to give terms of credit we would have to hold that the board had unlimited authority to prescribe the terms and conditions. In other words, if such a theory were adopted, the board could accept a deed of trust back on the property for a year or for ten years, at any rate of interest that

it saw fit, or it could accept no security at all for the deferred payments. We believe that the absence of these terms and conditions for extension of credit argues strongly for the proposition that the statute does not give the board such power.

CONCLUSION

It is, therefore, the opinion of this department that boards of education in city, town and consolidated school districts can only sell the property of such districts which is no longer needed by public sale for cash and cannot extend credit or accept deferred payments for said property.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

PROBATION AND PAROLE OFFICERS: Exempted from "concealed weapon" statute.

October 27, 1942.

10-28

FILED
13

Mr. Donald W. Bunker, Director
Board of Probation and Parole
Jefferson City, Missouri

Dear Sir:

The Attorney-General wishes to acknowledge receipt of your letter of October 26, 1942, in which you request an opinion of this Department. Your request, omitting caption and signature, is as follows:

> "The Board of Probation and Parole would greatly appreciate a ruling from you in regard to the following question: Does a State Probation and Parole Officer have the right to carry a gun in his car or on his person?
>
> "This question has arisen several times in this Department, and reference has been made to Section No. 9162 of the Revised Statutes of Missouri 1939, in which the following provision is set forth:
>
> "'The Board of Probation and Parole Officers appointed under this article shall have jurisdiction co-extensive with the boundaries of this State, and may make arrests anywhere in the State in the course of their duties under this article.'
>
> "The State Probation and Parole Officers must necessarily expose themselves to the same dangers as police officers in making arrests of parolees whose paroles have been revoked by the Board of Probation and Parole, and in returning

> parolees to the State penal institutions following the revocation of their paroles."

The general statute prohibiting the carrying of concealed weapons is Section 4423, R. S. Mo. 1939. Said section provides as follows:

> "If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of fire-arms, bowie knife, spring-back knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons, or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment: Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers

> and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

It will be noticed that such section provides that no person shall carry concealed weapons upon or about his person, but at the end of such section there is a proviso setting out that nothing contained in such section "shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, * * *"

That brings us to the question of whether or not parole officers come within the provisions of Section 4423, supra, which exempts certain officers from the provisions of the statute preventing the carrying of concealed weapons. Under Section 9162, R. S. Mo. 1939, the status of these parole officers is set forth. Such section of the statutes prescribes the following:

> "The parole officers and other employees of the Board shall perform such duties as may be prescribed by said Board. The Board and the parole and probation officers appointed under this article shall have jurisdiction co-extensive with the boundaries of this state, and may make arrests anywhere in the state in the course of their duties under this article. Upon request of the Board or any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested subject to the order of the Board or any parole or probation officer."

It will be seen, after reading the section of the statute quoted above, that the parole and probation officers appointed under Article 8 of Chapter 48, R. S. Mo., 1939, "may make arrests anywhere in the State in the course of their duties under this article." This being the power of the parole and

probation officers, they then come directly under the provisions exempting certain officers from the regulations as set out in Section 4423, in that they have the power to make arrests.

Conclusion

Therefore, it is the opinion of this Department that State Probation and Parole Officers come within the exemption of Section 4423, R. S. Mo. 1939, in that they are empowered under Section 9162, R. S. Mo. 1939, to make arrests anywhere in the State of Missouri. Therefore, they are not prevented from carrying guns for their protection by the provisions of Section 4423, R. S. Mo. 1939.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

BOARD OF PROBATION AND PAROLES: Printing must be done in accordance with Public Printing Act.

December 22, 1942

FILED
13

Hon. Donald W. Bunker
Director of Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

Under date of December 17, 1942, you wrote this office requesting an opinion as follows:

"We have been informed by the State Purchasing Agent and the State Auditor that all printed material for the Board of Probation and Parole must be ordered through the Commissioners of Public Printing in accordance with the provisions set forth in Section 14992 of the Revised Statutes of Missouri for 1929.

"It is the contention of the Board of Probation and Parole that:

"1. The law referred to was passed in 1929, eight years before the Board of Probation and Parole was created by the Legislature of 1937, and therefore, could not apply to this Board.

"2. Parole matters, bore 1937, were handled by the Penal Board, and all stationery and other printed matter was ordered from the Prison Printing Industry. After the creation of the Board of Probation and Parole this printed matter was ordered from the Prison Industry as before.

"3. From 1937 until the present time the State Purchasing Department and State

Auditor approved all printing bills submitted by the Prison Industrial Office to the Board of Probation and Parole.

"4. All printed material used by the Board of Probation and Parole is in the interests of Prison Inmates or released prisoners from the Penitentiary or the Circuit Courts, and therefore, this printing should rightfully be done by the Prison Printing Industry.

"5. Inasmuch as this printing is done by inmates who should be supplied with work as part of an effective treatment program for the rehabilitation of inmates, and as a means of saving State money, the Board feels that it should continue to order printed material through the Prison Printing Industry.

"The Board of Probation and Parole should appreciate an opinion from you relative to this situation."

In your letter you refer to Section 14992, Article I, Chapter 120, R. S. Mo. 1939, which section is herein set forth:

"Commissioners of printing shall examine the proof sheets of all work executed under the provisions of this chapter, and see that they are correctly printed, and that all such work is executed in a suitable manner and in accordance with the requirements of this chapter. Said commissioners shall keep an accurate account of all paper delivered to the public printer or printers, and see that it is used properly and without unnecessary waste. All work to be executed for the executive departments shall be ordered through the commissioners of public printing, and a requisition shall be obtained in advance signed by the head of the department ordering such work and said requisition shall be approved by the commissioners of public printing in the same

> manner as that provided in section 14995 of this law respecting the examination of accounts. Executive departments shall in this and other sections of this chapter be construed to mean both the heads of said departments and the subordinate branches thereof, the boards, commissions, bureaus and officers appointed by the heads of said departments except the boards of educational and eleemosynary institutions of the state. It shall be the duty of the commissioners to see that the full number of copies of each job is received from the printer and delivered to the proper department. No accounts shall be considered or approved by them or paid by the state auditor unless the work for which it is rendered is done in accordance with the requisition obtained in advance and approved as herein provided, and if when the final copies are delivered they be less than the number called for in the requisition, the commissioners shall pay only for the actual number of copies delivered, and no account for composition shall be rendered or approved until the requisition for the order is returned to the commissioners and thereafter no charge for composition shall be made on that order. The commissioners of public printing shall have the power to determine the number of copies and number of pages of subject material in each document printed under their supervision. They shall audit all accounts for printing and binding executed under the provisions of this chapter, and they shall keep a record of the cost of printing and binding, the amount of paper used, and the entire expense of each document or item, and a copy of each document shall be duly filed and preserved by them, with the cost indorsed upon it."

It will be noted that this section of the statutes requires all printing for the executive departments to be ordered through the commissioners of public printing, and further

defines executive departments, excluding only the eleemosynary and educational boards.

In the case of State ex rel. McKinley Publishing Company v. Hackman, 314 Mo. 33 (decided in 1926) suit was brought to compel payment of a printing bill incurred by the highway department, which printing had not been requested through the printing commission. The case was decided by the Supreme Court en banc, and in deciding, the court held against the publishing company. At l. c. 42 of the case, supra, the court considered and applied Section 9714, R. S. Missouri, 1919, and said:

> "The statute regulating public printing is limited in its purview to the executive departments. This term has been well defined elsewhere to include all acts which public officers are required to perform by legislative authority and which they are bound to obey (Altemus v. New York, 6 Duer (N. Y.) l. c. 455), and to include all persons upon whom are imposed duties in the administration of public affairs as contradistinguished from legislative and judicial functions. (People v. Salsbury, 134 Mich. l. c. 549.)
>
> "The triune character of our governments, state and national, being the same, this definition is as applicable here as elsewhere. Its correctness, no one familiar with their character will question. Despite this fact the Legislature, whether prompted by what it regarded as an improperly limited judicial definition of the term, as applied to the law (Sec. 10356, R. S. 1909) then in force in regard to the duties of the printing commissioner, or for other reasons, repealed the same and enacted what is now Section 9714 of the present statute."

"Although Section 10356 had provided generally that 'all work to be executed for the executive departments of this State shall be ordered through the Commissioners of Public Printing' the Legislature, in the enactment of the new section (now Section 9714) provided, among other things, that 'the executive departments shall in this and in other sections of this chapter' (now Chapter 89) 'be construed to mean both the heads of said departments and the subordinate branches thereof, the boards, commissioners, bureaus and officers appointed by the heads of said departments, except the boards of educational, and the eleemosynary institutions of the State.'

"The authority of the Legislature to thus more clearly define the application of the term is in harmony with its recognized meaning of which we will take judicial notice. Aside from this, the power of a Legislature to define the objects affected or sought to be affected by its own enactments is beyond controversy. (City of St. Louis v. Nash, 266 Mo. 1. c. 530; State ex rel. Bank v. Allison, 155 Mo. 1. c. 330.)

"The moving impulse in the enactment of what is now Section 9714, Revised Statutes 1919, we have indicated. Its intention was to include, so far as concerns the regulation of public printing, the executive division of the State Government as recognized by the Constitution, and all of its departments and the subordinate branches thereof, except the educational and eleemosynary institutions. This was what was meant by the general provision of Section 9714 before its amendment. The only effect of the definition in the amendment was to give legislative sanction in a definite and unmistakable manner to the meaning and application of the words as theretofore employed. With this statute before us, but for the interposition of

> subordinate objections, which we will consider later, the solution of the question at issue would be but one of classification."

The court further held in this case that the highway department was included within the term "executive departments."

In your letter you mentioned that the statutes that created the Board of Probation and Paroles were enacted subsequent to the statute relating to the public printing. The ruling is recognized that statutes subsequently enacted, when treating of the same subject as prior statutes, may by implication repeal the prior statutes or portions thereof. The provisions of the statutes relating to the Board of Probation and Paroles contains nothing which authorizes or purports to authorize the Board of Probation and Paroles to have its printing done in any manner other than that found to be prescribed in Article 1, Chapter 120, R. S. Mo. 1939.

Further, the law covering state printing was in force and effect at the time of the enactment of the statutes creating the Board of Probation and Paroles. The General Assembly had knowledge of the existance of the law, and had it been the intention of the General Assembly that the Board of Probation and Paroles should be exempted from the operation of the provisions of the printing laws, this board could have been exempted as were the Board of Education and the Eleemosynary Board.

Section 14992, Article 1, Chapter 120, R. S. Mo. 1939, referred to in your letter, is identical with Section 9714, R. S. Mo. 1919, construed and applied in the Hackman case, supra.

In your letter, you mentioned that the printing for the Board of Probation and Paroles has not been done in accordance with the statute. A previous failure to conform to the statutes would be no justification for continuing such course. Attention is directed to the brief but very pertinent quotation from the case of State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98, l.c. 104, wherein the court said:

"* * * * Usage cannot alter the law. United States v. McDaniel, 7 Pet. 1, 8 L. Ed. 587. It is self evident that a custom or usage repugnant to the express provision of a statute is void. * * * * * * * *"

CONCLUSION

The Board of Probation and Paroles is included within the executive departments mentioned in Section 14992, R. S. Missouri 1939, and should follow the provisions of Article 1, Chapter 120, R. S. Missouri, 1939, in having its printing done.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:S

ELECTIONS: Serial number on ballot must be covered by black sticker.

March 26, 1942

3-27

FILE
15

Mr. Ed. S. Carroll, Chairman
Jackson County Board of Election Commissioners
Court House
Independence, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The last session of the Legislature repealed Sec. 11607 of Art. 7, Chap. 76, R. S. of Missouri, 1939 and enacted in lieu thereof Sec. 11607, which among other things, requires the Election Judges in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers by means of a black sticker so as to conceal the number or numbers placed thereon.
>
> "Your opinion is desired as to the interpretation of identifying numbers. The ballot carries on the back the number placed by the judges in their own handwriting. This number is to be covered by the black sticker mentioned above, but what about the serial number that is printed on the stub of the ballot and the face of the ballot? In other words, should the black sticker be used on the serial number on the face of the ballot?

> "Your opinion is necessary and urgently requested because the Board is in the process of ordering black stickers to be used as required by Law."

The 1941 General Assembly enacted a statute relating to the secrecy of the ballot, which law provides as follows (Laws of Missouri, 1941, page 363):

> "Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eights (3/8) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

The physical makeup of the ballot is set forth in Section 11595, R. S. Mo. 1939, and is as follows:

> " * * * Provided, that in all cities and counties which now have or may hereafter

> have a legal registration, the election commissioner shall cause the ballots to be printed on the same leaf with a stub not over two inches in width, and separated therefrom by a perforated line extending across the top of the ballot one inch from the top thereof. Upon the left-hand margin of the stub of this ballot shall be printed the serial number of the ballot; one-half inch to the right of this serial number shall be left a space enclosed within printed lines not less than one-fourth inch in width nor less than one inch in length in which a judge of election will write the registration number of the voter when the ballot is voted. The same number as appears on the stub shall be printed on the left-hand side of the ballot near the top, and not more than one inch below the perforated line separating the ballot from its stub. The number of each ballot shall be the same as that on the corresponding stub and the ballots and stubs shall be numbered consecutively in each city: * * *"

The procedure to be followed by the election judges in marking the ballot is provided for in the same section, and reads as follows:

> " * * * In such precincts the election judges, at the time of separating the ballot from its stub, shall write in the space printed on this stub the registration number of the voter to whom the ballot shall be delivered. On receiving the ballot from the voter the number of the ballot voted in the order in which it is received, but no other writing except the initials of two judges as provided for in section 11602 of this chapter, shall be on the back of the ballot. * * *"

The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent, and this should be done from the words used, if possible, considering the language honestly and faithfully. St. Louis v. Commission Co., 85 S. W. (2d) 21, 337 Mo. 238; Graves v. Purcell, 85 S. W. (2d) 543, 337 Mo. 574.

The purpose of what is commonly known as the Australian Ballot System, which is the system in force in Missouri, is given in 20 C. J., p. 140, as follows:

> " * * * The distinguishing feature of this ballot system is that every elector shall be permitted to vote for whom he pleases, by depositing a ticket bearing the names of the persons for whom he wishes to vote in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the persons for whom he voted."

As our Supreme Court has aptly said in Bradley v. Cox, 197 S. W. 88, "The real requisites are that the ballot shall preserve secrecy and show the voter's choice."

Under Section 11595, supra, in counties like Jackson County, which have a legal registration, besides the number written on the ballot by the judges showing the number of the ballot voted in the order in which it is received, there is also a serial number, which serial number has also been printed upon the stub of the ballot. This stub contains a line in which the registration number of the voter is placed. It appears to us that it would be an idle gesture to cover only the number written upon the ballot by the judges and not cover the serial number, because the identification of the voter could be readily ascertained by reference to the ballot stub. Therefore, since it is the intent of the lawmakers to preserve absolutely the secrecy of the ballot, we believe that the serial number upon the ballot should also be covered by a sticker. It will be noted that Laws of Missouri, 1941, page 363, supra, provide that the sticker shall cover or conceal the identifying "number or numbers

placed on the ballot." The lawmakers obviously intended to take care of such a situation as presented under the election laws insofar as they apply to counties such as Jackson.

CONCLUSION

It is, therefore, the opinion of this department that in those cities and counties in which the ballots are required by law to have a serial number, the black sticker required to be placed over the identifying number or numbers on a ballot (Laws of Missouri, 1941, page 363) shall be placed not only over the written number of the judges but shall be placed also over the serial number on the ballot.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

AO:HR

SCHOOLS: County superintendent is a member of county textbook commission regardless of fact that he may have been employed by publisher of school books prior to his election.

November 17, 1942

11-25

FILED
15

Mr. Oscar L. Carter
Superintendent of Schools
Webster County
Marshfield, Missouri

Dear Sir:

We have your letter of November 12th, which reads as follows:

> "1. Can the directors of a closed (destroyed building) school district invest their insurance money in Defense Bonds? They have had these funds in the Bank on time deposit, but the Bank has quit paying interest, therefore, they desire to buy bonds. This is a Rural District with 3 directors.
>
> "2. Can a person representing a book company, selling books and supplies to schools, qualify as County Supt. of Schools if elected?
>
> "I understand that since he'd be President or Chairman of the County Textbook Commission, if elected, that he would not be eligible if he represented a book company any time 2 yrs. previous to the time of his election or appointment. I'll greatly appreciate a copy of your ruling on this."

In answer to your first question, we enclose herewith a copy of an opinion rendered by this office on April 23, 1942, addressed to Hon. J. R. Garrison, Prosecuting Attorney, Warrensburg, Missouri. This opinion answers your first question.

In answer to your second question, we submit the following:

Section 10609, R. S. Mo. 1939, prescribes the qualifications for county superintendent of schools. Said section reads in part as follows:

> " * * * said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; * * *."

It will be noted that there is no prohibition against a person being elected county superintendent of schools who has theretofore been a salesman or employee of any book company. So long as a person possesses the qualifications set forth in said Section 10609, he is eligible to be elected to the office of county superintendent of schools.

Section 10636, R. S. Mo. 1939, which provides for a county school textbook commission, reads as follows:

> "There is hereby created a county school textbook commission, which shall be the county board of education in all counties in which such a board exists. In counties where there is no county board of education the school textbook commission shall consist of the county superintendent of schools and two teachers, who shall be selected in the following manner: One member to be appointed by the County Court in each county and one member to be appointed by the state board of education, the appointments to be made in April, 1939, and every two years thereafter: Provided, that no person shall be appointed to serve on the said commission who has been in the employ, as a traveling salesman or otherwise, in this state, of any publisher of school textbooks within the period of two years prior to this article. Vacancies on the commission, resulting from death, resignation, removal from the county, disqualification, or otherwise, shall be filled as prescribed by law. A majority of the commission shall constitute a quorum for the transaction of all business of the commission."

By the latter section the county superintendent is ex officio a member of the textbook commission. The said section provides for the appointment of two teachers to serve with him as members of said commission. The proviso against appointment of persons to serve on said commission who have within two years prior thereto been employed by a publisher of school textbooks applies to the two members who are appointed, that is, the two teachers. The county superintendent is not appointed to the textbook commission by anyone, and so said proviso relating to appointing cer-

tain people has no reference to him. He is a member of said commission by law and no appointment by anyone is necessary to make him a member of the commission.

CONCLUSION

It is, therefore, the opinion of this department that the county superintendent of schools is a member of the county school textbook commission regardless of the fact that he may have been employed by a publisher of school textbooks prior to his election as county superintendent.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

PUBLIC SERVICE COMMISSION: Lessee operating motor vehicle properly
MOTOR VEHICLES: registered in the State of Texas and transporting own goods and wares in the State of Missouri, in operating for hire does not come within the purview of Public Service Act but must register said motor vehicle in the State of Missouri.

January 19, 1942

120

FILE
16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This will acknowledge receipt of your request of November 19, 1941, and supplemental request of December 26, 1941, which read as follows:

> "I am following up a recent letter that I wrote you in the case of complaint by the Weight Officer, Jack Howard, who works in conjunction with the PSC officers, against one Jordan the driver for the Wicker Fish Company. He is charged by the Weight Officer for operating a truck for hire without obtaining a Permit from the Public Service Commission.
>
> "Mr. Howard insists that their department hold that if a person has a lease for as much as ten days that they are classed by the PSC as owners of the truck and would thereby be required to secure registration in the State of Missouri.
>
> "These people have gone to considerable length and hired attorneys, both local and otherwise, and set up a contract which was made the 12th day of October, 1940 to run until the 12th day of October, 1944, in which they set out in

detail their agreement with the Columbia-Lessors, Inc., a corporation of Dallas County, Texas, and the truck company agrees to keep the trucks in running order, in other words to service them, and that appears to be the extent of their having to do with the operation.

"They claim that they have secured a registration under the Texas law and are equipped with the Texas number plates and all of the things required by the Texas law, and that they as owners of the product are hauling their own stuff.

"I would like to have your opinion on whether or not there is anything that we can charge these people with, and if so would like to have your suggestion by preparing a charge.

"The charge seems to be a possibility of a two-fold charge. One is that under the contract the fish company considered as owners, appear to have some headquarters and offices in Missouri but they claim that their main office is in Dallas, Texas and so state in their contract with the Lessor Company. Can we charge them on account of not having a registration in Missouri? Second, under their lease agreement could it be held that the Columbia-Lessor Incorporated are in fact transporting for hire and merely evading the law by means of the contract?"

Your supplemental request of December 26, 1941, reads:

"Replying to your letter of December 23, in regard to the above case, I will give you an outline of the facts as nearly as I am able to figure them out.

"Jack Howard, employed by the State as Weight Officer, whose duties also cover

any infraction of the transportation or truck laws arrested one R. H. Jordon driver of an International tractor and trailer. Motor number 4033 and trailer serial 44878.

"Jordon stated he was employed as driver for the Wicker Fish and Poultry Company. My information is that Wicker Fish and Poultry maintain extensive offices and warehouses in Kansas City, Missouri, but their main office is in Dallas, Texas.

"The registration or license are issued by the Texas authorities.

"The driver did not have a copy of the lease contract between the Columbia Lessors Inc., stated in the contract as a Texas Corporation, and the Wicker Fish and Poultry Company also a Dallas County, Texas Corporation as lessee.

"The Officer charged him with operating a truck for hire and especially charged that where there is a lease agreement an agreement must be carried and produced by the driver. The driver did not have any contract with him. After the charge had been filed the attorney for the Wicker Fish Company sent me a copy of the contract, which I am enclosing herewith fr your inspection.

"The Weight Officer contends that the driver of the truck and trailer is in fact the employee of the Columbia Lessors Inc., and as such that company should have Missouri tags or registration, and also that in case the Fish Company is hauling their own property the truck should bear a Missouri registration.

"These seem to be the applications as I gather it from the Weight Officer.

"The Fish Company insists that under the

> laws of Texas they are required to take out the registration even under the provision of the contract from Texas."

You inquire if any charge may be pressed against either of the above companies by reason of this agreement entered into on the grounds that it was entered into so as to circumvent the Public Service Commission Act.

You further inquire if this Lessee may operate such trucks on the highways of this State without registering in Missouri.

After careful examination of the copy of the attached lease, the writer finds that the Columbia Lessors, Inc., a Texas corporation, has leased for a period of four years certain trucks to the Wicker Fish and Poultry Company, another Texas corporation. Said trucks are to be used to transport goods and wares belonging to the Wicker Fish and Poultry Company, Lessee, from Lessee's place of business to retailers in various states.

The Lessor obligated itself to maintain and keep in good repair all leased equipment, to insure trucks and take out liability to cover any damages or injuries to persons or property, to garage said trucks while in Dallas, Texas, to furnish all gasoline and lubricating oils used by said trucks and equipment. The Lessee obligates itself to use said equipment within a radius of thousand miles (1000) of Dallas, Texas. Lessee further agrees to pay Lessor a stipulated weekly rate for each truck and mileage, to employ and pay all drivers, reserving the right to the Lessor to object to such drivers who are careless and negligent in operating said equipment; Lessee further agrees to furnish all labor for loading and unloading said equipment, to insure all cargoes of goods against damage, etc. Lessee has already registered said trucks and equipment in the State of Texas.

The Public Service Commission Act in this State was primarily enacted to regulate common carriers transporting persons and property for hire. As stated in Schwartzman Service v. Stahl, 60 Federal (2d) 1034, l. c. 1037:

> "Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his

> property upon them by auto vehicle,' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause.' Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596."

The Public Service Commission, being created by statute, is vested with only such authority as given it by statute. The same rule as laid down by the court, regarding authority of county courts, in Ray County v. Bentley , 49 Mo., 236, l. c.242, is applicable to the Public Service Commission. The court said:

> "The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36 Mo. 555.)"

The writer is unable to find wherein said lease may be considered a subterfuge so as to circumvent the Public Service Commission Act. It appears to be a perfectly valid document entered into in good faith. Unless there be other facts not revealed, the writer fails to see where any criticism can be leveled against such lease or any charges preferred against either of the parties to said lease.

We know of no provision of the Public Service Act which brings this Lessee under its regulation. This Lessee is merely transporting its own goods and wares from its own establishment to other branches and certain retail customers in other states.

It does not transport for hire other commodities or persons, neither does it hold itself out for such purposes. It is not in the business of transporting for hire, such as a common carrier, its main business being to sell fish and poultry, all of which it owns.

Section 5720, R. S. Missouri 1939, subdivision (b) of the Public Service Commission Act, in defining "motor carrier" reads as follows:

> "The term 'motor carrier', when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier: Provided, however, this article shall not be so construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation."

Subdivision (c) of the same Section defines "contract hauler":

> "The term 'contract hauler', when used in this article, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and

> or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

The foregoing definitions are not broad enough to include the Lessee. In the Motor Vehicle Act the word "owner" is defined so as to include any person, firm, corporation or association owning or renting a motor vehicle or having exclusive use thereof under a lease for a period greater than ten days successively. Section 8367, R. S. Missouri 1939, in part reads:

> "The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively. * * *

> or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

We shall look to the Texas law to determine if like exemptions are granted Missouri residents while operating motor vehicles under similar circumstances in the State of Texas. Article 827b of the Penal Code of Texas requires the registration of said motor vehicles belonging to a resident of another state with the county tax collector, for which a fee shall be charged.

Therefore, it is the opinion of this Department, in view of this requirement which places an additional burden on residents of Missouri while operating a motor vehicle in Texas, that such trucks shall be registered within this state for the reason there is not full reciprocity between the States of Texas and Missouri.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH:EAW

MOTOR VEHICLES: Finder of numberless automobile tire has sufficient ownership to have a special number assigned by the Secretary of State.

January 22, 1942

1-23

FILE 16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

We are in receipt of your letter of January 21st in which you request the opinion of this Department. Your request reads as follows:

> "Recently our Sheriff took charge of three large truck tires.
>
> "He got them from a man out in the country through an attempt on his part to sell them.
>
> "The fellow he got them from declared that he found the tires near the road side, and that he did not have any idea where they came from. We therefore found ourselves without much to proceed on, for the reason that we were unable to locate the owner. The sheriff still holds the tires however, subject to the proper proof of the true owner, but on closer examination we find that the number on the casings have been buffed off or removed.
>
> "What I would like to have your valued opinion on is as to what disposition

the sheriff may make of these tires. Section 8396 makes it misdemeanor under sub-head B, to offer for sale a tire where the distinguishing number has been removed. These tires are practically new and are claimed at a commercial value of $150.00 for the three of them. Under the present conditions and the need of tires the use of these tires should be made available.

"Please give the benefit of your opinion in the manner by which the sheriff may dispose of them."

Section 8397, R. S. Mo. 1939, partially reads as follows:

"Whenever the original or manufacturers' number or other distinguishing number on any motor vehicle, trailer or motor vehicle tire has been destroyed, removed, covered, altered or defaced, the owner of such motor vehicle, trailer, or motor vehicle tire may apply to the Secretary of State, at Jefferson City, Missouri, for, and upon receipt of such application together with a fee of $1.00 the Commissioner shall issue to said applicant, a certificate authorizing the owner to make or stamp or cause to be made or stamped on the motor vehicle, or motor or engine thereof or motor vehicle trailer or motor vehicle tire a special number to be designated by the Commissioner and when such number has been placed upon such motor vehicle or motor or engine thereof or trailer or motor vehicle tire such new number shall become and thereafter be the lawful number of the same, for the purpose of identification and registration and for all other purposes under the provisions of this article, and the owner

> thereof may thereafter sell and transfer such property under said special number and no person shall destroy, remove, cover, alter or deface any such special number: Provided, that in connection with such application for such new number the owner of such motor vehicle, trailer or motor vehicle tire shall produce satisfactory evidence that he is the owner thereof."

Under the above partial section "the owner" is required to make the application. This question will be referred to later in this opinion.

Under this partial section the owner may obtain substitute serial numbers for the tire and after receiving the number assigned him by the Secretary of State as set out in Section 8396, R. S. Mo. 1939, he would not violate paragraph "b" of Section 8396, supra.

In your request you state that no conviction could be had upon the man who alleged he found the tires near the roadside, and by reason of that, Sections 4164, 4165 and 4168, R. S. Mo. 1939, are not applicable to the disposal of the property by the Sheriff for the reason that in each of the sections a conviction must be had before the property is disposed of.

Chapter 132, R. S. Mo. 1939, provides the procedure for the vesting of ownership in persons who find property. You infer in your request that the tires had been stolen and under the law of this State the stealing of property, which has been later found by an innocent person, is considered the same as if the owner had lost the property.

In the case of State v. Buzard, 144 S. W. (2d) 847, l. c. 849, the Supreme Court of this State in defining "lost" said:

> "In the case of Foster v. Fidelity Safe Deposit Company, 162 Mo. App.

> 165, 145 S. W. 139, 140, the plaintiff while in the business place of the defendant noticed an envelope lying on a desk in a private room maintained by the defendant for the use of its customers. The plaintiff examined the envelope, found therein $180 in money. He delivered the money to one of defendant's offices. The defendant, although it made diligent effort to find the owner of the money, failed to do so. After a time the plaintiff brought suit claiming, 'if he should be successful in this action, he must institute certain proceedings prescribed by sections 8268-8273, R. S. 1909 (Mo. St. Ann. Secs. 14227-14232, pp. 5036, 5037), concerning lost property * * *.' The court held the money was not lost in a legal sense; that for property to be 'lost,' as that term is used in the law, it must have been involuntarily parted with by the owner; that the situation of the property must clearly indicate it was lost and not voluntarily placed by the owner in the place where it was discovered."

It also said that the property is lost where it has been involuntarily parted with by the owner.

Also, the Supreme Court of the State of Iowa in the case of Flood v. City National Bank, 253 N. W. 509, 95 A. L. R. 1168, l. c. 1173, construes the term "lost property" as follows:

> "In practically all of the cases cited by appellee the court attempts to define and construe the term 'lost property.' In none of them, however, do the courts hold that property stolen under

the conditions disclosed by the evidence in this case would not constitute lost property.

"It is also contended by appellee that, because the money in question was intentionally hidden in a place known to the robbers it could not have been lost. The true rule, however, from an interpretation of all the cases, is that, in order to justify a holding that the property was not lost, it would have to be hidden or voluntarily left somewhere by the owner. The distinction between these cases and the case at bar is that it was not voluntarily hidden or misplaced by the owner. In the case at bar the owner knew absolutely nothing about the place where it was hidden. It was taken away from the owner involuntarily and hidden in the place where it was found without his knowledge or consent and against his will. This is not a case where the property was lost because of bad investments, or because it was squandered or given away, or because of gambling, waste, or bad loans. In all of such cases the money is voluntarily and intentionally parted with by the owner, and, though it might be said it was lost, the fact remains that, after it was gone, through the voluntary acts of the owner, it was no longer his property. He not only voluntarily parted with its possession, but its ownership as well. Money lost by theft is still the property of the owner. In the case at bar the money was parted with not only involuntarily, but taken away from the bank officers by duress, by fear, force and threats. It cannot be said that simply because the officers of the bank opened the vaults of the bank through fear, force, and

> threats their acts became voluntary. In such a case the acts were involuntary and procured through duress. Money or property taken from the bank under such circumstances might be as effectual ly lost as though it was accidentally dropped in the sea. Without pursuing the subject further it is our conclusion that money lost by theft, and parted with by a bank in the manner in which the money in question was taken from the officers of the bank to a place unknown to the owners, is lost property under the provisions of section 12211 of the Code."

The Supreme Court of this State in the case of Hoagland v. Amusement Co., 170 Mo. 335, l. c. 341, in holding that the finder has a special property in a chattel found, said:

> "All of the authorities hold that the finder of a lost chattel is entitled to its possession as against all other persons except the true owner. The finder has a special property in the chattel found, sufficient to maintain trover against every person except the true owner. (2 Kent, star page 356 (Lacy's Ed. 1892, p. 453); Darlington on Personal Property, 35, 36, 37.) And generally the place in which it is found creates no exception to this rule. (Hamaker v. Blanchard, 90 Pa. St. 377.) In that case a domestic servant in a hotel found in the public parlor a roll of bank bills. She immediately informed the proprietor of the hotel, who suggested that the money belonged to a transient guest of the house and received it from the servant to hand to him. It was afterwards acertained that the guest did not lose the money, and upon demand by the servant for the return of the money the proprietor refused to return it to her.

She brought suit for the money, and it was held that she was entitled to recover.

"In the case of Bowen v. Sullivan, 62 Ind. 281, an employee in a paper manufactory, while engaged in assorting a bale of old paper purchased by the proprietor for manufacture, found certain lost genuine bank bills inclosed in a clean, unmarked and undirected envelope, which had formed part of such bale, and, for the purpose of ascertaining whether they were genuine, delivered them to the proprietor, upon his promise to return them, who upon demand refused to do so, whereupon the finder instituted suit for their value. Held, that she was entitled to recover the value of the bank bills as against the defendant.

"In Durfee v. Jones, 11 R. I. 588, the plaintiff had bought an old safe and soon thereafter instructed his agent to sell it again, he in the meantime having permission to use it. The agent found between the outer casing and the lining a roll of bank bills belonging to some person unknown, whereupon the owner of the safe first demanded the money, and then demanded the safe and its contents as they were when the agent received them. The agent returned the safe but retained the money. In an action brought by the owner of the safe for the money found, held, that as against the plaintiff the agent was entitled to retain the money, and that the place where it was found made no difference."

The finder of the property by complying with Sections 15317 to 15320, inclusive, of Chapter 132 of the

Revised Statutes of Missouri, 1939, may become the permanent owner of the property and under the holdings of the Supreme Court in the cases set out above he has a special ownership in the property and may obtain the special serial number as set out in Section 8397, supra.

Section 15317, R. S. Mo. 1939, reads as follows:

> "If any person finds any money, goods, right in action, or other personal property, or valuable thing whatever, of the value of ten dollars or more, the owner of which is unknown, he shall, within ten days, make an affidavit before some justice of the county, stating when and where he found the same, that the owner is unknown to him, and that he has not secreted, withheld or disposed of any part thereof."

It is very noticeable under this section that it states that "if any person finds any money, goods * * *" Under the facts in your request, if the man who originally alleged that he found the tires on the highway is not available to complete the procedure as above set out, then it may be assumed that he was guilty of larceny and the Sheriff could be considered as the finder of the tires. We say that for the reason that it has been held in this State in the case of State v. Buzard, supra, that where the owner has parted with the property involuntarily, the property is considered the same as lost property.

Conclusion

In view of the above authorities it is the opinion of this Department that a person finding automobile tires on the roadside, which bear no serial numbers, has sufficient ownerhsip in the tires to obtain special numbers from the office of the Secretary of State. It is further the opinion

of this Department that if stolen property is found by the Sheriff he may as a special owner or bailee obtain special numbers for the tires the same as if he was the permanent owner of the tires. It is further the opinion of this Department that if the tires are assigned a special number by the office of the Secretary of State, and then sold, after Chapter 132, supra, has been complied with, the bill of sale should contain all of the restrictions set out in said chapter, such as, the restoration of the property or its value if the real owner is found. It is further the opinion of this Department that the finder cannot sell the tires until he obtains the special numbers assigned him by the Secretary of State. We are assuming in this opinion that the tires are not new tires.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:EG

MISSOURI SCHOOL FOR THE BLIND: Discussion of what constitutes
TEACHER'S CONTRACT: teacher's contract.

- -

May 14, 1942

5-79

Dr. C. C. Chesterson, President
Board of Managers
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

FILE
16

Dear Dr. Chesterson:

This will acknowledge receipt of your letter, dated May 7, 1942, in which you request an opinion from this office, as follows:

"I enclose photostatic copy of a letter of application for reemployment as a teacher in the Missouri School for the Blind and a reply penned by and signed by the president of the Board of Managers. This reply was written after the Board of Managers passed a motion to reemploy this individual.

"The questions we present to you follow:

"1. Does this constitute a contract?

"2. If not, may the Board of Managers offer this individual a contract in which terms are set forth?

"3. If the original letter enclosed does not constitute a contract, by what method may the Board of Managers make the terms?

"4. If it became necessary for the Board to discharge, what position

would they be in under such agreement as the letter attached?

"We would greatly appreciate your opinion prior to May 29."

Accompanying the foregoing letter is a photostatic copy of a typewritten letter with penned reply at the bottom, which are as follows:

"St. Louis, Mo. April 4, 1942

"Board of Managers and Superintendent,
Missouri School for the Blind,
St. Louis, Mo.

"Gentlemen:

"This is to say I desire reappointment on the staff of the Missouri School for the Blind. Naturally I wish to serve in the highest capacity for which you judge me to be abundantly qualified, and in which a vacancy definitely exists.

"For your convenience the following brief summary of my education and experience is submitted.

"Education:

"Degree of Bachelor of Science in Education from the University of Missouri, and additional credits from the University and other state schools about eighty hours, making a total of approximately two hundred college hours.

"My majors are:

"Education
Science
Agriculture
English
Social Science

"In addition to the subjects covered by these majors, I meet the state requirements to teach a number of other subjects. Among them is mathematics in which I have a fraction over eighteen hours.

"Experience:

"Of the executive position held the most significant are those at Polo, Mo. and at Edina, Mo. I taught in the grades at Polo for three years, and was then elected superintendent but declined the position to attend the University of Missouri. Upon graduation from the University I was elected superintendent at Edina, Mo. and served eight and one half years.

"I was afterward elected superintendent at Polo a second time and held that position six years.

"I have also had actual experience in teaching grades one to eight inclusive.

"Thank you for your consideration.

"Respectfully,

C. F. RIDDLE

"Dear Mr. Riddle:

"At the meeting of Board of Managers held April 10th you were re-employed for the School term 1942-43.

"Respectfully,

DR. C. C. CHESTERSON
Pres. Board of Managers."

The Board of Managers for the Missouri School for the Blind is created by Section 10846, Article 24, Chapter 72, R. S. Mo. 1939, and Section 10863 of the same article and

chapter, directs the organization of the Board, reading as follows:

> "The board of managers of each of these two schools shall organize at the regular meeting of the board, held in March of each odd numbered year, by electing one of their number president, and also a secretary, who may or may not be one of their number: Provided, that in either school that employs a secretary or bookkeeper, such secretary or bookkeeper shall be secretary of the board of managers thereof."

The duties of the Board of Managers are prescribed in Section 10847 of the same article and chapter, as follows:

> "The board of managers of each of said schools shall elect the superintendent and all teachers and officers of said school and prescribe the number to be employed therein, and fix their terms of office and the amount of compensation for their services. The superintendent shall have the power to employ all foremen, employees, supervisors, mechanics, servants and other persons not otherwise provided for and shall have the power to discharge the same at his pleasure: Provided, that the board shall have first designated the number of employees and their wages; and provided further, that nothing herein shall prohibit the board from discharging any employee when they may deem it for the interest of the school so to do. The salaries and wages due officers, teachers and employees of these schools shall be allowed and paid monthly. The superintendent and matron of each school shall reside therein."

From the foregoing it is apparent the Board of Managers has the duty and the authority to employ teachers from the school.

In Article 2 of the same chapter, 72, relating to all classes of schools, Section 10342 provides directions for the employment of teachers, as follows:

> "The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk: Provided, that the board of education of any first-class high school may employ a superintendent either before or after the annual school election."

The Board of Managers having authority to employ teachers must employ them by written contract which sets out the wages and the number of months to be taught, and signed by both parties.

Applying the foregoing to the photostatic copy of correspondence enclosed, you will see the document alone could not constitute a contract. It does not contain a statement of the salary to be paid or the number of months to be paid.

Answering your second question, from the foregoing sections of the statutes you will observe the Board not only <u>may</u> offer a contract containing all of the terms, but it is the <u>duty</u> of the Board of Managers to do so.

It has been pointed out that the correspondence enclosed does not alone constitute a contract, but it, when taken with the minutes of the meeting of the Board of Managers, might constitute a contract, and, in this connection your attention is called to the following lengthy extract from the case of Edwards v. School Dist., 297 S. W. 1001, l. c. 1002:

> "Did plaintiff have a valid contract? April 2, 1926, plaintiff, a legally qualified teacher, made written application to the board of directors of defendant school district for a position as teacher in the district, and specified the length of the term and the salary desired, to wit, $70 per month. April 10th thereafter defendant's board of directors in session made this order of record:
>
> "'Board of directors met April 10, 1926, district No. 73, county of Christian, and state of Missouri, and agreed on Reba Edwards for teacher for the term of eight months starting the first Monday in August, second day, for $70 per month.'
>
> "In addition to placing the order of record, the directors signed a separate written paper which was a copy of the order placed of record.

"May 25, 1926, Walter Wilcox, president of the board, notified plaintiff by registered mail that the board was not going 'to hire you to teach this school for the coming term.' May 29th thereafter the board met and by an order of record attempted to rescind its action of April 10th employing plaintiff. Plaintiff refused to accept the purported rescission, and on August 2d, the day the school commenced, she went to the district and offered to teach the school, but another teacher was then employed, and plaintiff's offer was refused.

"Section 11137, R. S. 1919, provides that a teacher's contract--
"'shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk,' etc.

"Plaintiff had no contract unless her written application and the action and orders, etc., of the board thereafter as above set out constitute a contract.

"Defendant's learned counsel invokes the letter of section 11137, and contends that plaintiff had no contract signed by herself, by the president of the board, and attested by the clerk, as provided in the statute, and that therefore she had no valid and binding contract. Section 11138, R. S. 1919, provides that the contract required by section 11137 shall be construed under the general law of contracts. Section 2164, R. S. 1919, is a part of the general statutory law of contracts, and provides:

"'No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.'

"Sections 11137 and 2164 both require that a teacher's contract be in writing, and there is no conflict in the two sections. Since section 2164 is a part of the general statutory law of contracts, it may be invoked in the construction of a teacher's contract. Neither section requires that a teacher's contract be in any particular form, nor does either section require that the parties to be bound all sign the same instrument. In construing section 2164 the Kansas City Court of Appeals in Platte City to Use of Prior v. Paxton, 141 Mo. App. 175, 124 S. W. 531, held that, in an ordinance for street improvement, a written bid duly signed and a resolution accepting the bid, constituted a written contract and was a substantial compliance with the requirements of section 2164. To the same effect are Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979; City of California v. Telephone Co., 112 Mo. App. 722, 87 S. W. 604.

"A contract is the agreement which the parties make and not the writing which

evidences the agreement. 13 C. J. 239. In Baxter v. School District, 217 Mo. App. 389, 266 S. W. 760, we held a teacher's contract valid, although the president of the board had not signed a formal written paper evidencing the contract.

"Plaintiff in the cause at bar filed her written application, duly signed by her. It specified as to the school term, salary, etc. This application may be termed an offer, and the board of directors not only made an order accepting this offer, but went further, and each director, including the president, signed a writing which evidenced the contract which they had consummated by their acceptance of record. It also appears that the clerk of the district signed the minutes of the board accepting plaintiff's application to teach the school. This record shows that every requirement as to writing and signing, made by section 11137, was fully met. There is no argument against the validity of the contract except that it was not formally written upon a separate paper and there signed by all the parties required by the statute. Such is not necessary and could not be made so without making the law respecting teachers' contracts different from the general law of contracts. We hold that plaintiff's contract was valid and binding."

Following this decision you will readily see the original of the photostat enclosed with your letter, if supplemented by sufficient written evidence, might make evidence of the contract sufficient to make it enforceable.

The foregoing answers your first two questions. Referring to the same authorities furnishes the answer to your third question. The Board of Managers must contract in writing and which writing definitely sets out the terms of the agreement and is signed by both parties.

In reply to your fourth question, the Board of Managers would be in the same position with reference to discharging a teacher no matter what the form of the contract. The Board could not discharge the teacher and terminate the contract, so long as the teacher properly discharged the duties and is not guilty of gross immorality or of any crime. It is respectfully suggested that if the occasion arises when the Board considers discharging a teacher it would be much better to take up and discuss the matter of discharge at the time such question arises, as the facts in the case would have great bearing on the matter.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

ELECTIONS: In re election to fill vacancy in
STATE REPRESENTATIVES: office of State representative.

- -

July 10, 1942

9-13

FILED
16

Hon. G. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Chamberlin:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

"I am herewith enclosing a copy of a Writ of Election which was sent to our sheriff for action. The original was duly signed by the Governor, Secretary of State, Chief Clerk and sealed by the state in regular order.

"This is based on Sections 12858-12862 inclusive, but the point that we are not clear on is what the Governor intends to have done. He states in the notice that the election to supply the vacancy is to be held on Tuesday, August 4; then states that at the time of the general election next preceding the last above date and that the sheriff is to issue a proclamation for holding an election, etc.

"I notice in the paper, The Kansas City Star, that the Governor was ordering a special election to be held on August 4 along with the primary.

"I would like to have your interpretation as to what the writ really means, when

> this election is to be held and if held as a special election on August 4, whether or not the additional election might be held in November on the same subject."

Under Section 14 of Article IV of the Constitution, writs of election to fill vacancies which occur in either house of the General Assembly shall be issued by the Governor.

Under Section 12859, R. S. Mo. 1939, which seems to be an enabling act to the foregoing provision of the Constitution, provides as follows:

> "Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

According to the writ of election which the Governor has issued it appears that the Representative of Cass County has resigned. Therefore, the Governor has invoked the foregoing provisions of the Constitution and Statutes.

Section 12860, R. S. Mo. 1939, provides as follows:

> "When any vacancy shall happen in the senate, for a district composed of more than one county, the writ of election shall be directed to the sheriff of the county first named in the law establishing the district; and when such vacancy shall happen in a senatorial district, which shall have been divided or altered after

> the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the county first named in such old district; and when any vacancy shall happen in either house, for any county which shall have been divided after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the old county."

You will notice the writ of election follows the language of this section. The particular language to which you refer, that is: "at the time of the general election next preceding said last above mentioned date" refers to the boundary of the district and not to the date. In other words, it is the duty of the Governor to direct the writ, in cases of vacancies in the office of senator, to the county first named in the law establishing the district and the boundaries of that district are those which existed at the time of the general election next preceding the notice of the special election.

We do not think that this particular provision is pertinent and probably is not necessary in a case where a vacancy exists in a county such as Cass. We assume that it is put in there on account of the way the statute reads.

You will note that the Governor directs this election to be held on August 4, 1942. The fact that this election is to be held on the date of the primary is merely coincidental and the ballot for the special election will be separate and distinct from the primary ballot. In our research on this question we find that such an election is held under the same rules and regulations that a general election is held. That being the case there would be no prohibition in having the same election officials for both elections. This election is for the unexpired term of the present incumbent.

Under Section 2, of Article IV of the Constitution the term of the representative is two years. Therefore, the

special election will be for the term expiring at the end of this year. This special election does not affect the nomination and election of the representative for the next biennium. That being the case, any person desiring to be nominated and elected for the next term, should follow the statutory provisions for nominations in the primary in order to have his name placed on the general election ballot to be voted on in November for the term which will begin when the next session of the General Assembly convenes in 1943.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MISSOURI SCHOOL FOR THE BLIND:

Missouri School for the Blind is a part of the free public school system.

August 6, 1942

FILED 16

Dr. C.C. Chesterson
President, Board of Managers
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Mr. Chesterson:

Under date of June 5, 1942, you wrote this office requesting an opinion as follows:

"The Board of Managers of the Missouri School for the Blind respectfully requests an opinion upon the following:

The full appropriation of the Missouri School for the Blind is from the School Moneys Fund. In the past, all appropriations had been from General Revenue.

1. Under which fund should the school operate?

2. If we can legally be under School Moneys Fund, can parts of the appropriation be used for operation, additions, and repairs and replacements?

3. If this school legally belongs under School Moneys Fund, does Chapter 72, Article 2, R.S. of Missouri, also govern the Missouri School for the Blind?"

The Missouri School for the Blind exists

and functions in accordance with the provisions of Article 25, Chapter 72, R. S. Mo., 1939. This Article at the 1939 Statutes was enacted by the Fifty-first (51st) General Assembly in 1921, it was House Bill 521. The title of the Act and the first section are herein set out:

> "SCHOOLS: Classifying Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton as Educational Institutions of the State.
>
> "Section 1. Classed and conducted -- how--The 'Missouri school for the blind' at Saint Louis, and the 'Missouri school for the deaf' at Fulton shall be regarded, classed and conducted wholly as educational institutions of the state."

The school for the blind was originally classed as an eleemosynary institution and was under the same control as the eleemosynary institutions. In 1915 the control of the school was taken from the Managers of the eleemosynary institutions and placed in a separate board by the Legislature. In 1921, the old law relating to the school was repealed by House Bill 517, Laws of 1921, page 643. This repeal was followed by the enactment of House Bill 521, quoted from herein.

Article 1, Chapter 72, R. S. Mo., 1939, classifies the public schools of the State and is as follows:

> "The public schools of this state are hereby classified as follows: First, all districts having only three directors shall be known as common school districts; second, all districts outside of incorporated cities, towns and villages, which are governed by six directors, shall be known as consolidated school districts;

> third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts, and fourth, all districts in which is located any city of the first, second or third class shall be known as city school districts."

This Section was enacted long prior to the present law governing the Missouri School for the Blind. It was Article 1, Chapter 57, R. S. Mo., 1919.

From this classification it is apparent that when the law was enacted the school for the blind was not considered as a portion of the free public school system by the Legislature. At this point it is desired to call to your attention Section 1, Article XI of the Constitution of the States:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

This section is a command to the General Assembly to establish and maintain free public schools for all persons between the ages mentioned, it does not except the blind persons, the deaf persons or any other class of persons; it is all embracing.

Inasmuch as blind persons would require different methods of instruction and teachers especially trained, it follows that separate schools would necessarily be provided in order that the instruction be furnished to the blind persons.

The State of Missouri maintains the School for the Blind; it is free to the residents of the State and provision is even made for furnishing travelling expense and clothing for persons who are

entitled to instruction but who are unable to pay their own expenses. Section 10856, R.S.Mo., 1939. Further, the General Assembly has made no other provision for the education of blind persons.

This would indicate it was the intention of the General Assembly to make the Missouri School for the Blind a free public school. No Missouri case has been found defining the words "free public schools" as used in Section 1, Article XI of the Constitution. But in the South Carolina case of In re Malone's Estate, 21 S. C. 235, the words "free public school" as used in the South Carolina Constitution are defined as follows:

> " * * * * * providing that the proceeds of all escheated property shall be faithfully appropriated for the purpose of establishing and maintaining free public schools, and for no other purpose or use whatever, means schools supported by the public for the use of the public generally, * * * * * "

And in the Maryland case of State v. Maryland Institute for Promotion of Mechanic Arts, 41 A. 126, 87 Md. 643, system of public schools is defined as follows:

> "The constitutional provision requiring the General Assembly to establish and maintain a thorough and efficient system of free public schools means that the schools must be open to all without expense. The right is given to the whole body of the people."

Section 6, Article XI of the Constitution provides for the Public School Fund of the State and contains the following clause:

> " * * * * * shall be faithfully appro-

> priated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

The Missouri School for the Blind being a free public school it would follow that an appropriation for the school made from the public school fund would be authorized.

It might be urged the school for the blind is not included in the classification of the Public Schools found in Article 1, Chapter 72, and is therefore not a fact of the system of free public schools and not entitled to an appropriation from the public school fund. In this connection it is pointed out that Article 1, Chapter 72, is an earlier enacted general law, while article 25, Chapter 72, is a later enacted special law. It is believed that the later enacted special law relating to blind school and particularly Section 1 of the Act, now Section 10845 amends by implication Article 1, Chapter 72, R. S. Mo., 1939; And that the whole of the Act relating to the Missouri School for the Blind amends by implication the statutes relating to the distribution and apportionment of the public school funds to authorize an appropriation from such funds for the Missouri School for the Blind. Amendments by implication, while not being favored, are recognized. 59 C. J. paragraph 434, page 851. In the early case of State ex rel Maguire v. Draper, 47 Mo. 29, the possibility of amending by implication is recognized by the following language at local citation 32:

> " * * * * * The constitution has gone so far as to prohibit amendments in terms, except in a particular way, but it has not prohibited amendments by implication. It has not said that when an act is passed inconsitent with a preceding one, so that both can not stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz: that when two statutes are

> inconsistent and repugnant, the one last enacted shall be considered in force. This must be so in the nature of things, for the last enactment is the latest expression of the Legislative will, and must prevail, unless it contains some inherent vice that prevents it becoming a statute."

And in the later case of Dorris Motor Car Co. v. Colburn, 270 S. W. 339, we find the following brief statement at local citation 344:

> "If it be conceded that the act contains provisions which modify, amend, or repeal in part the general statute relating to appeals and the statute relating to the consolidation of corporations, still the fact that the title contains nothing to indicate such amendments or repeals does not render the act obnoxious to section 28 of article 4 of the Consituttion; for neither that section, nor section 34 of said article, relating to amendments, has any application to amendments and repeals by implication. State v. Miller, 100 Mo. 439, 13 S. W. 677; State v. Draper, 47 Mo. 29; Geisen v. Heiderich, 104 Ill. 537 Anderson v. Commonwealth, 18 Grat. (Va.) 295; Poe v. State, 85 Tenn. 495, 3 S. W. 658."

On this particular point the later case of Schott v. Auto Ins. Co., 31 S. W. (2d) page 7, l.c. 11, follows and cites with approval the Dorris Case, supra.

From the foregoing it is the opinion of the writer that the Missouri School for the Blind is a part of the system of free public schools and an appropriation for it out of the public school fund is authorized.

Section 1, Article XI, of the Constitution, supra, directs the establishing and maintaining of free public schools. Section 6 of the same Article creates the public school fund, which Section is as follows:

> "The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriations); also, all other grants, gifts or devises that have been, or hereafter may be , made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

And Section 7 of the same Article directs the General Assembly to set apart not less than twenty-five percent (25%) of the revenue of the State, exclusive of the interest and sinking fund, to be applied annually to the support of the schools.

If the foregoing is correct it naturally follows that such funds as would be appropriated could be used for "operation", "additions", "repairs" and "replacements".

As previously pointed out, the law establishing the school for the blind is a special law and the provisions of Article 2, Chapter 72 would not take precedence over any of the provisions of Article 25, Chapter 72, the Law establishing the school for the blind. Where no provision is made in Article 25, the provisions of Article 2 would govern so far as applicable although there are very few provisions in Article 2, which would be applicable and not in conflict with the provisions of Article 25.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

SCHOOL FOR THE BLIND: Age of pupils must conform to limits fixed by Section 1, Article 11 of the Constitution.

August 7, 1942

4-8

FILED
16

Dr. C. C. Chesterson, President
Board of Managers
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Dr. Chesterson:

Under date of June 5, 1942, you wrote this office requesting an opinion as follows:

> "The Board of Managers of the Missouri School for the Blind respectfully requests an opinion upon the following:
>
> "Article 25, Revised Statutes of Missouri, 1939, places the maximum age limit of students at 21. The Constitution places the age limit at 20. Which is to be our guide?"

The Section of Article 25, to which your letter refers is Section 10853, which is as follows:

> "All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

And the Constitutional limitation referred to is found in Section 1, Article XI of the

Constitution. This Section is as follows:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

In a recent opinion from this office, it was held that the Missouri School for the Blind was included within the system of free public schools. The free public school system is authorized by Section 1, Article XI of the Constitution, set out herein, and the legislative acts relating to the free public schools must conform to the constitutional authority.

Section 10853, supra, sets out the age of persons who may attend the school for the blind as follows:

> " * * * all persons under the age of twenty one * * * * "

This is apparently a legislative interpretation of the portion of Section 1, Article XI of the Constitution fixing the age of persons who are entitled to attend the free public schools,

> " * * * all persons in this State between the ages of six and twenty years."

as including those persons who have passed their twentieth birthdays but who have not reached their twenty-first birthdays.

A legislative interpretation is entitled to some weight in considering the meaning of a constitutional or statutory provision but must give

way if found to be in conflict with the true meaning of the provision under consideration.

However, in the Michigan case of Jackson v. Mason, 145 Mich. 338, 108 N. W. 697, there was before the Supreme Court of Michigan an act containing language similar to that in Section 1, Article XI, Missouri Constitution. The Court in construing that act ruled as follows at local citation 698 N. W.:

> "The only question in the case is whether the statute applies to children above the age of 15 years. The circuit court held that it did not, and error is alleged upon such holding. The contention of the relator is that it applies to children over 7 years and under 16 years of age. The words of the statute before us for construction are, 'any child or children between and including the ages of seven and fifteen years.' It is urged that to give any force to the word 'including' the section must be construed to include children during the entire fifteenth year and until they become sixteen years old. We think to do so would be a doubtful construction and the court should hesitate to make an act a crime by such means. The statute is not ambiguous in designating the age limit between the ages of 7 and 15 years. The word 'including' has no force to extend that limit beyond the time specifically designated. A child over 15 years of age is not between the ages of 7 and 15 years, and therefore not within the provisions of the act. An examination of these provisions of the earlier acts shows: that by the act of 1895 compulsory education was enforceable for a period of 8 years as to children not in cities, and as to children in cities for a period of 9 years; that by the act

> of 1901 compulsory education was enforceable for a period of 7 years as to children not in cities, and as to children in cities for a period of 8 years. In each of these acts the children in cities were subject to its provisions one year earlier in life than other children in the state. The evident intent of the Legislature in the portion of the act of 1905 under discussion, establishing the limit between the ages of 7 and 15 years, being a period of 8 years was to fix the same age limit for all of the children in the state, at such a time in their lives, and for such a term between the two extremes of the former acts as experience had shown would be most satisfactory."

In this case the Court had under consideration a penal statute which was required to be strictly construed. The reasoning used, however, seems to be particularly applicable to the question here under consideration; and the Missouri case of Rogers v. McCraw, 67 M.A. 407, the St. Louis Court of Appeals had before it a question involving the proper allegation in a pleading as to the age of a person desiring to attend the free public schools. From this case the following extract is taken at l. c. 408:

> "The action of the court sustaining the demurrer must be affirmed. The school age as fixed by the constitution is between the ages of six and twenty years. (Constitution, article 11, section 1.) Section 6, of the same article declares that the public school fund 'shall be faithfully appropriated for establishing and maintaining the free public schools * * * in this article provided for, and for no other uses or purposes whatsoever.'
>
> "To entitle the plaintiff to maintain the action, she must have been within the school age (as fixed by the consti-

> tution) at the time she was prohibited from attending the school. Roach v. Board of Public Schools, 77 Mo. 484. This is one of the essential facts of her alleged cause of action. Under the code every constitutive fact must be distinctly set forth in the petition; otherwise it is the subject of demurrer. The averment is that at the time the plaintiff was excluded from the school 'she was over six and under twenty-one years of age.' It is manifest that the petition failed to state a cause of action."

Following these two cases it would appear that the language at Section 1, Article XI fixing the age of persons for whom free public schools must be maintained does not apply to persons who have passed their twentieth birthday.

If this is correct, then any statute enacted in accordance with the command contained in this Section could not modify the age requirements.

Section 10853, supra, undertakes to fix the maximum age for admission to the school for the blind as "under the age of twenty-one years".

CONCLUSION

If the Missouri School for the Blind is included in the system of free public schools, Sec-

tion 10853, Article 25, Chapter 72, R. S. Mo., 1939, in setting the maximum age for attendance at the school above twenty exceeded the constitutional maximum which should be followed.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

WOJ:FS

RELIGIOUS CORPORATIONS: Pension Board of the Methodist Episcopal Church is not a religious corporation.

- -

September 9, 1942

9-11

FILED
16

The Reverend William K. Chatten
Minister and Commisrioner
Fairfax, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on whether or not "The Board of Pensions of the Methodist Church, Incorporated in Missouri" is authorized to be incorporated and to function under the Constitution and Laws of the State of Missouri.

Generally it has been the policy of this department to render official opinions only to certain officers and departments named in the statutes, but due to the importance of this question to your denomination and as it is more or less of a public nature we are giving this as an official opinion.

From your letter it appears that you are interested to know whether or not the formation of this corporation is in violation of the provisions of Section 6, Article 2 of the Missouri Constitution. This Section reads as follows:

> "That no religious corporation can be established in this State, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."

A religious corporation is defined in 54 C. J., page 7, Section 3, as follows:

> "A religious corporation is a corporation whose purposes as defined by charter or statute are directly ancillary to divine worship or religious teaching, although the scope and application of the term may be defined and restricted by the terms of the statute in which it is used. A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation, even though engaged in educating youths for the ministry, or placed under the management of a religious body. Nor is a charitable society made into a religious corporation by being controlled by a church. * * * "

From an examination of the records in the Corporation Department of this State we find that your corporation was formed in 1918 under the authority of Article 10, Chapter 34, Revised Statutes of Missouri, 1909, which is contained in the same article and chapter in the 1939 Revised Statutes, and which relates to the incorporation of benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations. It was formed by a pro-forma decree from the Circuit Court of the City of St. Louis. The articles of incorporation were amended in 1940, in the same court, but the amended articles did not change the original purposes for which the corporation was formed.

Article 2 of the Articles of Incorporation of the Board of Pensions of the Methodist Church incorporated in Missouri, provides as follows:

"The object and purpose of this association shall be to provide for the support and maintenance of the super-annuated, worn-out or permanently disabled preachers, their widows and orphans, of the Methodist Church, who otherwise would have no sufficient means for their support and maintenance."

Article 4 of said Articles of Incorporation provides as follows:

"Only such persons shall be eligible to become and continue members of this association who are and shall continue to be members of the Board of Pensions to be selected in such manner as may be authorized or provided by the general conference of the Methodist Episcopal Church."

Article 7 of said Articles of Incorporation provides as follows:

"All funds raised as herein provided and available for appropriation and distribution by this association shall be distributed to super-annuated, worn-out or permanently disabled preachers, their widows and orphans, of the Methodist Episcopal Church or others, according to the rules and regulations provided or enacted, from time to time, by the General Conference of the Methodist Episcopal Church, or as may be provided by the laws of said association."

The character of a corporation is to be

judged by the objects of its creation as expressed by its charter. Wyatt v. Stillman Institute, 303 Mo. 94, 104.

Since a religious corporation can only be formed to hold title to real estate for church edifices, parsonages and cemeteries, then if this corporation is a religious corporation it would be functioning in violation of said Section 8 of Article 2 of the Constitution, supra. However, if it was validly incorporated for benevolent purposes then it is a valid organization. Section 5439 contained in said Article 10, Chapter 33 R. S. Mo. 1939, provides in part as follows:

> "Any association formed for benevolent purposes, including any purely charitable society, hospital, asylum, house of refuge, reformatory and eleemosynary institution, fraternal-beneficial associations, or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public, may become a body corporate and politic under this article; * * * * "

In the case of Helpers of Holy Souls v. Law, 267 Mo. 667, the plaintiff corporation was attacked because it was alleged to be a "religious corporation". The purposes for which this corporation was formed were stated at local citation 673 as follows:

> "'Article (3): The purpose and object of

> said corporation shall be to maintain the establishment now under our charge in said city of St. Louis, known as "The Society of the Helpers of the Holy Souls," and also others that we may hereafter establish in said city or in the State of Missouri, and in connection with same, to gratuitously visit the sick poor daily, irrespective of creed or color, rendering them every assistance in our power by nursing them in their own homes; to organize in our convent, meetings and sewing classes for the working class and poor children and impart religious instruction to same, and assist said classes and children as best we can; to maintain a free circulating library and perform various other gratuitous works of charity and benevolence.'"

The Court, after analyzing and digesting the purposes for which this corporation was formed, held that it was a valid corporation formed for benevolent purposes even though religious instruction was imparted. At local citation 676 the Court, in discussing this contention, said:

> "The second objection of appellant relates to the expression under subdivision 'b' of the powers given to the plaintiff to provide meetings and sewing classes for the working class and poor children and impart religious instruction to same, etc., it being claimed that these underlined words embraced a power which could not have been included in the charter. If, as is inferable from the agreed facts, these underlined terms, considered

> apart, implied the inculcation of a particular faith by teaching its tenets, then they are not an object for which a legal corporation may be exclusively formed under the Constitution of this State, and if the present corporation had been chartered for that purpose alone, or is carried on only for that object, then its franchise would be a nullity or subject to revocation at the suit of the State. (St. Louis v. Shields, 62 Mo. l. c. 252; Haskell v. Worthington, 94 Mo. l.c. 569; Black v. Early, 208 Mo. l.c. 303; Klix v. St. Stanislaus Parish, 137 Mo. App. l.c. 357.) But an inspection and analysis of the powers granted in plaintiff's charter do not sustain the position that it was only created to teach and propogate the Roman Catholic religion, nor that this has been its only employment. The specific powers and active duties prescribed in the charter of plaintiff, as has been shown, provide for the doing daily of many acts of diverse nature in helping the helpless and alleviating the sufferings that come from human poverty and want, purely from motives of charity and the sense of duty on the part of the doers of these acts. It is to such services that the corporation seems to have devoted its practical efforts. * * * * *"

Comparing the purposes for which the Helpers of the Holy Souls was incorporated with the purposes for which the "Board of Pensions of the Methodist Church, Incorporated in Missouri", was incorporated it will be found that the purposes for which the Helpers of the Holy Souls was incorporated were much closer to being a religious corpora-

tion than were the purposes for which the Board of Pensions of the Methodist Church was incorporated.

The fact that the beneficiaries of this pension fund are limited to members of the Methodist Church would not necessarily make it a religious corporation. In the case of State ex rel. Morris, Collector, v. Board of Trustees of Westminister College, 175 Mo. 52, 58, the Court, in discussing this principle, said:

> "It has been held by this court that a corporation might lawfully be formed under our statute regarding fraternal beneficial societies, which limited its membership to members of a particular church, and that such was not a religious corporation. (Franta v. Bohemian R. C. Cent. Union, 164 Mo. 304.) And our St. Louis Court of Appeals has held that a colonization society limiting its membership to members of a particular church was not a religious corporation. (Colonization Society v. Hennessy, 11 Mo. App. 555.) In that case the court, per THOMPSON, J., said: 'Is this then a religious corporation? We do not think it is. . . It is apparent from these provisions that the primary object of this association is colonization, and not the propagation of religion. It is true that the scheme of colonization is confined to persons of a particular religious faith; but there is certainly nothing in the section of the Bill of Rights above quoted which prohibits persons of a particular religious faith from settling together so that they may be able to have a church in which to exercise the offices of their faith and a

school in which to educate their children in the faith of their fathers, if they shall choose to do so.'"

The above authorities and facts clearly convince us that the incorporation of the Board of Pensions of the Methodist Episcopal Church, Incorporated in Missouri, and the purposes for which this corporation was formed do not violate the provisions of the State Constitution nor any of the laws of this State.

CONCLUSION

It is, therefore, the opinion of this department that the above mentioned pension fund corporation does not come within the restrictions mentioned in the Constitution of Missouri relating to religious corporations, and that it may legally function as such corporation in this State.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

PROSECUTING ATTORNEY: Term of office continues until successor has qualified.

- -

December 12, 1942

12-15

FILED
16

Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Chitwood:

This will acknowledge receipt of your letter of December 9, 1942, requesting an opinion as follows:

"Two years ago I was elected prosecuting attorney of Reynolds County, Missouri. I served in this office until September 1, 1941, when I resigned to take a position with the U. S. Engineers in connection with the clearing of certain land titles in the Clearwater Flood Control and Reservoir Area. Because of the war and the government's policy of reducing personnell in all activities not directly related to the war effort, I was given an honorable discharge July 1, 1942.

"About October 1, 1942, I was appointed by Govenor Donnell to fill out my own unexpired term as prosecuting attorney of Reynolds County, made vacant by the resignation of my father who was in very poor health. I have been serving in said office until the present time.

"Mr. John A. Johnson, was elected to this office at the November general election 1942, although he was at that time and now is in the United States Army, presumably in Australia. It is very evident that Mr. Johnson will not be present to take over the duties of this office on January 1, 1943.

"In view of these facts and also similar recent cases (although the facts are not the same as in the instant case) I was wondering if my commission, which is in the regular form would be sufficient to entitle me to proceed with the duties of the office of prosecuting attorney of Reynolds County, after the 1st of January 1943; and if so, whether or not I would be entitled to exercise those privileges until Mr. Johnson's return from the army.

"Your opinion in this matter is requested at the earliest possible date. I have no intention of trying to usurp an office to which I am not legally entitled, and I am sure that the Reynolds County Court would not want to issue county salary warrants to me unless I was legally entitled to them."

Section 12820, Article 1, Chapter 85, R. S. Mo., 1939, applies to all terms of office and is as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Section 12934 makes provision for the election of prosecuting attorneys, and the filling of a vacancy in the office of prosecuting attorney is provided for by Section 12989, which is here quoted:

"At the general election to be held in this state in the year A. D. 1880, and every two

> years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

The Constitution of Missouri, Section 11, Article V, relates to all vacancies in office:

> "When any office shall become vacant, the Govenor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

and Section 11509 applies to filling vacancies in office which have not been otherwise provided for. This general section and Section 12989, supra, follow closely the provisions of Section 11, Article V of the Constitution, and in the case of State ex inf. Hadley v. Herring, 208 Mo. 708, this constitutional provision is discussed at local citation 728:

> "The framers of our Constitution when they drew section 11, article 5 thereof, were considering vacancies in public offices; they foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for

these vacancies as far as possible in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law. When this vacancy occurred in the office of collector of the revenue in Chariton county, the condition existed which authorized the Governor to fill it by appointment. Whether we look to section 11 of article 5 of the Constitution or to section 7028, Revised Statutes 1899, for authority to fill the vacancy, we find that it is vested in the Governor. The obvious purpose in conferring this authority upon the Governor was to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. The language of the Constitution is: 'He shall appoint a person to fill such vacancy.' Giving these words their natural significance, and it has often been held that the word, 'vacancy' has no technical meaning, but must be understood with reference to the context in which it is found, they import that the appointee of the Governor would be entitled to hold the office until the end of the term in which the vacancy occurs. And when the additional words of the section, to-wit: 'Shall continue in office until a successor shall have been duly elected or appointed and qualified according to law,' are considered, we think the obvious purpose was to extend the appointee's tenure after the end of the term in which the vacancy occurred until everything has been done which is required by law to give title to the office to another person. * * * * * "

The case of State ex inf. Barrett v. Schweitzer, 258 S. W. 435, was a case quite similar to the case stated

in your letter. The following quotation is taken from this case at local citation 449:

> "Reading together sections 13823, 782, 9168 and 4786, and giving full effect to each, we think the logical conclusion is that, when a vacancy occurs in the office of prosecuting attorney for the St. Louis court of criminal correction, the Governor shall appoint some competent person to fill the same until the next regular election for said office and until his successor shall be elected and shall qualify, but that the successor so elected cannot qualify for a term beginning earlier than January 1st following such election. Where such vacancy occurs before a general election, not the regular election to fill the office, the effect of section 4786 would necessarily have to be considered. But that question is not in this case. The foregoing is the only conclusion which can be reached by giving effect to all of said sections of the statute without running counter to express provisions contained in one or more of them.
>
> "It is our conclusion that no short or unexpired term existed between the November, 1922, election and January 1st following; that relator was appointed for the term expiring December 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

The sections of the statutes referred to in the above quotation are now respectively Sections 2243, 12989, 12820 and 11509 R. S. Mo., 1939. Section 2243, supra, has no bearing on your question as it applies to officers of the city of St. Louis, but the others are

pertinent.

CONCLUSION

It is apparent from the foregoing that the prosecuting attorney whether elected or appointed will serve until his successor has been chosen and has qualified.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

TAXATION:
EXEMPTIONS:

In re exemptions of American Royal Buildings, American Royal Annex and American Royal Parking Lot.

April 30, 1942

5-11

FILE 17

Mr. George R. Clark
County Assessor
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the question of whether or not the real estate upon which the American Royal Building, American Royal Annex and the American Royal Parking Lot are situated in Jackson County, Missouri are exempt from taxes.

In the statement of facts which are included with your request, it appears that a corporation titled "American Royal Association" is thereby formed under a Pro Forma Decree. The purposes of this association are set out in paragraph (4) of the Articles of Agreement, which are as follows:

> "This association is formed for the following purposes: To foster, encourage and promote progress and improvement in the science of agriculture and in the breeding and raising of horses, cattle, swine, live stock, poultry and other animals; to foster, encourage, develop, promote and disseminate education and information with reference to agriculture and the breeding and raising of horses, cattle, swine, live stock, poultry and other animals; to foster, encourage and promote a greater interest in the breeding and raising of pure-bred animals, live stock and poultry; in accordance with the foregoing purposes and for the furthering thereof, to promote, foster, encourage, manage, conduct and operate horse, cattle, swine, animal, live stock and poultry shows; and to do such other things as may be necessary, suitable

> or proper for the accomplishment of any of the foregoing general purposes, and for the attainment of any of the objects, or the furtherance of any of the purposes hereinbefore set forth either alone or in connection with other corporations, firms or individuals and either as principals or agents, and to do every act or acts, thing or things incidental or appurtenant to or growing out of or connected with any of the aforesaid objects, purposes or powers or any of them, whether general or specific."

The owners of this property claim exemptions by virtue of the provisions of Section 6 of Article 10 of the Constitution of Missouri, which reads as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Also by virtue of the provisions of Section 10938 R. S. Mo., 1939, which is as follows:

> "The real estate and personal property which may be used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state, shall be exempted from taxation for state, county, city or other municipal purposes."

In the case of Fitterer v. Crawford, Collector, 157 Mo. 51, 58, the court in stating the rule to be applied in construing the exemption section, said:

> "In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt."

This rule, down to the present time, has been constantly applied by the courts in construing exemption sections.

The portion of the exemption section, which is applicable to your question, was before the Supreme Court in Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425. In that case the court went into the history and reason of this portion of the exemption section. In that case, the court at l. c. 434, said:

> "Is the plaintiff an agricultural or horticultural society within the meaning of this constitutional provision, and was this land used exclusively for such a society? The contention of plaintiff is that a business corporation organized as it was under article 8 of chapter 21, Revised Statutes 1879, section 929, for the purpose, among others, of encouraging agricultural and horticultural pursuits 'and to establish and maintain a race course and promote

athletic and other sports and amusements,' is an agricultural and horticultural society within the meaning of the Constitution.

"In the ascertainment of the meaning of any law, fundamental or statutory, it is legitimate and even necessary to trace the history of the terms used therein in order to gather their significance. Prior to the adoption of the Constitution of 1875 the Legislature was forbidden to pass any law exempting any property, real or personal, from taxation, except such as should 'be used exclusively for public schools, and such as belonged to the United States, to this State, to counties, or to municipal corporations within this State.' (Constitution of 1865, art. 11, sec. 16.)

"As early as 1853 the General Assembly of this State incorporated the Missouri State Agricultural Society. (Act February 24, 1853.) By an act of the Legislature, approved September 13, 1855, that law was repealed, and a new act adopted dividing the State into agricultural districts, and establishing a society for each, and designating the counties that should constitute such district agricultural society. Their powers were defined by the act.

"Later in 1863 the Missouri State Board of Agriculture was created a body corporate and it was made the duty of all agricultural and horticultural societies to make reports to such State board.

"The scheme of promoting county agricultural societies will be found in the General Statutes of 1865, pp. 321 to 324.

These societies were intended to promote agriculture, manufactures and raising stock.

"The county courts were authorized to vote money for premiums and they were adjuncts of the State Board of Agriculture and the presidents of said county societies were ex-officio members of the State Board of Agriculture, and they were required to make reports of their transactions to the State board.

"These county agricultural and horticultural societies were thus provided for in the general statutes of this State when the constitutional convention of 1875 met and organized, and these statutes were continued in our general revision in 1889 (R. S. 1889, pp. 178 to 183, inclusive) and were in full force and effect when the plaintiff corporation was organized.

"Throughout the statutory history of these associations they are styled 'Agricultural' or 'Agricultural and Horticultural Societies.' Recurring now to the act of the Legislature of 1883 (Laws 1883, p. 140; R.S. 1889, sec. 7505) under which this exemption is claimed and without which there could be no exemption, because the proviso of the Constitution is that it could only be granted by a general law, we find that the exemption is granted to agricultural or horticultural societies heretofore organized or which may hereafter be organized in this State.

"These agricultural societies, both State and county, had been favored objects of the State's bounty for many years. Every re-

> vision, commencing with 1855 down to the present, contains the law authorizing their formation and government. The purpose of their creation was not private gain but the encouragement of agriculture and horticulture."

The court then refers to Section 4060 R. S. Mo., 1879, which is now Section 10939 R. S. Mo., 1939. The court also said, in the Exposition Driving Park case, supra, that the societies which were exempted under the foregoing section, were not considered corporations and were never classed as corporations. The court in that case, finally held that the exemption section did not apply to the association which sought the exemptions therein and said that "the nature of the exemption which plaintiff seeks is such as to forbid an implied exemption."

The letter written to you by Mr. Borders, Attorney for the petitioner, indicates that if the corporation is formed for agricultural or horticultural society purposes, that that is determinative of the question of whether or not the corporation is exempted. In connection with this, however, we refer to the case of St. Louis Young Men's Christian Association v. Gehner, 47 S. W. (2) 776, paragraphs 2 and 3, wherein the court said:

> "Plaintiff was organized by pro forma decree of the circuit court under the statutes governing benevolent, religious, scientific, fraternal, beneficial, educational, and miscellaneous associations. Its purpose is declared in its charter to be 'the improvement of the spiritual, mental, social and physical condition of young men'. It is described by its general secretary as follows: 'Q. Now, isn't it a fact, Mr. Haworth, that your organization could be more accurately described as a character-building organization than as a charitable organization? A. I think that is correct. It could be described

as a character-building and educational-building and religious organization.'

"Even so, the purpose and object of the organization, standing alone, is not determinative of the question."

We do not think that the suggested plan of operation by the proposed corporation and the facts submitted, would be sufficient to authorize the taxing officials to hold that this property is exempt beyond a reasonable doubt.

CONCLUSION

It is, therefore, the opinion of this department, that the lands upon which are located the American Royal Building, the American Royal Annex and the American Royal Parking Lot, upon the facts submitted, should not be exempted from taxation.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

PROBATE JUDGE:
CLERK OF PROBATE COURT:

Amount, approval and place of signed bond of ex officio clerk.

- -

December 28, 1942

12-30

FILED
17

Mr. Leo J. Clavin
Clerk Circuit Court
Chariton County
Keytesville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 5, requesting our opinion concerning the bond of a Probate Judge.

Section 2440 R. S. Mo. 1939 covers completely, this subject. That section is as follows:

"The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded, the same as is required of clerks filling said office by appointment: Provided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge. Said clerk shall take the oath required of other clerks of court in this state, and, before entering upon the duties of his office, shall enter into a bond to the state of Missouri, with two or more good and sufficient sureties, to be approved by the judge, in the sum of one thousand dollars, conditioned that he will faithfully discharge all the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county where such clerk of probate is to serve, upon which bond, when breach thereof is made, suit may be brought as upon other penal bonds. Said clerk, when so appointed and qualified, may discharge all the duties of clerk, and shall have power and authority to do

> and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter. All probate clerks and ex officio probate clerks now in office shall continue in office and discharge all the duties prescribed by law until the expiration of the term for which they were respectively elected, and during this term shall receive the same compensation now provided by law. Every clerk or ex officio clerk of probate failing or refusing in his receipts for fees to give an itemized account of each charge, with date, together under appropriate headings the number of section and chapter of statute authorizing such charge to be made, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than one hundred nor more than five hundred dollars."

Under this section, it is clear that when a Probate Judge acts ex officio as his own clerk, he is to give a bond in the sum of one thousand dollars to be approved by the judges of the county court and to be filed and recorded in the office of the county clerk of the county. This section applies to the probate courts in all counties and is applicable to Chariton County.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:AW

HEDGE FENCES - Form of Petition; Form of Instruction and Form of Verdict, to be used in a proceeding under Section 8578 R. S. Missouri, 1939.

January 3, 1942

13

FILE

Hon. Clyde E. Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 11, 1941, which reads as follows:

"I would like the aid of your office in the following matter:

"Barton County is a county of some 14,000 inhabitants operating under township organization.

"Information has reached me that at least two of the township boards have decided to enforce Sec. 8578 R. S. Mo. 1939 regarding regulation of hedge fences, one township board having sent a notice to all the property owners whose hedge fences have been untrimmed this year, a copy of which is hereto attached. The other township, I understand has had the county highway engineer send the owners notice.

"I have been unable to find anything concerning this section as to the procedure, whether or not the section has been upheld in the higher courts and the form of petition necessary if any action is taken by me. I would like the opinion of your office as to the probability of enforcing this sec-

tion and if so, whether or not there are any necessary steps to be taken by the township boards or county highway engineer inasmuch as neither of these townships have a road overseer, and a citation of any Missouri cases which would throw any light on the matter.

"Also please send me a form of petition to be used and instructions as to the procedure in the same. From all information I can gather this is the first time there was ever any attempt to enforce this section in this county."

We are enclosing a copy of an opinion rendered by W. J. Burke, of this office, on July 19, 1939, to Mr. Donald B. Dawson, Prosecuting Attorney of Bates County, Butler, Missouri, wherein it was held that it was not necessary to notify landowners to cut hedge fences before beginning civil action.

The following are some of the cases construing Section 8578 R. S. Missouri, 1939:

Moore v. Hawk, 57 Mo. App. 495 -(hedge case);
State v. Feitz, 154 Mo. App. 578 -(twp. org.);
Board ex rel v. McPhearson, 172 Mo. App. 369;
State of Missouri v. Auffart, 192 Mo. App. 133.

We are also attaching hereto a suggested form of petition, instruction and verdict to be used in a proceeding of this kind.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

STATUTES:
COOPERATIVE COMPANIES: Section 14417 R. S. Missouri, 1939, is a special statutes in character, and having been enacted subsequently will prevail over Section 8318 R. S. Mo., '39.

January 24, 1942

1-26

FILE

Hon. Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

We are in receipt of your request for an official opinion, which request is dated January 19, 1942, and reads as follows:

> "Several cooperative companies in our county operating under the provisions of Section 14417 of the Revised Statutes of 1939 are making certain rebates or dividends to customers based on the amount of goods purchased during the preceding year.
>
> "Several persons in competitive business with these cooperative companies are complaining to me that by giving these rebates or dividends, that the cooperative companies are violating the provisions of Section 8318 of the 1939 Revised Statutes of Mo. Will you please give me an opinion as to whether or not cooperative companies giving rebates or dividends based on the amount of purchases are violating the provisions of Section 8318 of the Revised Statutes of 1939."

At the outset we assume the opinion request refers to cooperative companies organized under Article 28, Chapter 102, R. S. Missouri, 1939. From a reading of the request, we note the following statement:

> "are making certain rebates or dividends to customers based on the amount of goods purchased during the preceding year."

In this connection we quote a portion of Section 14417, R. S. Missouri, 1939, as follows:

> "The shareholders of such an association at any general or special meeting, shall apportion the earnings by first setting aside not less than ten (10%) per cent of the net profits for a reserve fund until an amount has accumulated in the said reserve fund equal to fifty (50%) per cent of the paid-up capital stock, and then shall be declared a dividend upon paid-up capital stock, to be determined by said shareholders, which dividends shall not exceed ten (10%) per cent and the remainder of the said net profits shall then be divided by a uniform dividend, determined and based upon the amount of sale or purchases or upon both the sales and purchases of those who have done business with such association. In case the association is both a selling and productive company, such last mentioned dividends may be determined by and based upon both raw material delivered and goods purchased by patrons. The net profits of said association shall be distributed at

> least once in each period of twelve (12) months at such time and in such manner as may be provided by its by-laws. * * * "

It will be noted from reading the above quoted portions of the section, that it is provided:

> " * * and the remainder of the said net profits shall then be divided by a uniform dividend, determined and based upon the amount of sales or purchases or upon both the sales and purchases of those who have done business with such association. * * * "

The opinion request does not set forth any facts which would show specifically how the cooperative companies are making rebates or giving dividends contrary to the provision of the statute above quoted. Therefore, we are forced to confine this opinion to the interpretation and construction to be placed upon Section 14417, supra, as it may or may not apply to Section 8318 R. S. Missouri, 1939.

In tracing the history of Section 14417, supra, we find that Article 28, of which Section 14417, supra, is a part, was enacted by the legislature in 1919. (L. 1919, p. 116). Later, in 1929, the legislature repealed Section 10257, Chapter 90, Article 10, R. S. Missouri, 1919, and enacted in lieu thereof two new sections to be known as Section 10250 and 10257. The latter section is now what is known as Section 14417. (L. 1929, p. 334). Now turning to the history of Section 8318 we find that this section was in substance on the statute books prior to 1913. However, the legislature in 1913, repealed Section 10314, Article 2, Chapter 98, Laws of 1909, and re-enacted a new section designated as 10314 which section is now Section 8318, and which provides as follows:

"Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Missouri and engaged in the production, manufacture, purchase, sale or distribution of any commodity or article of commerce in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer of such commodity, or to prevent the competition of any person, who in good faith intends and attempts to become such dealer, shall discriminate between different sections, localities, communities, cities or towns of this state, by purchasing such commodity or article at a higher price or rate in one section, locality, community, city or town, than is paid for the same commodity or article by the said person, firm, company, association or corporation, in another section, locality, community, city or town; or by selling such commodity or article in one section, locality, community, city or town at a lower price or rate than such commodity or article is sold for by said person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture or storage, or from the point of production, manufacture or storage to the place of sale or distribution, or by giving or paying or promising to give or pay a secret or private rebate or bonus in connection with the purchase, sale or distribution of any commodity or article or commerce, shall be deemed guilty of unfair discrimination which is hereby prohibited and declared unlawful."

From the history of these sections we see that Section 14417, supra, is a later section than Section 8318, supra. It will be further observed that Article 28, Chapter 102, R. S. Missouri, 1939, of which Section 14417, supra, is a part, was enacted for a specific purpose, that is, to provide a legislative scheme for the organization and operation of cooperative companies.

In the case of State v. Gehner,280 S. W. 416, l.c. 418, the court said:

> "'Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to or qualification of the prior general one, and, where the general act is later, the special act will be construed as remaining an exception to its terms unless it is repealed in express words or by necessary implication.' 36 Cyc. p. 1151.
>
> "The foregoing rule has frequently received the approval of this court. It is succinctly stated in Ackerman v. Green, 100 S. W. 34, 201 Mo. loc. cit. 244, in these words:
>
> "'Where a statute in relation to special proceedings is complete in itself and covers the entire subject, it is exclusive, and the proceedings under it are governed solely by its provision' - citing cases.
> * * * "

See State v. Brown, 68 S. W. (2d) 55, l. c. 59.

For a collection of cases holding the same as the portions of the cases we have set forth see State v. Max Richman, 148 S. W. (2d) 796, l. c. pars. 2,3.

From the reading of the cases, supra, and from the history of each of the sections, we must conclude that Section 14417, supra, is a special statute and having been passed at a later date than Section 8318, supra, would have precedence over Section 8318 and the cooperative companies complying with the conditions of Section 14417 would not be amenable to Section 8318, supra.

We also wish to call attention to a portion of the opinion in the case of State v. Brown, 68 S. W. (2d) 55, l. c. pars. 9-12, where the court said:

> "Nor will it do to say, as respondent suggests, that section 5613 'is discriminatory and does violence to the policy of equality.' In the absence of constitutional inhibition, and none has been called to our attention, the General Assembly has power to classify corporations and deal with them accordingly, as long as such classification is reasonable and there is no discrimination between those falling within the same class. No such objections are here urged, and absent such, a law is neither local nor special within the meaning of the inhibitions imposed by section 53, article 4, of the Constitution of Missouri. City of Springfield v. Smith, 322 Mo. 1129, 19 S. W. (2d) 1. In respects not properly challenged, the constitutionality of a statute is presumed. The public policy of a state must be determined by its Constitution, laws, and judicial decisions. In re Rahn, 316 Mo. 492, 500, 291 S. W. (2d) 120, 51 A. L. R. 877. * * * "

On the authority of the statement of the court, supra, we must conclude that Section 14417, supra, is constitutional and further that it is not discriminatory.

CONCLUSION

We are of the opinion that any cooperative company under the provisions of Article 28, Chapter 102, R. S. Missouri, 1939, is in no wise amenable to Section 8318, R. S. Missouri, 1939, if the provisions of Article 18, supra, are followed by the cooperative company.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

ADOPTION LAWS: Discussion of Section 9611B, enacted by 61st General Assembly.

February 16, 1942

2-73

Honorable Wallace V. Coleman
Secretary and Treasurer
Circuit Clerks Association
Hillsboro, Missouri

FILE
18

Dear Sir:

Under date of December 15, 1942, you wrote this office requesting an opinion, as follows:

> "At a recent meeting of the Circuit Clerks Association of Missouri, the Clerks went on record to ask your office for a legal opinion relative to the operation of Section 9611 B of the Laws of 1941, as this is a troublesome section, especially in rural counties where the local attorneys and abstractors are allowed free access to the files and records in the Circuit Clerk's office.
>
> "I assure you that an opinion from you will greatly help the Clerks to carry out the intentions of the legislators regarding this new law."

Section 9611B, Laws of Missouri, 1941, p. 317, referred to in your letter, was Committee Substitute for House Bill No. 273, and is as follows:

> "The files and records of the court in adoption proceedings shall not be open to inspection, or copy, by any person or persons, except upon an order of the court expressly permitting the same."

It will be noted there is no punishment provided for failure to comply with the terms of the Act.

Before proceeding to discuss this Act, it is deemed advisable to call attention to the rule that Acts of the Legislature are presumed to be constitutional, and in this connection the following brief quotation from the case of City of Springfield v. Smith, 19 S. W. (2d) 1, l. c. 3, is inserted:

> "'Both upon principle and authority the Acts of the Legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the Constitutionality of the Act.' Hamman v. Cen. Coal & Coke Co., 156 Mo. 232, loc. cit. 242, 56 S. W. 1091, 1093; Miners' Bank v. Clark, 252 Mo. 20, loc. cit. 30, 158 S. W. 597."

Keeping in mind the foregoing rule, attention is called to the following provisions of the State and Federal Constitutions.

Section 44, Article VI, of the Constitution of Missouri is as follows:

> "All judicial decisions in this State shall be free for publication by any person."

This section of the State Constitution has not been construed and applied by the appellate courts of this state, and we find no other state with an identical constitutional provision. Several states have language similar to the above

language, but in some of them the provision is expressly made applicable to the appellate courts only. In other states the laws enacted by the Legislature and the decisions of the courts are made free for publication. We fail to find where the application of any of these provisions has been before an appellate court.

Adoption proceedings are in the juvenile division of the circuit court. Section 9608, Article 1, Chapter 56, R. S. Mo. 1939. And the circuit court is a court of record, and the decision in an adoption case is part of the record. If the above Section 44, Article VI, of the Missouri Constitution applies to all courts, and not to appellate courts only, there might appear to be a conflict of the Act with Section 44, supra, in so far as it would prevent the free publication of the decision of the court in an adoption proceeding by any person, for if the decision could not be seen it could not be published. It might be urged that this section means no charge can be made by the court for permission to publish its decisions, in which event, under Section 9611B, supra, the decision would be free for publication by any person to whom the court should give permission. If Section 44, supra, applies only to the decisions of the appellate courts, as similar sections do in most states, then there could not possibly be a conflict between the Act and the Constitution.

Attention is also called to Subsections 26 and 32 of Section 53, Article IV, of the Constitution of Missouri, which subsections are as follows:

> "The General Assembly shall not pass any local or special law:
>
> * * * * * * *
>
> "(26) Granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track:
>
> * * * * * * *

> "(32) Legalizing the unauthorized or invalid acts of any officer or agent of the State, or of any county or municipality thereof. In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject."

It might be possible to raise some question as to the validity of Section 9611B, supra, when considered in connection with these paragraphs.

Attention is also called to Article III of the Constitution of Missouri, which is as follows:

> "The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

A question might be raised as to whether or not the enactment of Section 9611B, supra, was an unauthorized attempt of the legislative branch of the government to interfere with the inherent right of the courts to control their records.

And attention is further directed to the Fourteenth Amendment to the Constitution of the United States, which is herein set out:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Only one case in Missouri has been found where a statute in any respect similar to Section 9611B, supra, was before the courts. In the case of Ex Parte French, 285 S. W. 513, the Supreme Court had before it Section 11679, R. S. Mo. 1919, as amended by the Laws of 1923, page 222. This section was as follows:

> "The bank commissioner, his deputies, clerk, stenographer, each examiner and every employee shall be bound, under oath, to keep secret all facts and information obtained in the course of all examinations, except so far as the public duty of such officer requires him to report upon or take special action regarding the affairs of any bank, private banker, savings and safe deposit company or trust company, and except when he is called on as a witness in any criminal proceedings or criminal trial in a court of justice. If any bank commissioner, deputy, clerk, stenographer or examiner shall disclose the name of any debtor of any bank, private banker, savings and safe deposit company or trust company, or anything relative to the private accounts, affairs or transactions of such bank, private banker, savings and safe deposit company or trust com-

pany, or shall disclose any facts obtained in the course of his or their examination of any such bank, private banker, savings and safe deposit company or trust company, except as herein provided, he shall be deemed guilty of a misdemeanor, and upon conviction thereof in a court of competent jurisdiction, be subject to a forfeiture of his office and the payment of a fine of not less than one hundred dollars, nor more than one thousand dollars, provided, however, that the bank commissioner, his deputies, and each examiner may furnish to the federal reserve board, the federal reserve banks or to examiners duly appointed by the federal reserve board, or the federal reserve banks, the Comptroller of the Currency of the United States, or to examiners duly appointed by him, the clearing houses in the state of Missouri and examiners duly appointed by them, copies of all examinations made, and may disclose to such federal reserve board, federal reserve banks, comptroller of the currency, clearing houses, or examiners, any information with reference to the condition of affairs of state banks or trust companies organized under the laws of this state. And the bank commissioner, his deputies and examiners shall, with respect to all banks, trust companies and savings companies in which state funds are on deposit, furnish to the state treasurer access to reports of all examinations made, of such institutions, and shall, upon request from the state treasurer, disclose to him any information or facts with reference to the condition of the affairs of any such bank, trust company or savings company, obtained in the course of any such examination, which

> the state treasurer may desire to know; and the state treasurer, his deputies, clerks and stenographers shall be under the same obligation to keep secret all facts and information thus obtained as is by this section imposed upon the bank commissioner, his deputies, clerks, stenographers and examiners, and for a violation of such duty they shall be deemed guilty of a misdemeanor and subject to the penalty herein provided."

Section 9611B prohibits anyone from seeing the records in adoption cases except by order of the court. Section 11679 prohibited the State Finance Commissioner from divulging information in his office except to certain designated persons.

The court held Section 11679, R. S. Mo. 1919, void in the following language, l. c. 514:

> "The section permits the bank commissioner, his deputies and examiners, to furnish information, which they obtain from an examination of a bank, to the federal reserve board, federal reserve banks, the United States Comptroller of the Currency, or their examiners; to clearing houses of the state of Missouri, and their examiners. These are excepted from the restriction which binds him, under penalty, as for a misdemeanor, to reveal to any person the result of such examinations. This feature of the statute is clearly contrary to the equal protection clause of the federal Constitution, and subdivision 26, section 53, of article 4 of the state Constitution. In re Flukes, 157 Mo. 125, loc. cit. 132, 57 S. W. 545, 51 L. R. A. 176, 80 Am. St. Rep. 619; State v. Baskowitz, 250 Mo. loc. cit. 107, 156 S. W. 945, Ann. Cas. 1915A, 477; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State ex rel. v. C. B. & Q.

> R. R. Co., 246 Mo. 512, 152 S. W. 28. The rule stated by Cooley in his Constitutional Limitations, and quoted several times by this court, governing this principle, is as follows:
>
> "'A statute would not be constitutional * * * which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.' 157 Mo. 132, 57 S. W. 547."

While it is pointed out certain questions might be raised concerning the validity of the Act, unless some question is raised before a court of competent jurisdiction and the Act shown to be unconstitutional beyond a reasonable doubt, it is a valid Act under the rule that Acts of the Legislature are presumed to be constitutional, and should be obeyed.

In connection with this discussion, it is respectfully suggested that the application of the Act be taken up with the Judge of your Circuit Court by you.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

TAXATION:
ROAD DISTRICT:
SPECIAL BENEFIT DISTRICTS:

Commissioners may not levy tax for construction and maintenance of roads and bridges.

April 7, 1942

420

FILE
18

Mr. Loren W. Coe
County Clerk
Atchison County
Rock Port, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the following question:

> "On January 16th., 1942, the Board of Commissioners of the Westboro Special Road District filed with me, as County Clerk, a written statement that they had levied a fifteen (15¢) cent special tax on each one hundred dollar assessed valuation in the district, said levy to be used only for the construction and maintenance of roads and bridges throughout the district, they base their authority for this levy on Section 8716 R. S. Mo., 1939.
>
> "Please give me your opinion on this levy, whether or not it is within direct conflict with the provisions of Section 23, Article 10 of Missouri Constitution."

You do not indicate in your request whether or not the Westboro Special Road District was organized under the provisions of what is now Article 11 of Chapter 46, R. S. Mo., 1939. However, from your inquiry, we assume it was organized under that chapter. Section 8716, to which you refer, in so far as it applies to your question is as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the

> district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, * * * * * * * * and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected.* * * *"

It will be noted that this section is contained in Article 11, Chapter 46 R. S. Mo., 1939, which applies to Special Road Districts under benefit assessment plan. From a reading of this Article, it will be seen that these districts are composed of lands, the owners of which are willing to permit special assessments to be levied against such lands for the improvement of roads in the district. These assessments and special benefit taxes are levied and assessed on the same theory that taxes for street improvements, drainage and levy district taxes are levied and assessed. In other words, the property benefited by such improvements are taxed in proportion to the benefits derived therefrom.

In speaking of the nature of such taxes and comparing them to general taxes for public purposes, the court in the case of Ranney v. City of Cape Girardeau, 255 Mo. 514, 517 said:

> "The whole of article 10, of which section 3 forms a part, is <u>in pari materia</u> and relates to revenue and taxation. But, unfortunately for the constitutional point raised by respondent, it has been always ruled that under our former constitutions special benefit assessments for local improvements do not come within the purview of constitutional provisions relating to

> levying taxes in proportion to the value of the property (now section 4, article 10, Constitution) and it has always been ruled that under our present Constitution the uniformity therein prescribed (section 3, supra, a new provision) has no reference whatever to special assessments for local improvements nor have any of the other sections of article 10, supra.
>
> "The accepted doctrine is that special assessments for local improvements, while, in a broad sense, referable to the taxing power, are not taxes for public purposes or taxes at all within the purview and the sense of the constitutional provision invoked or within the sense and purview of other sections of the article on revenue and taxation."

This article which pertains to benefit road districts was before the Supreme Court for consideration in 1913 in the case of Embree v. Road District 257 Mo. 593, 610, wherein the court in speaking of the nature and validity of the special road tax said:

> "This court from its earliest history down to this time, has uniformly held that special taxes or benefits, such as were levied against appellants' property, under said article 7, are not public taxes within the meaning of the Constitution authorizing the levy and collection of taxes for public or governmental purposes, but are special taxes assessed against the property for the payment of the improvements made upon the highways in the vicinity of the property, which in legal contemplation adds to the value of the property as much or more than the amount of the taxes imposed."

At l. c. 617 the court said:

> "Counsel for appellants also insist that

> said article 7 is unconstitutional, null and void because it authorizes the road district to create a bonded indebtedness in excess of the constitutional limitation. The constitutional provision referred to is section 12 of article 10; * * * *"

Again at l. c. 618 the court further said:

> "The assessments authorized by said article 7 of the statute are for the payment of local improvements denominated special benefits to the land against which the assessments are made; and for that reason this court has uniformly held that such assessments do not constitute an indebtedness within the meaning of the constitutional provision just quoted. * * * * *"

From a reading of this opinion, it will be seen that the obligation incurred by the districts and which were under consideration at that time were not obligations of the districts but were obligations against the property benefited thereby. This case was before the court prior to the enactment of that portion of Section 8716, which is under consideration here. The portion of Section 8716, which is under consideration on this question was first enacted in 1913; Laws of Missouri 1913, page 682, section 10617, is as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district; * * * * * * *."

Since Section 10617, was enacted after the rendition in the Embree case, supra, then nothing the court said there pertaining to the constitutionality of the law as it then existed, could apply to the amendment. Section 8716, was again amended in 1927, but the amendment did not affect the clause of the statute here under consideration. In 1920, Section 23 of Article 10 of

the Constitution was adopted. This section is as follows:

> "In addition to the taxes now authorized to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

By comparing said section 23 of article 10 of the Constitution with said section 8716, it will be seen that there is a conflict in them as to whether or not the county court under said section 23, after having been authorized by the voters may levy a tax for the special road district, or whether the commissioners under section 8716, may levy a tax for the district. There is also a question of whether or not a tax may be levied both, by the county court when authorized, as aforesaid, and by the commissioners.

The question resolves into this: Have the people by the amendment of Section 23, Article 10 of the Constitution, granted authority to the county court, when authorized by the

vote of the people, to make the levy and thereby withheld from the Legislature the authority to enact legislation such as is included in the foregoing provision of Section 8716, which authorizes the commissioners of such district to make a general levy for road purposes? It will also be noted that said Section 23 limits the amount of the levy which may be made by the county court, while said Section 8716, does not limit the commissioners to any amount, if they are authorized to make the levy.

Said Section 8716, as stated above was before the Legislature in 1927, and the argument might be advanced that this was a legislative construction of the constitutional amendment to the effect that said Section 23 of the constitution does not prohibit the Legislature from enacting legislation authorizing commissioners to make a levy. However, we do not think this rule would apply here because the purpose for which this section was before the Legislature in 1927, was not one which pertained to this particular provision of the act. Therefore, we do not think that it should be held as a legislative construction of the portion of said Section 8716, which permits the commissioners to make the levy.

This section and this question were before our Supreme Court in State ex rel. v. Southwestern Bell Telephone Company, 139 S. W. 500 (1940), but the court disposed of the case without passing on this question.

A rule of construction which should be applied in all cases of statutory and constitutional construction, is stated in State v. Shelby 64 S. W. (2d) 269, 271, the court said:

> "* * * The state Constitution is not a grant of power, but rather a limitation on the power of the Legislature. The power to make laws is lodged in the Legislature, subject only to the restrictions contained in the state and national Constitutions. Ludlow-Saylor Wire Co. v. Woolbrinck, 275 Mo. 339, 205 S. W. 196; Pitman v. Drabelle, 267 Mo. 78, 84, 183 S. W. 1055, 1056, Ann. Cas. 1918D, 601. The Legislature having plenary power to enact laws, absent constitutional restrictions, such restrictions must be expressed in the Constitution or clearly implied by its provisions.

> McGrew v. Mo. Pac. Ry. Co., 230 Mo. 496, 525 et seq., 132 S. W. 1076. A statute will not be held to violate the Constitution if it can reasonably be given a construction in harmony therewith. Pitman v. Drabelle, supra. Constitutional restrictions will not be held to apply if reasonable doubt exists in the judicial mind as to their repugnancy to the act under review. Ludlow-Saylor Wire Co. v. Wollbrinck, supra, 275 Mo. loc. cit. 350, 351, 205 S. W. 196. Legislative acts and constitutional provisions must be read together and so harmonized as to give effect to both when this can consistently be done. Straughan v. Meyers, 268 Mo. 580, 187 S.W. 1159; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864."

Applying this rule, the question here is: Can said Section 23 of the Constitution and Section 8716 of the Statute be read together and harmonized and effect be given to both? We also recognize the rule that repeal by implication is not favored and if possible, full force and effect should be given to each and every word of the statute and each and every word of the Constitution. If these two sections cannot be read together and harmonized and effect given to both, it will be because of the application of the rule "Expressio Unius est Exclusio Alterius", which means "the expression of one thing is the exclusion of another." Applying that here, the question is: Did the framers of the Constitution by said Section 23, place the sole authority in the county court, when authorized by a vote of the residents of a district, to make a levy for road purposes, in addition to those levies authorized by Sections 11 and 22 of Article 10 of the Constitution?

If the people have not expressly or impliedly withheld from the Legislature the power to enact legislation providing for a levy in such districts, then the foregoing provisions of Section 8716, are constitutional. Section 1 of Article 4, of the Constitution of Missouri is as follows:

> "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri'."

Under authority of this Section, the court has on a number of occasions held that the General Assembly retains all legislative power not expressly or by necessary implication forbidden it by the constitution. State ex rel. v. P.S.C. 270 Mo. 547, State ex rel. v. Board 267 Mo. 598.

Regardless of the foregoing rule, if limitations on legislative powers are expressly declared or are clearly implied by the constitution, such limitations are to be construed as mandatory rather than directory and they are exclusive in their terms. State ex rel. v. P.S.C. 270 Mo. 429,

In State ex rel. v. Hitchcock 241 Mo. 464, the court said:

> "This court is quite firmly wedded to the doctrine that constitutional requirements must be considered as mandatory rather than directory.* * * * * "

In the case of State ex rel. McDonald v. Lollis, 33 S. W. (2d) 98, we find where the court applied the foregoing rule of "Expressio Unius est Exclusio Alterius". In that case at l. c. 100, the court said:

> "* * * The express language of the amendment limits the authority of the judge of a court to the hearing and determination of contested elections of public officers, thereby excluding the idea that the framers of this amendment intended to vest such judge with authority to hear and determine contested nominations for a public office. A primary election for the purpose of nominating candidates for public offices is not the election of public officers; therefore, constitutional authority to the judge of a court to hear and determine contested elections of public officers does not give him authority to hear and determine contested nominations for public offices."

Also in the case of McGuire v. State Savings Association et al, 62 Mo. 344, the court in speaking of whether or not the

penalty provisions of delinquent real estate tax act, applied to personal property taxes, applied this rule and at l. c. 346, said:

> "In relation to the first point no doubt is entertained. An examination of section 84, p. 122, Gen. Stat., 1865, the law in force at the time the taxes referred to had accrued, will cleraly show that, while the legislature with special care provided that the taxes on land and town lots 'should, if not paid, bear ten per cent, interest from the first day of January, etc.;' yet not the slightest mention is made in that section as to any interest by way of penalty in consequence of the nonpayment of taxes due on personalty.
>
> "The legislature, in thus specially mentioning and providing for interest on land tax, must be presumed to have had in contemplation the whole matter of affixing penalties for failure to pay taxes at the appointed time, and therefore intentionally negatived the accruing of interest on any species of property other than real. And this presumption obviously accords with the familiar maxim of such frequent recognition in statutory construction; <u>expressio unius exclusio alterius</u>."

In these instances the rule was applied to legislative acts, however, from our research, we think the rule is equally applicable to constitutional provisions.

In State ex rel. Kersey v. Pemiscott Land & Cooperage Co., 317 Mo. 41, 295 S. W. 78, it was held that the constitutional provision (Article X, Sec. 22) authorizing a special tax for roads and bridges was an express grant of discretionary power to the county courts and was a limitation of the power of the Legislature. The court said, l. c. 80, 295 S. W.:

> "It will be noted that this section of the Constitution, in plain and simple language, provides, in addition to taxes authorized to be levied for county purposes (under Section 11 of Article X of the Const.)

> the county courts may levy and collect, as state and county taxes are collected, a special tax of not more than twenty-five cents on each one hundred dollar valuation, to be used for roads and bridges, but for no other purposes whatever; and the power thus conferred upon the county courts is declared to be discretionary. This is an express grant of power to the county courts, and is a limitation of the power of the Legislature; a power granted to the county courts to levy and collect a special tax for road and bridge purposes."

Section 23 of Article 10 of the Constitution and Section 22 of said Article 10, are identical in the sense that each contains an express grant of power to the county court. In Section 22, it is discretionary with the court as to how and when the power may be exercised, however, in Section 23, the time when the county court may exercise this power is fixed at such time as the court is authorized by the vote of the taxpayers in the district. Any interpretation of said Section 23, of Article 10, of the Constitution other than that said section limited the power of the Legislature so as to prevent the grant of such taxing power to anyone other than the county court, would render said Section 23 absurd and meaningless, which is contrary to the rules of statutory and constitutional construction.

The consequence of such construction would be that the commissioners of the special road district under said section 8716, could make a levy without any limitation whatever but if the residents of the district at an election held for that purpose, authorized the county court to make such a levy, then the levy is limited to fifty cents on the one hundred dollar valuation. Such a construction would render the limitation provision of said Section 23 meaningless and such a construction should not be adopted by the courts. State ex rel. Crow v. Hostetter, 137 Mo. 636.

By the constitution, three modes have been provided for

the raising of revenue for road purposes, namely; Sections 11, 22 and 23 of Article 10 of the Constitution. It will be noted that the framers of these Acts have placed limitations on the amount of such taxes that may be levied. In our research through the laws authorizing the levying of general taxes, we fail to find any other section, either in the Constitution or in the statutes, which does not limit the taxing body to some amount. Benefit Assessments, Special Road District Acts, as stated above were passed for the purpose of authorizing the taxing of properties, the owners of which were willing to pay special taxes for special benefits. The purpose of the foregoing provisions of said Section 8716, is to levy a general tax for the entire district and this is foregin to the original purpose of such Benefit Assessment District. However, were it not for the provisions of said Section 23, of Article 10, of the Constitution, we concede that the Legislature would have been authorized to enact such legislation.

Said Section 23 clearly indicates that the framers of that section of the Constitution, expressly provides that no tax in addition to that provided by Section 11 and Section 22 of Article 10 could be imposed, unless the people affected thereby voted such a tax.

CONCLUSION

From the foregoing, it is the opinion of this Department, that the provisions of Section 8716 R. S. Mo., 1939, which authorizes the commissioners of a special benefit road district to levy for the construction and maintenance of bridges and culverts and working, repairing and dragging roads in the district, general taxes on property taxable in the district, is in violation of the provision of Section 23 of Article 10, of the Constitution and is therefore unconstitutional. We are further of the opinion that the residents of such districts can only authorize such a levy when the proceedings set out in said Section 23 of the Constitution are followed.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

SCHOOLS: 1. Annexation of a district, or a part thereof, provided for in Section 10484 R. S. Mo., 1939 is a "special election."

2. Said election would be valid even though set at the same time as a regular meeting as is provided for in Section 10418 R. S. Mo., 1939.

May 4, 1942

5-7

Honorable William R. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri

FILE
18

Dear Sir:

This is to acknowledge receipt of your letter in which you request an official opinion, as follows:

"This office has had a request from the County Superintendent of Schools relative to the correct procedure under Section 10484, R. S. Missouri, 1939, for the annexation of a school district to a city district, and he has requested us to obtain an opinion from your office.

"The precise question which has come up is whether or not such an election can be held at the regular school district meeting on the first Tuesday in April. At one district in this county all the preliminary requirements, such as the proper petition, were met and the Board of Directors issued a call setting the date of the election on the date of the regular school district election. The proposal was defeated in this district so your ruling on this matter would have no effect at the present time, but the Superintendent of Schools believes that a number of districts will want to vote on the matter next year and they would all prefer to have the election on the

same day as their general election, if this is lawful."

Section 10484, R. S. Missouri, 1939, reads in part as follows:

"Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said purpose by giving notice as required by section 10418. * * "

When we turn to Section 10418, R. S. Missouri, 1939, to which section we are referred in Section 10484, supra, we find that this section provides for an "annual meeting", and it is our view that the words annual meeting as used in said section are equivalent to annual election.

It was held in the case of State v. Burial Association, 28 Ohio Cir. Ct. Rep. 379, l. c. 412, as follows:

" * * * counsel for the relator undertake to distinguish between the 'annual election' and the 'annual meeting' provided for in the statutes. We think the same thing is intended by both expressions; * * * * * * "

3 C. J. p. 196, Note 50.

By the same analogy the use of the words "special meeting", as contained in Section 10484, supra, is equivalent to using the words "special election."

In the case of Buchanan v. Clark, 121 S. W. (2d) 681, l. c. 684 (Ky.) the court distinguished between a "regular" and a "special" election and quoted with approval from 9 R. C. L. 978, par. 3, as follows:

> "* * * "Any election which is not regularly held for the election of officers or for some other purpose which shall come before the citizens at regular fixed intervals is a special election"; whilst general elections are those held upon fixed dates for the choosing of officers for regular periods of time and at which the voters may exercise their choice by casting their ballots. * * * *'"

Applying the above definition, we find that Section 10418, supra, provides for annual school meetings or annual school elections, and that at said meetings the voters have the power to vote upon any of the matters that may be presented, if they are contemplated by Section 10419, R. S. Missouri, 1939, which section we do not copy for the sake of brevity. In this sense, if a matter was properly before the voters, as provided in Section 10419, supra, then the meeting would be "regular" and the matter would be voted upon at the regular election, provided for in Section 10418, supra. On the other hand, if it were sought to have the voters of the particular school district vote upon any other proposition which was not provided for in Section 10419, supra, then the proposition would have to be voted upon at a special meeting or special election.

c

As to the question of the annexation of a district, or part thereof, as provided in Section 10484, supra, we find that this is a special matter not provided for in Section 10419, supra, and it is for this reason that the legislature provided that a special meeting or special election must be had for such proposition could not be presented at the annual meeting, but the legislature, in order to provide for a proper notice adopted the notice provided for in Section 10418, supra. It was held in the case of State v. Andresen, 222 P.585, l. c.587, as follows:

> "A regular election is an election recurring at stated times, fixed by law; while a special election is one arising from some exigency outside the usual routine. * * * "

We must conclude, that an election held for the purpose of annexing a district, or part thereof, to an adjoining city, town or village school district, as is provided for in Section 10484, supra, is "special" in its nature. If the board of directors places the special meeting or special election upon the second Tuesday in April, the date also provided for in Section 10418 for annual meetings, it is our view that said election, or meeting, would not be void, for the reason that the election, or meeting, would be special and would not be effected by Section 10418.

In the case of Hansen v. Malheur County, 86 P. 964, l. c. 965, par. 3, the court said:

> "* * * An election for issuance of road bonds is a special election although held on the same day by the same officers as a general election. * * * " (Citing cases.)

The rule set forth in the above case was also followed by the Supreme Court of Missouri in the case of Dysart v. City of St. Louis, 11 S. W. (2d) 1045, l. c. 1051, par. 8, where it is said:

> "A definition of 'general election' appears in section 7058, R. S. 1919, as 'the election required to be held on the Tuesday succeeding the first Monday of November, biennially.' Under that definition a general election could occur only once in two years. Should we therefore conclude that every other election which takes place at any other time, whether required by law to be regularly held or not, is a 'special election?' There appears no such legislative intention.
>
> * * * * *
>
> "Later enactments indicate a legislative intention to consider a special election as one not provided for by general law, but one which must be especially called." (Underscoring ours.)

The court in this case held that the special election was valid, even though it was held on a regular election date, and the voters voted upon special matters at the same time that they voted upon the regular issues.

CONCLUSION

It is our opinion that a special meeting, as is provided for in Section 10484, R. S. Missouri, 1939, may be set upon the first Tuesday in April, notwithstanding the fact that that is the day provided for annual meetings under Section 10418, R. S. Missouri, 1939, and the elec-

tion, or meeting, provided for in Section 10484 would still be "special" in character, and valid, assuming all of the necessary steps in regard to notice have been adhered to.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

BRC:RW

CRIMINAL COSTS:
and
PROSECUTING ATTORNEYS:

Prosecutor not entitled to fee for conviction upon a plea of guilty when plea was set aside and case dismissed.

June 3, 1942

67

Hon. Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

FILE
18

Dear Sir:

We are in receipt of your letter of May 26, 1942, in which you request an official opinion, as follows:

> "In the Cedar County Circuit Court, March Term, 1942, one Johnnie Wallace entered plea of guilty to a charge of burglary and larceny under Section 4448, R. S., 1939.
>
> "On April 30 the same being an adjourned day of said Term of Court the defendant by leave of Court withdrew his plea of guilty and Prosecuting Attorney entered nolle proseque.
>
> "In bill of costs to State should the following fees be presented:
>
> "To Circuit Clerk, taking and entering plea.....0.15
>
> "To Sheriff, trial or confession, ...1.00
>
> "To Prosecuting Attorney, to convicting defendant of burglary and larceny.....12.50

"The defendant in the above case was not sentenced on his plea of guilty."

Under Section 13409 R. S. Missouri, 1939, the clerk of the circuit court, acting as criminal clerk, is entitled to a fee for the services in recording "* * * every order in a case not herein provided for .....15 ." The fee, as set out in your request, is an order and the clerk should be entitled to the amount as set out by the above section.

There is no provision in this Section that the defendant be convicted and sentenced to either the penitentiary or county jail. The question as to whether or not the State or the county should pay the fee is set out in Article 20, Chapter 30, Sections 4221, 4222 and 4223 R. S. Missouri, 1939. Under the facts set out in your request the State would have been liable for the costs, unless payment of same could be obtained from the defendant, either upon the plea of guilty by a sentence to the penitentiary, or by a dismissal. Upon the dismissal the State was liable by reason of Section 4223 R. S. Missouri, 1939, and upon a plea of guilty and sentence to the penitentiary the State would have been liable under Section 4221, supra.

You also state in your request that you intend to include in the cost bill a fee due the sheriff in the amount of one dollar for trial or conviction. Section 13413 R. S. Missouri, 1939, allows the sheriff as fees for services in criminal cases, one dollar, for every trial in a criminal case or conviction. In view of that section we are holding that the sheriff is entitled to one dollar as a fee on the plea of guilty. This section does not provide that in order for the sheriff to be entitled to the fee that the defendant be sentenced to the penitentiary.

Also, you state in your request, that you intend to include a fee to the prosecuting attorney, for convicting the defendant of burglary and larceny, in the amount of Twelve Dollars and Fifty Cents.

According to the last decennial census (1940), the population of Cedar County is 11,697. Under Section 12939, R. S. Missouri, 1939, the prosecuting attorney of Cedar County shall receive for his services per annum, to be paid out of the county treasury, the sum of Twelve Hundred ($1200.00) Dollars.

Section 13405, R. S. Missouri, 1939, in reference to the allowance of fees, provides, partially, as follows:

> " * * * for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; * * *."

This section specifically provides:

> "* * * where the punishment assessed shall be by confinement in the penitentiary, * * * ."

Under the facts in your request there was no sentence upon the plea of guilty and the same was set aside and the prosecuting attorney entered a nolle prosequi. Since the defendant had not been sentenced under the plea of guilty the prosecuting attorney should not be allowed the fee of Twelve Dollars and Fifty Cents.

Of course, under Section 12941 R. S. Missouri, 1939, the fee, if paid by the State, should be paid into the county treasurer.

It has been held in this State that a prosecuting attorney is entitled to the fee for a conviction where the conviction has not been set aside, and by stipulation the defendant should pay the costs.

The court, in the case of State Bar Committee v. Stumbaugh, 123 S. W. (2d) 51, l. c. 53, indicated that if the sentence had been set aside the prosecuting attorney would not have been entitled to the fee allowed for the conviction of the defendant. The court, in that regard said:

> "As to count five, the evidence disclosed that appellant represented a Mr. Salmon in a justice court. A trial resulted in a conviction of Salmon, and a fine of $50 and costs was assessed against him. Included in the costs, which amounted to $21.85, was a prosecuting attorney's fee, which, under the law, was payable to the county treasurer. In March, 1934, appellant appealed the case to the circuit court. At the September term, 1934, of the circuit court of Madison county, appellant and the prosecuting attorney reached a settlement to the effect that Salmon was to pay all the costs, the appeal was to be dismissed, the fine stayed and Salmon was to agree not to again violate the law. Appellant collected the costs from Salmon and paid the same to the justice, except the $5.00 assessed as a prosecuting attorney's fee. This he retained under the pretense it was not due the county under such circumstances. He did not return the $5.00 to his client or pay it to the county treasurer. He charged his client a fee which was paid. The conviction of Salmon was not set aside and therefore the fee of $5.00 was due as costs. See sec. 11783, R. S.Mo. 1929, Mo. St. Ann. Sec. 11783, p. 7003. But, be that as it may, the $5.00 did not belong to appellant. He had not paid it to his client nor to the county at the time of the trial in this case."

The Supreme Court of this State has held that the State is not liable for costs in criminal prosecution, unless the defendant should be convicted of a capital offense or should be sentenced to imprisonment in the penitentiary.

In the case of State of Missouri, ex rel., v. Carpenter, et al., 51 Mo. 555, l. c. 556, the court said:

> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penetentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.
>
> "The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.
>
> "But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.
>
> "Although the indictment was for capital crime, and under it the prisoner might also have been convicted of a felony,

> punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

Also in the case of State v. Clifford, 124 Mo. 492, l. c. 497, the Supreme Court holding that a circuit attorney cannot be allowed a fee where an indictment has been dismissed at the defendant's cost said:

> "This court in at least four cases has ruled that where a prosecution of an indictment is dismissed at the defendant's costs a fee for the circuit attorney can not be properly taxed either against a defendant, the state or the county. State v. Beard, 31 Mo. 34; State ex rel. v. Thompson, 39 Mo. 427; State v. Foss, 52 Mo. 416; State ex rel. v. Ray County Court, 52 Mo. 27. * * * * "

Also, in the case of State v. Foss, 52 Mo. 416, l. c. 417, the court said:

> "For the purposes of that case it may be conceded to be correct, as the agreement of the defendant fixed his

liability for the costs, but for the costs only that were taxed and authorized by law. But in the present case, the fee of five dollars to the Circuit Attorney was not authorized, as that officer had not prosecuted the indictment to a conviction, which was essentially necessary before an allowance could be made to him.

"The case of the State vs. Beard, (31 Mo., 34) decides the very point here presented for review, and holds that where the prosecution of an indictment is dismissed at defendant's costs, a fee for the Circuit Attorney cannot be properly taxed against the defendant."

CONCLUSION

In view of the above authorities, it is the opinion of this department, that a circuit clerk is entitled to a fee of fifteen cents for the taking and entering of a plea, and that a sheriff is entitled to a fee of One Dollar for a trial or confession, for the reason that the payment of the fee to the clerk or sheriff does not depend upon a sentence to the penitentiary.

It is further the opinion of this department that the prosecuting attorney is not entitled to a fee of Twelve Dollars and Fifty Cents for the conviction of a defendant until the defendant has been sentenced.

APPROVED:

Respectfully submitted,

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
Assistant Attorney General

WJB:RW

SOLDIERS: Entitled to free copies of public records.

- -

December 4, 1942

1-19

FILED
18

Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Mr. Combs:

Receipt is acknowledged of your letter of December 1, 1942, in which you request advice as follows:

> "The Recorder of Deeds of this county has inquired of this office as to whether or not there is any obligation upon the Recorders in this state to furnish, free of charge, to soldiers, sailors, and other parties in the armed forces of the United States, certified copies of marriage licenses recorded in this county.
>
> "I am unable to find any provision in the Missouri law which would require the Recorder to furnish these certified copies free of charge, however, our Recorder wishes to be more than fair with men in the armed forces and if this is required, or customary, kindly advise me so that he may comply with the law or custom in this state concerning these matters."

The only section of the statutes pertaining to your inquiry is Section 15077, Article VII, Chapter 21, Revised Statutes of Missouri of 1939, which is herein set out:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

Trusting this furnishes the information desired, I am

Very truly yours,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

TAXATION: COLLECTION: PARTIAL PAYMENT OF TAXES: Partial payments of taxes are held by the collector as a trustee and such taxes belong to the tax payer until the full amount of the taxes are paid.

January 8, 1942

1-12

1-13

FILE 19

Hon. Phil H. Cook
Prosecuting Attorney
Lexington, Missouri

Dear Mr. Cook:

This is in reply to your letter of recent date, wherein you request an opinion based upon the following statement of facts:

> "Mr. Sam Smith, during his incumbency in office as county collector, had a practice of permitting people to make installemnt payments upon their taxes, for instance, a man who had one item of taxes on only one piece of property against which the tax amounted to $150 would pay $10 to the collector as an installment on his taxes. This money was accepted by the collector and not deposited but placed in a separate envelope marked in the name of the man who had made the deposit and kept in the safe until the full amount of the tax upon such item had been paid at which time he would deposit the money in the regular collector's account and give a receipt for the taxes to the person so paid. At the time Mr. Smith went out of office there was a fund amounting to approximately $1300 representing these paid deposits and all of which were earmarked in the name of the depositors and the amount deposited by each. A contention has arisen as to the proper disposition of this fund. It is the contention of the attorneys for Mr. Smith that there is no provision in the statutes for the payment of installments in taxes unless a person pays the entire tax on some one particular item of property or unless he pays upon an undivided interest in the property under the provision of Section 11084, and it is their further contention that this money

> is held in the nature of a trust and should be by him returned to the individuals who had so deposited the same with him. On the other hand, it is the contention of counsel for the bondsmen that under the provision of Section 11084, the county collector had a right to receive installment payments on taxes and that this money should either be turned over to the incoming collector or should be accounted for in a settlement to the county court. Of course no tax receipt has or could be given these depositors at this time for the reason that only installments on the same have been made, and no particular item of the tax has been designated."

Section 11052, R. S. Mo. 1939, provides as follows:

> "As soon as may be after the tax book of each year has been corrected and adjusted, and the amount of county tax stated therein according to law, the county courts shall cause the same to be delivered to the proper collector, who shall give receipts therefor to the clerks of the county courts respectively; and each collector shall be charged by such clerk with the whole amount of the tax books so delivered to him."

After the collector has received the tax books, as provided in the foregoing section, his duties are to collect the taxes as certified, and with which he is charged. In the case of State v. Young, 38 S. W. (2d) 1021, 1023, the court, in speaking of the duties of officers with respect to collecting taxes, said:

> "* * * The power to levy and collect taxes is purely statutory, and has been confided to the legislature and not the courts. De Arman v. Williams, 93 Mo. 158, 163, 5 S. W. 904; State ex rel. v. Ry. Co., 87 Mo. 236; City of Carondelet v. Picot, 38 Mo. 125, 130; 25 R. C. L. pages 27 to 29. Collection of taxes can only be made in accordance with the tax books as actually made and furnished to the collector. * * * * "

Also, in State ex rel. Hamilton v. Brown,122 Mo.374,the court in discussing this same question, said: (l.c.381)

> "* * * After the tax books were adjusted and turned over to the collector, he had but one duty to perform; that was to collect the taxes and apply them as indicated by the tax book. The collector has no power over the tax books, he is not authorized by any statute that has been brought to the attention of this court, to alter or change the tax books at pleasure. He is responsible for the taxes as they appear upon his books, and if they are changed in any manner, except in pursuance of the statute, however just the change might be, it would afford him no protection."

From these opinions it can not be successfully contended that the collector is authorized to collect taxes in any manner other than as certified to him under Section 11052, unless the exception is provided for by Section 11084, R. S. Mo. 1939, which is as follows:

> "Whenever any person shall pay taxes charged on the tax book, the collector shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons paying such tax shall furnish a particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known. If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

From an examination of this section, we think it was the intention of the Missouri lawmakers to permit a person to pay taxes on the portion of the property on which he desires to pay. But, we do not think that this section authorizes a partial payment on any particular tract or tracts. In other words, this statute does not authorize payment of taxes on the installment plan.

The facts which you have submitted reveal that the moneys which the collector holds, and which have been paid to him as partial payments on taxes, have never been paid into the treasury, but have been kept separate and apart from the public funds and earmarked in envelopes.

The collector is not authorized to issue a tax receipt for partial payment of a tax, and if he does so, that would be in excess of his statutory authority. If, under such circumstance, the collector becomes possessed of moneys paid to him as a partial payment of taxes, that would be contrary to the provisions of the statute, we then think the collector would hold such funds in a capacity of a trustee ex maleficio. A similar case was before the court in the case of Cantley v. Beard, 98 S. W. (2d) 730, wherein a bank was holding county funds which had been deposited in it as a county depository. The county court and the bank had not complied with the statute in selecting this bank as the depository. In speaking of the capacity in which this bank held this county money, the court said (l. c. 735):

> "* * * * That the Bank of Barnett was not a legal depository of the county at the time of the $12,000 deposit is conceded; therefore the bank held these public funds as trustee ex maleficio * * * *."

Also, in the case of In Re Cameron Trust Co., 51 S. W. 1025, a school district, which under the statute was required to select a depository every two years, had failed to comply with the law with respect to selecting a depository and continued to deposit its funds with the trust company after the expiration of the depository bond contract. In speaking of the relationship of the school district and the trust company, the court said (l. c. 1027):

" * * * * * * * * * * Respondent in making this argument has overlooked the fact that the bank in such a case, when it received the deposits and used the funds of the school district, knew the funds were trust property, and also knew that it had no right whatever to appropriate the money or legally receive the title thereto. The bank, as well as the officers of the school district, was a party to the wrong. Huntsville Trust Co. v. Noel, supra. Under such circumstances the law does create the relation of trustee and cestui que trust. Harrison Township et al. v. People's State Bank et al. (Mo. Sup.) 46 S. W. (2d) 165; State ex rel. v. Page Bank, 322 Mo. 29, 14 S. W. (2d) 597, loc. cit. 599 (1,2), and cases cited. The bank is a trustee ex maleficio of the funds. * The trustee ex maleficio, in this case the Cameron Trust Company, never obtained legal title to the funds of the school district, and therefore the general creditors are not, as a matter of law, entitled thereto. * * * * * "

So, in this case your collector, Smith, never obtained legal title as county collector to these partial payments of taxes. Therefore, as a matter of law, the public treasury is not entitled to the funds, but they belong to the parties for whom they were being held by the collector as trustee aforesaid.

CONCLUSION

From the foregoing, it is the opinion of this department that a collector who receives partial payments on taxes holds such partial payments as a trustee ex maleficio for the tax-payers and such moneys do not belong in the public treasury.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

HEALTH: Regulation made by Board of Curators of University of Missouri, requiring all students to submit to vaccination to prevent smallpox and their failure so to do constituting grounds for exclusion from the University, is a reasonable regulation and can be made and enforced by such Board of Curators.

April 21, 1942

4-23

Mr. Leslie Cowan
Secretary
University of Missouri
Columbia, Missouri

FILE
19

Dear Sir:

Your letter of April 13, 1942, requesting an opinion has been referred to me. The opinion request is as follows:

> "The Curators of the University of Missouri desire to have your opinion on the validity of its regulation regarding vaccination against smallpox which regulation reads as follows:
>
> "'Beginning with the fall of 1911 compulsory vaccination, under proper regulation, be required of all students of the University as recommended by the University faculty.
>
> "'It is ordered that students who fail to comply with the regulation regarding vaccination shall be required to withdraw from the University. The director of the Student Health Service shall administer this provision.'
>
> "From time to time some protest has been made by students who believe that the enforcement of this rule infringes their personal liberty and denies their absolute right to attend the University. However, our medical advisors have reported (1) that the only certain method

of controlling and preventing smallpox in a given community is by universal vaccination before any epidemic breaks out or is threatened; (2) that if vaccination is delayed until an epidemic, or even individual cases, breaks out in the community, there is a strong probability of the first outbreak occurring among University students, who by reason of their congregation in rooming houses, dormitories, and classrooms, are particularly susceptible to the transmission of contagious diseases; (3) that there is no substantial dispute among medical authorities on this question and public health records throughout the civilized world maintain their recommendation. It being the desire of the Board of Curators to preserve their regulation, the opinion of the University Attorney was asked on the question of their power to enact and enforce it.

"It has been his opinion, based upon the decision of in re Rebenack, 62 Mo. App. 8, and State vs. Cole, 220 Missouri 697, 119 S. W. 424, that the above regulation was not an abuse of the discretion vested in the Board of Curators by the Constitution of Missouri (Article II, Section 5) and the statutes of the State (Revised Statutes of Missouri, 1939, Section 10782) and that it could be enforced against a student protesting on grounds of personal religion even though no epidemic was threatening in the immediate vicinity. He has pointed out that while Section 10341 of the Revised Statutes, 1939, probably does not apply to the University of Missouri, both of the above cases were expressly decided upon the general powers of the school board in question, and the latter case particularly rejected the argument that the power granted by Section 10341 in regard to excluding students in public schools suffering from communicable diseases was exclusive. While Section 10814 in turn

authorizes the admission of all youths resident of the State of Missouri, that Section has been interpreted as a 'tuition' provision only (State ex rel. Gaines vs. Canada, 342 Missouri 121, 113 S. W. (2nd) 783). Moreover, the Missouri Constitution granted the right to free education between the ages of six and twenty to the students before the courts in the two cases cited above. The Curators were advised that while the Cole case, supra, was concerned only with a situation where an actual epidemic of smallpox was in progress and the opinion expressly confined itself to the facts before the court, it is unquestionable authority for the proposition that individual religious convictions or personal beliefs in matters of health, no matter how sincere, cannot be allowed to prevent the exercise of the discretion granted the 'governing' body of the school when the latter is supported by generally accepted medical opinion. Furthermore, the reasoning in the case, finding that vaccination of healthy persons may be required to prevent the spread of disease, as well as the exclusion of a person actually suffering from it, is directly applicable to a rule designed to prevent contagion from ever starting. It was asserted that the only issue was the reasonableness of the regulation, not the a priori wisdom of it, and the Court took judicial notice of the effectiveness of vaccination in controlling the ravages of the disease.

"Acting upon this medical and legal advice the Curators have consistently preserved and enforced the rule in question. Within the past year, however, several students embracing the Christian Science faith have so earnestly sought an exception in their cases, which the Board was unwilling to

> make, and have so vehemently asserted their alleged constitutional rights that the Board of Curators desires your opinion on the matter."

Regarding the Board of Curators of the University of Missouri, we find a constitutional provision which is Article XI, Section 5, of the Constitution of Missouri. There is also a statutory provision regarding the Board of Curators.

Article XI, Section 5, of the Constitution of Missouri, reads as follows:

> "State University- Curators.--The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State University shall be vested in a Board of Curators to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate."

Section 10782, R. S. Mo. 1939, is as follows:

> "University Established.-- A university is hereby instituted in this State, the government whereof shall be vested in a board of curators."

In both of the foregoing provisions the word "government" is present, so it will probably be best to determine what this word means in provisions of this kind.

In the case of State ex rel. Heimberger v. Board of Curators of University of Missouri, 188 S. W. 128, 268 Mo. 598, the Supreme Court held that the word "government" used in the constitutional provision above meant "guidance, direction, regulation, management and control."

Also with reference to the terms "government" with reference to a University, the following is found in West v. Board of Trustees of Miami University and Miami Normal School,

181 N. E. 144, l. c. 148, 41 Ohio App. 367: The term "government" in act vesting government of University in trustees held to include administrative rules and regulations affecting scholastic procedure as well as disciplinary measures.

Webster's Standard Dictionary defines "government" as, "control, direction or restraint exercised over men in communities."; "moral, mental or physical control."

Century Dictionary and Cyclopedia: "Guidance; direction; regulation; management; control; as the government of one's conduct."

Webster's New International Dictionary: "Act or fact of governing; exercise of authority in regulating the action of something; control; direction; rule; regulation; specifically the directions of the affairs of State; the ruling and administration of a political body."

From these definitions of the term "government" it would appear that the Board of Curators has the guidance, direction, regulation, management and control of the affairs of the University of Missouri.

Also, under Section 10807, R. S. Mo. 1939, is the following: "By-laws,--The curators shall have power to make such by-laws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them, * * *."

There have been no decisions with reference to matters of the kind involved in this case and wherein the University of Missouri was directly interested. There have been two decisions involving the vaccination of students involving the "Public Schools" of the State. The Public Schools of the State have at the head of each district or division a Board of Directors who, like the Board of Curators of the University have the "government and control" of their particular districts. So, the Board of Curators are in the same position, as the Board of Directors of the cases which we will now cite. Consequently, if the Boards of Directors in these cases had the right to make and enforce rules regarding vaccination, the Board of Curators would also have such right, as the corresponding governing body over the University of Missouri.

The first case in which the vaccination of pupils was questioned was In re Rebenack, 62 Mo. App. 8. The facts were as follows: two children were excluded from the St. Louis schools due to the fact they were not vaccinated and their father would not have them vaccinated. When they were not permitted to continue school the father asked the court to issue a writ of mandamus to force the Board of Directors to admit his two children. At the time there did not appear to be an epidemic. Writ was denied.

The other case in which this question arose was State ex rel.v.Cole, 220 Mo. 697, 119 S. W. 424. Relator in this case was a resident of Sedalia and the father of two children who had been excluded from the public schools of that city due to the fact that they had not been vaccinated against smallpox. Relator asked for a writ of mandamus to force the School Directors to admit his children in school. It seemed that smallpox had been prevalent in Sedalia for eight years. Writ denied. The Court held in this case that where there is a "threatened epidemic," the school board has a right to pass rules and regulations regarding vaccination and has the power to enforce them. The Court said that it would not go beyond the facts in question which showed that there was a threatened epidemic.

However, in the Rebenack case, supra, the Court did not confine itself to cases where there was a "threatened epidemic" but held, "It results from the foregoing that we are not warranted in declaring the rule of the St. Louis School Board unreasonable and hence must deny the writ of mandamus."

It has also been held in this State in State ex rel. v. Cape Girardeau School District, 237 Mo. 640, 141 S.W. 640, that: "A board of education whose duty it is to maintain free public schools, has power to make reasonable regulations to guard the health of the pupils therein."

At 56 C. J. 818, Section 1003, the following is found:

> "Sec. 1003 (b) In Absence of Specific Statutory Requirement -- A mere general power vested in administrative authorities to make such rules and regulations as they may deem necessary to the preservation of the public health, or to take

> such measures as in their judgment may be necessary for the protection of the people from dangerous diseases, does not, it has been held in the absence of the existence or present menace of such disease, justify a regulation forbidding children to be enrolled in the public schools without a certificate of vaccination, but it has been held to the contrary that the power of the school authorities to exclude unvaccinated children from the public schools is implied from a general grant to make all proper rules, ordinances and statutes for the government and management of the schools."

As can be seen from the above, this question has been passed on in two different ways in this country but the cases cited from this State are the cases cited supra. The Rehenack case would allow a rule requiring vaccination regardless of an epidemic. The Cole case would allow such a rule in case of a threatened epidemic but does not pass on whether or not in the absence of a threatened epidemic, a rule of this kind would be reasonable. We do not think that the Cole case overrules the Rebenack case.

Again citing 56 C. J. 817, under footnote 76, the following is found, taken from the case of Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 103 AmSR 859, 70 L. R. A. 796:

> "'The right to attend the public schools of the state is necessarily subject to some restrictions and limitations in the interest of the public health. A child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both dangerous and contagious, may be lawfully excluded from attendance so long as the danger of contagion continues. Public health, as well as the interest of the school, requires this, as otherwise the school might be broken up and a pestilence spread abroad in the community. So a child recently exposed to such a disease may be denied the privilege of our schools until

all danger shall have passed. Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of the law. Nearly every state of the Union has statutes to encourage or directly or indirectly to require vaccination, and this is true of most nations of Europe, It is required in nearly all the armies and navies of the world. Vaccination has been compulsory in England since 1854, and the last act upon the subject, passed in 1898, requires every child born in England to be vaccinated within six months of its birth. It became compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Wurtemberg, Hesse and other German states, 1818; Prussia 1835; Rumania, 1874; Hungary, 1876; and Servia, 1881. It is aided, encouraged, and to some extent compelled, in the other European nations . . . It is compulsory in but few states and cities in this country, but it is countenanced or promoted in substantially

> all, and statutes requiring children to be vaccinated in order to attend the public schools have generally been sustained by the courts.'"

The case cited above was passed on in 1904 and it is the common knowledge or belief of the people generally that vaccination for smallpox is a preventative against such disease. This belief becomes stronger with each passing year. A rule of this kind operates impartially on all students and is not only for the protection of each individual student but is for the protection of all of the people of the State of Missouri. As stated in your letter, there seems to be no substantial dispute among medical authorities on this question.

Furthermore, at the present time, the means of travel and communication have been greatly speeded up from those at the time of the Viemeister, Cole and Rebenack cases. Diseases can be communicated much faster in this day and age and if vaccination is not enforced, an institution such as the University of Missouri would be a fertile field for the ravages of disease due, as you stated in your letter, to the crowded condition of the dormitories and classrooms. Therefore, it is only reasonable to believe that if the courts looked upon regulations of this kind as favorably as they did some thirty years ago, that if such matters were to come before them now, with the increased favorable knowledge of the people and the speed with which contagious diseases can be communicated, they would favor the passing and setting up of rules of this kind.

Now as to a question of the violation of Article II, Section 5, of the Constitution of Missouri, which said section reads as follows:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this State, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought,

> by any law, to be molested in his person or estate, on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this State, or with the rights of others."

It might be said by the students in question that that part of the constitutional section cited above which says, "that no human authority can control or interfere with the rights of conscience," would prevent a rule of this kind being passed by the Board of Curators, since it might interfere with the "rights of conscience" of such students. However, further along in said section also will be found the following, "but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this State or with the rights of others."

Students professing the Christian Science faith may feel that some of the rights guaranteed by the Constitution above are being violated by the regulations requiring all students of the University to be vaccinated before entering school. However, if the latter quotation cited above is considered, it can be seen that if a rule of this kind could not be enforced, those exempted might endanger the safety and rights of a majority of the students attending the University.

The number of students complaining about this regulation, is undoubtedly a small minority and the following excerpt taken from the case of State ex rel. Freeman v. Zimmerman, 86 Minn., l. c. 358, seems to be the logical view:

> "The welfare of the many is superior to that of a few, and as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools."

Conclusion

It is, therefore, the conclusion of this department that the regulation compelling students to be vaccinated against smallpox before entering the Missouri University and their failure to obey such regulation constituting grounds for exclusion therefrom, is a reasonable regulation and one which the Constitution of Missouri and the statutes have given the Board of Curators of Missouri University the power to make and enforce.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

SPECIAL ROAD DISTRICTS: May contribute to construction of road within 15 miles of the district limits regardless of county lines. County courts may not contribute to construction of roads outside of its own limits.

August 25, 1942.

8-28

FILED
19

norable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

The Attorney-General wishes to acknowledge receipt of your letter of August 20th in which you request an opinion from this Department. Your letter, omitting caption and signature, is as follows:

> "Will you please give me an opinion on the following statement of facts.
>
> "The County Court of Lafayette County and a special road district organized under the provisions of Article 10 of Chapter 46 of the 1939 Revised Statutes of Missouri, desire to make contributions for graveling three miles of road located in Johnson County, Missouri, which is an adjoining county. The said three miles of road is a prolongation of an improved highway in the said special road district, but the said three miles of road is outside the said special road district and outside of Lafayette County. Does either the special road district or the County Court of Lafayette County have the right to make contributions for graveling of such a road?"

There are two questions to be considered under your inquiry. First, does Lafayette County have the right to contribute to the improvement contemplated under your letter? Second, does the special road district have such right?

Answering your first problem we will cite you to Article VI, Section 36 of the Constitution of Missouri, which reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

As can be seen from reading the above provision the county court "shall have jurisdiction to transact all county and such other business as may be prescribed by law." This undoubtedly means that the county court may transact such business of the county as the statutes of Missouri give it the right to do. In view of this provision we will call to your attention the maxim of law which says, "express inclusion is implied exclusion." In other words, unless the right to contribute to the improvement of a road in another county is given to the county court of Lafayette County by statute, even though such improvement is to be made on a road which is a prolongation of a road in Lafayette County, said county court cannot contribute to the improvement of such road. Consequently, we have searched the statutes for a provision which will give a county court the right so to do, but we are unable to locate any such provision.

Therefore, it is the opinion of this department that the county court of Lafayette County, not having such inherent power, cannot contribute in any manner to the improvement of a road in an adjoining county.

In answering your second question, relative to the special road district, we will cite you Section 8685, R. S. Mo. 1939, which prescribes as follows:

> "Said boards may repair, grade, gravel, macadamize, pave or otherwise improve

to the distance of 15 miles from any line of such special road district any highway outside of such district if the same be a prolongation of an improved street or highway in said district and if liberal contributions toward such improvements be made in money, material or labor by the inhabitants interested in such improvements or the county court or any special road district organized under the laws of this state, or the state highway board, or the United States government, or by any one or more of the foregoing. Or in lieu of doing such work in the improvement of such roads such boards may, under the same conditions as would authorize them to do such construction work under this section, contribute toward the repair, grading, graveling, macadamizing, paving or otherwise improving any such highway such an amount as the said board of commissioners may determine, providing the other contributions from any one or more of the sources herein mentioned are liberal contributions toward such improvements and together with the contribution of such board will be sufficient to make and complete such improvement; and provided, also, that such work shall be done under plans and specifications and estimate of cost prepared by some competent engineer and approved by such board of commissioners and such contribution of such board shall be paid from time to time only as the work is done or the improvement constructed in compliance with said plans and specifications and on certificate of some competent engineer designated by such board of commissioners and the payments on the work completed shall be in the same proportion as the total contribution of said board bears to the estimated cost of the entire job, and said certificate of the engineer shall show the work completed and the proportional amount of contribution to be paid thereon."

This provision seems to be plain and unambiguous. As can be seen, a special road district may contribute to the improvement of a road up to fifteen miles from the district lines where, "liberal contributions toward such improvements be made in money, material or labor by the inhabitants interested in such improvements or the county court or any special road district organized under the laws of this state, or the state highway board, or the United States government, or by any one or more of the foregoing." This statute not only provides that contributions may be made by the special road districts but further contains the provision that such district may do the actual work itself provided contributions are made by some of the other agencies mentioned in the aforesaid Section 8685.

In speaking of contributions, the aforesaid statute refers to those made by "the county court." We think that when the Legislature passed this provision that they had in mind the fact that one county court could not contribute to the improvement of a road in an adjoining county. Therefore, in speaking of "the county court," it is our opinion that it refers to the county court of the county wherein the improvement is to take place. Following this line of reasoning, if the County Court of Johnson County makes "liberal" contribution to the improvement, the special road district has the right under this statute to either contribute to such undertaking or to make the actual improvements itself. In other words, as far as the county lines are concerned, we do not think that they have any effect on such special road district. With respect to our present question, our stand is further strengthened by the fact that this statute permits this course of action if liberal contributions are made by any other "special road districts organized under the laws of this State." It will be noticed that this does not say that such road district must be in the same county.

This section also contains a proviso that such improvements shall be made in a certain manner, with respect to plans and specifications. However, for the purposes of your query, we will presume that such requirements have been met.

Conclusion

Therefore, it is the opinion of this department that (1) the County Court of Lafayette County cannot contribute in money, material or labor to improvements on roads in Johnson County, where such roads are a prolongation of roads in Lafayette County; (2) also that Section 8685, R. S. Mo. 1939, empowers special road districts in this State to improve or contribute to the improvements of roads not more than fifteen miles from the limits of such road districts, where liberal contributions have been made by other agencies mentioned in such provision, notwithstanding the fact that such contemplated improvements are not situate in the same county as such special road district.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

BONDS:
CONSERVATION COMMISSION:
FISH AND GAME REGULATIONS:

Conservation Commission authorized to furnish surety bonds to cover distribution agents in the sale of hunting and fishing permits.

December 16, 1942

12-19

FILED
19

Conservation Commission
Jefferson City
Missouri

Attention: Mr. I. T. Bode, Director

Gentlemen:

This will acknowledge receipt of your request, under date of December 11, as to the legality of the Conservation Commission of the State of Missouri, taking out a surety bond on the county clerks in this state as distributing agents for the commission in the sale of hunting and fishing permits; and, the commission paying premiums on same.

Section 16, Article XIV of the Missouri Constitution creates a Conservation Commission of the State of Missouri. This section reads as follows:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of

said commission shall be appointed for terms, as follows: one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, in-

> cluding the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

This amendment gives the Commission almost unlimited powers to control, regulate, manage, restore and conserve wildlife in the State of Missouri.

In State v. Bode 342 Mo. 162 loc. cit. 168, the court, in holding that the conservation amendment prevails when any constitutional amendment is in direct conflict with said amendment, such as Section 10, Article VIII of the Constitution of Missouri, and that the latest expression of the people shall prevail, said:

> "Relator does not contend that the paragraph presents an ambiguity, and it is admitted that the word 'determine,' as commonly used, means to conclude, settle, decide and fix. If so, the paragraph, standing alone, authorizes the commission to settle the necessary qualifications of a director. We do not understand the relator to otherwise contend. He argues only that the paragraph should be harmonized with Section 10, Article VIII (which requires a residence of one year) by interpolating after the word 'determine' in said paragraph the words 'subject to the provisions of Section 10, Article VIII.' We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with Section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' In other words, we are without authority, absent an ambiguity, to resort to interpolation. In

this situation 'the rule as to harmonizing inconsistent provisions' is without application. * * * * * * *"

Also, in Marsh v. Bartlett 343 Mo. 526 loc. cit. 539, the court, in holding that the Conservation Commission shall promulgate regulations necessary for the control, regulation, management, restoration and conservation of wildlife in the State of Missouri, said:

"The sovereign people having enlisted the Conservation Commission as the constitutional agency to exercise the powers and functions granted in Amendment No. 4, it is not our function to consider or to determine the wisdom, the expediency or the policy to be executed by that body. But we are properly concerned with the questioned validity of the Amendment. For the reasons announced we find the validity to be absolute.

"Further, and in reference to the operative effect of the Amendment, and its contained declaration that it is self-enforcing. It seems clear that there is no incongruity in the situation created by it through a rightful and permanent entry into the legislative field, as in the present instance, for the attainment of the Amendment's objective with the harmonious and invited co-operation of the Legislature, so far as may be necessary or helpful, by the latter's future enactment of laws relating to that objective. No doubt should be entertained of the willingness of that body to co-operate with the Conservation Commission in the manner just stated. And the former will doubtless need no reminder that, apart from the Amendment, the Constitution lays upon that body a duty to at least 'pass all such laws as may be necessary to carry all amendments of the Constitution into effect.'"

* *

"There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith. We think the question here is whether there remain sufficient existing laws not inconsistent therewith. And the correct answer is determinative of self-enforcement. The answer is yes, conditioned upon whether there still exist fixed penalties established by statute and now applicable to violations of rules and regulations established by the Conservation Commission. It has been held that such a provision for such additional legislation as may 'aid' the operation of the constitutional amendment does not hold it in abeyance until such legislation is enacted, the word 'aid' signifying to support, help or assist. (State ex rel. Clark v. Harris, 74 Ore. 573, 144 Pac. 109; see 12 Cyc. sec. 106.)"

* *

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. (Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648, 5 L. R. A. (N.S.) 186.) Regulation and legislation are not synonymous terms. (In re N. W. Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65, 70.) Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. (Southern Railroad Co. v. Russell, 133 Va. 292, 112 S.E. 700, 703.)

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the Grimaud case, supra, punitive laws or laws fixing punishment as for

violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite.

* *

"The Game and Fish Code, to which reference has been made, comprises more than one hundred sections. It is probable that among them, sections may be found here and there which were not inconsistent and not so repealed, and doubtless other sections that, with slight change might readily be re-enacted. But that is not of present concern. * * * * * * * * * * * * *"

Under the old Fish and Game Department, prior to the creation of the Conservation Commission, the county clerk was the authorized agent by statute for the sale of hunting and fishing permits. No one questioned the fact, at that time, that such clerk in selling these permits, was liable for said funds as a result of any sale of said permits and his official bond protected the State of Missouri for any deficiency for which he might be responsible, over the state.

It is our contention that in view of Section 16, Article XIV, supra, the two cases construing said amendment hereinbefore referred to, indicate that the Conservation Commission may promulgate any regulation necessary to carry out the functions delegated to that body under said constitutional amendment, except the authority to enact penal provisions for violation of said regulations shall be reserved in the General Assembly. The Conservation Commission

has unlimited authority to adopt regulations such as the appointment of agents for the sale of said permits. It is barely possible that such clerks, under certain regulations, could not properly distribute and sell same in such a case and certainly the commission could adopt such regulations that would permit the appointment of persons better qualified to distribute said permits. There is nothing penal about such regulations.

In anticipation of placing these agents under surety bonds on and after January 1, 1943, and in view of the fact an insurance company informed the commission that they could furnish a surety bond for this purpose, describing same and fixing the penalty for same, the Conservation Commission adopted the following regulation to become effective as of Januray 1, 1943.

> "Sec. 30. DISTRIBUTING AGENTS. -- The Conservation Commission hereby designates and appoints the clerk of the county court in each county and the license collector of the city of St. Louis as distributing agents for such permits as may be stipulated by the Commission, provided that every such clerk before he enters upon the duties of his office shall agree to enter into a bond, provided by the Commission and payable to the State of Missouri in a sum to be fixed and approved by the Commission. The bond shall be conditioned that such distributing agents will faithfully perform such duties as may be delegated to such agents who shall accept, receipt for, and remit to the State Treasurer at the close of each month, all moneys derived from the distribution of such permits, less and except such personal service fees as are herein specifically provided. The Commission reserves the right to designate additional distributing agents whose duties shall coincide with those of the clerks of the county court when acting as distributing agents whosshall before entering upon such duties enter into a bond as hereinabove provided for clerks of county courts when acting as such distributing agents for the Commission. Distributing agents are authorized to charge and collect the service fee of fifteen cents (15¢) for each permit distributed and such additional

> distributing agents so designated by the Commission shall accept, receipt for and remit to the Commission at its office in Jefferson City, at the close of each month all moneys derived from the distribution of such permits, except the permitted service fee. Distributing agents shall, at the time of furnishing a permit, furnish each permitee a copy of the Wildlife and Forestry Code supplied by the Commission."

The above regulation and the conservation amendment is ample authority for the purchase of such surety bond. It has been held that a voluntary bond not authorized by any statute, if it does not contravene public policy, is valid also. It is well established law in this State, that a bond taken by a public officer in attempted compliance with a statute is good as a common law bond even if it falls short of filling the requirements of the statute. See, Burton Machinery Company v. Ruth 196 Mo. 1. c. 465; also, Howard County v. Fayette Bank 347 Mo. 982.

We are also familiar with that principle of law, that in the absence of statutory authority of some kind authorizing such bond, that the state is not liable for the premiums on said bonds; and that said premiums, if paid, may be recovered at a later date. But since the Conservation Commission is authorized to control, regulate and conserve all wildlife in the State of Missouri, as well as expend the money derived from said management and being the only body authorized to spend such moneys, apparently, it is a logical and reasonable conclusion that the qualified voters in the State of Missouri, when enacting the conservation amendment, fully expected the commission to do the wise and expedient thing and to make proper appointments for such distribution and sale of permits; and, likewise to protect said funds while in the custody of the distribution agents, by requiring said agents to be covered by surety bonds. Such regulation requiring said agents to be covered by surety bonds is just as necessary for the protection of said funds as it is to control and regulate wildlife, for without such funds there could be no regulation and control of wildlife by the commission for this is the only available method by which the commission may receive appropriations to carry on the duties under the conservation amendment.

Therefore, such regulation, effective as of January 1, 1943 is in effect and for all purposes of the same effect as legislation enacted by the legislature.

Section 3238 R. S. Mo. 1939, authorizes the purchase of such bonds by the commission when such agents are required by law to furnish same. This section reads as follows:

> "Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any offical bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond,or bonds, with surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

CONCLUSION.

Therefore, in view of the conservation amendment granting almost unlimited authority to the commission to regulate, control, manage, restore and conserve wildlife in the State of Missouri, and the above Regulation, Section 30, promulgated by the commission, effective as of January 1, 1943, it is the opinion of this Department, that a surety bond covering such agents as the county clerks in the sale and distribution of hunting and fishing permits, constitutes a valid bond and the commission is authorized to purchase same, under Section 3238 R.S. Mo. 1939.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:AW

OFFICE OF DEPUTY COUNTY CLERK: LEGISLATORS: Members of the General Assembly may not be appointed Deputy County Clerk during the term for which he is elected to the General Assembly.

January 15, 1942



Hon. Claude E. Curtis
Prosecuting Attorney
Lebanon, Missouri

Dear Mr. Curtis:

This is in reply to your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

> "Will you please advise whether, in your opinion, a member of the Missouri House of Representatives may be legally appointed as Deputy County Clerk, and whether such person may hold both positions?"

Section 12 of Article 4 of the Constitution of Missouri applies to this question. It is as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

You will note that this section prohibits the appointment of any member of the General Assembly during his term of office, "to any office under this State," etc. This department, under date of October 23, 1941, by an opinion to Governor Donnell relating to a member of the General Assembly being appointed to the office of Recorder of Deeds,

treated the subject of "any office under this State." We are enclosing a copy of this opinion for your information.

Since your question applies to a "deputy", we think the case of State v. Buck, 135 Mo. 325 may be pertinent because it relates to a "deputy" officer. There the court said (l. c. 332):

> "Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualification they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' R. S. 1889, secs. 8181 and 8182.
>
> "The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers.
>
> "It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. * * * *"

The statute provides for the appointment of deputy county clerks as follows: (Sec. 13299, R. S. Mo. 1939)

> "Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, whosshall be at least

> seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

In the case of In Re. Rothwell, 44 Mo. App. 215, 221, in speaking of the powers and duties of a county clerk's deputy, the court said:

> "* * * The clerk is entitled to appoint a deputy by the consent of the judges, and when so appointed such deputy may perform the duties of the clerk. R. S. 1889, sec. 1977. Besides the rule is that 'where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself.' * * "

Also, in the case of State ex rel. Blakemore v. Rombauer, 101 Mo. 499, the court in considering whether or not the office of circuit clerk is "an office under this state" said at l. c. 503:

> " * * * * If the title to the office of such a clerk is not a title to an office under this state, then it is difficult to see what meaning can be given to the words of the clause in question. "

And, in the case of State ex rel. v. Bus, 135 Mo. 335, the court in speaking of county officers said:

> " * * Officers of a county, though not named, would be included under the expression 'officers under the state.' * * * * * *"

By the same process of reasoning, we think the office of county clerk is "an office under this state". Since the

deputy clerk's office is in the same class as the principal, it is also "an office under this state."

CONCLUSION

From the foregoing, it is the opinion of this department that a member of the General Assembly may not be legally appointed to the office of deputy county clerk during the term for which such person is elected to the General Assembly.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

SCHOOLS: The Board of directors of a common school district can legally bind their successors on warrants drawn on the proper funds provided said warrants are valid and legal.

January 19, 1942

2-3

Mr. Lieu. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

FILE
20

Dear Sir:

This Department is in receipt of your letter of January 7, 1942, wherein you request an opinion based upon the following facts:

"The Treasurer of Camden County, has requested that I obtain an opinion from you concerning the stopping of payment of a School District warrant by the Board of Directors of the District, elected subsequent to the issuance of the warrant.

"The Board of Directors of Camden County Common School District No. 7, issued a warrant drawn upon the Treasurer of Camden County, payable to the Stoutland Consolidated School District in the amount of $344.00, as payment for transportation for the students of School District No. 7, to the Stoutland Consolidated School.

"The warrant bears the signature of the President of the Board and the Clerk of the Board, and was dated March 1st, 1940. The warrant was not presented for payment for more than a month, and during that time the annual school election was held, and two new members of the board were elected, who, due to the animosity to the preceding

members of the board, passed a resolution on the 4th day of April, 1940, directing the Treasurer of Camden County, not to pay out any money on said warrant. A certified copy of which said resolution was duly presented to the Treasurer of Camden County, and she in turn, marked the warrant payment stopped, and refused, when it was presented to her for payment.

"The warrant was drawn at a regular meeting of the School Board, and is payment for a legitimate debt of the District, and the Stoutland School District are threatening to institute mandamus proceedings against the Treasurer of the County, to force her to pay the warrant.

"I enclose a copy of the warrant and a copy of the resolution for your consideration.

"I would appreciate your opinion as to the authority of the succeeding school board to stop the payment on the warrant in question, and as to what the Treasurer should or should not do in regard to paying the warrant upon its presentation."

As stated in your letter, the matter appears to be a controversy between members of the new board and members of the prior board of the school district.

Under Section 10366, R. S. Missouri, 1939, the manner of paying out school monies and the form of warrants to be issued are set forth. The warrant in question refers, as stated in your letter, to payment of transportation. The section in question states as follows, "Money apportioned for transportation of pupils shall be credited to the incidental fund."

The authority of a school board district to bind a succeeding school board district has been recognized in the decision of Tate v. School District, 324 Mo. 477, 23 S. W. (2d) 1013. The question of a county court binding its successors by its actions on a contract in the future and for a reasonable length of time, is considered in the decision of Aslin v. Stoddard County, 341 Mo. 138. We herewith quote extensively from the Aslin Case as it contains all of the authorities and a digest of the Tate Case, above referred to. The court, in citing the Tate Case and other authorities, said at l. c. 143, as follows:

> "No case from this State is cited nor have we found any directly adjudicating the precise question now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. Appellant cites, on this point, 15 C. J., p. 541, par. 234, and Tate v. School District, 324 Mo. 477, 23 S. W. (2d) 1013. The Tate case is cited chiefly on the proposition that the contract must be for a reasonable time and free from bad faith or collusion, etc. (a point to be discussed in our next paragraph). Respondent also cites the Tate case.
>
> "In said Tate case the plaintiff, a qualified school teacher, was employed by the school board, composed of three members, by contract dated December 18, 1924, to teach for a term of eight months, beginning August 3, 1925. There was to be, by law, an annual school meeting in April, 1925, at which time the term of one of the directors, Cottrill, president of the board, would and did expire, he being suc-

ceeded by another. (Incidentally, we may state, it appears that Cottrill's vote was necessary to the employment of the plaintiff). After the April, 1925, school meeting the 'new board,' composed of two of the former members and Cottrill's successor, after reorganizing as provided by statute, refused to recognize the contract with the plaintiff. She sued and recovered, the judgment being affirmed here. A number of questions are discussed in the opinion. Pertinent to the question now under consideration the court said, 324 Mo. l. c. 492, 23 S. W. (2d) l. c. 1020, (2):

"'The foregoing statutes reflect the clear and unmistakable intention of the General Assembly . . . . that the government and control of each of the common-school districts in the State shall be vested in a board of directors composed of three members, whose terms of office shall not expire concurrently, but that the term of office of only one of the three members composing said board shall expire during each school year, thereby reflecting the intention of the General Assembly that such governing board of direcotrs of a common-school district shall be a continuous body, or entity, of which a majority of the members composing the board shall continue in office during the next succeeding school year. While provision is made in the statutes for a change in the personnel of the membership of the board of directors by the vote of the qualified electors of the school district at each annual meeting of the school district, yet the intention of the Legislature is clearly reflected in the statutes that the board of directors of a common school district is a continuous body or entity, and that transactions had, and contracts made,

with the board are the transactions and contracts of the board, as a continuous legal entity, and not of its individual members.'

"In said Tate case a number of authorities are reviewed, in which it is held that contracts of the nature of that there in question are binding upon the school district, though the term of office of some members of the board making them have expired, if the contracts were for a reasonable time and not otherwise repugnant to public policy. The opinion says that such is the prevailing rule, citing and quoting from 35 Cyc. 1079, 1080, and 24 Ruling Case Laws 579, and citing numerous decisions following that rule. The court held that the contract was not void for want of power or authority in the then board of directors to make in on December 1[illegible], 1924.

"The text of Corpus Juris cited by appellant reads:

"'Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest.'

"We have examined the cases cited in the footnotes in support of said text. In our opinion most of them are distinguishable, either in their facts or because of statutory provisions, from the case before us.

"In Manley v. Scott, supra, the Minnesota Supreme Court had before it a question similar to that we are now considering. On December 31, 1908, the board of county commissioners appointed and by written contract employed one Schaffer as morgue keeper for the year 1909. The terms of two of the five members of the board expired at midnight that night, two new commissioners having been elected at the preceding November election. When the two new commissioners took office, soon after January 1, 1909, the board elected a new chairman and vice chairman, as required by statute, and attempted to rescind the contract with Shaffer and make a new contract with one Manley as morgue keeper for the year 1909. The court held the board of county commissioners had power to make the contract with Shaffer when it was made and, 'Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office;' and that, the contract with Shaffer being fair and reasonable and there being no question of fraud or collusion, said contract was binding and the board, after the qualification of the new members had no power to rescind it without cause being shown. Speaking of the question of power of the board of county commissioners to 'make a contract with an employee which extends beyond the expiration of the terms of office of certain members of

the board,' the court said, 29 L. R. A. (N. S.) l. c. 655: 'While there is some apparent conflict in the authorities, it is reasonably clear that the weight of authority is to the effect that the board has such power,' citing numerous cases. The court further said (29 L. R. A. (N. S.) l. c. 659), quoting approvingly from Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385:

"'It (the board) is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason.'

"In said case of Manley v. Scott the court mentioned, as apparently announcing a 'somewhat different conclusion' from that which it said was supported by the weight of authority, practically all of the cases cited in the footnotes in 15 Corpus Juris, supra, and proceeded to discuss and distinguish those cases. [See, also, notes to Manley v. Scott, 29 L. R. A. (N. S.) 652.)

"We regard said case of Manley v. Scott as in point and as being soundly reasoned. The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be con-

> ceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent and economical management of its affairs. * * * * * * * * * * *."

We are of the opinion that the former members of the board of directors of Camden County Common School District No. 7 can legally bind the succeeding members in the payment of the tuition in question, under the authorities cited, supra.

The question of the legality of the warrant becomes a question of fact and the copy of the same, on its face, appears to be legal. The copy of the resolution instructing the treasurer not to pay the warrant merely states that two members of the board unlawfully and wrongfully issued and signed the warrant on the school district in the sum of Three Hundred Forty Four ($344.00) Dollars, payable to Stoutland Consolidated School District. The resolution further states that the members were without authority to issue the warrant, and that the same was without consideration and against public policy and issued in violation of the laws of the State.

As above stated, the question of the warrant and the consideration for the same is a question of fact, which this Department can not pass upon. However, assuming that the warrant is valid in every respect, we know of no liability which the treasurer would incur in honoring and paying the warrant.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

ROADS AND BRIDGES: PURCHASING MACHINERY: Commissioners of special road districts may purchase road machinery with bond funds issued for the purpose of constructing, repairing and maintaining bridges and roads.

February 6, 1942

2-16

FILE
20

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camdenton, Missouri

Dear Mr. Cunningham:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of whether or not the commissioners of a special road district, organized under the provisions of Article 11, Chapter 46, R. S. Mo. 1939, may purchase road machinery with bond funds which have been voted for the purpose of constructing, repairing and maintaining bridges and culverts, and working, repairing, maintaining and dragging public roads in such district.

The commissioners of the special road district of the class to which you refer in your letter, by virtue of the provisions of Section 8717 of Article 11, R. S. Mo. 1939, may issue bonds. This section directs the purposes for which the proceeds from the sale of such bonds may be used in the following language:

> "* * * * The proceeds of the sale of such bonds shall be used for the purpose only of paying the cost of holding such election, and constructing, repairing and maintaining bridges and culverts within the district, and working repairing, maintaining and dragging public roads within the district."

Since this section does not expressly provide for the expenditure of such funds for the purpose of purchasing road machinery, the authorization for such an expenditure must be obtained by implication, unless we also find some statutory authority. Section 8714 of this same article specifically grants to the commissioners of such road districts certain powers and duties in the following language:

> " *
> Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; * * * * * * * * * * * * * * * * * * *"

This section expressly grants to the commissioners the power to purchase road machinery. In construing this section in the case of Hawkins v. Cox, 66 S. W. (2d) 539, l. c. 542, the court said:

> "This road district is given authority under section 8065, R. S. 1929 (Mo. St. Ann. Sec. 8065, p. 6857,) to construct, improve, and repair highways and bridges and is enjoined to keep same in good condition, and to this end is authorized to 'employ hands and teams' and to 'rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work.'"

All of the duties and powers imposed and granted in the foregoing section could be implied from the express duty imposed on the commissioners to repair and maintain the roads and bridges in the district.

In the case of King v. Maries Co., 297 Mo. 488, the Supreme Court in treating the question of implied powers granted by express powers, said: (l. c. 496)

> "It has been uniformly held that county courts are not the general agents of the counties, or of the State. Their powers

> are limited and defined by law. They have only such authority as is expressly granted them by statute. (Butler v. Sullivan County, 108 Mo. 630; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492; Steines v. Franklin County, 48 Mo. 167.) This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effec tual the purposes of the authority expressly granted."

And in the case of Bybee v. Hackman, 276 Mo. 111, this rule was again announced as follows (l. c. 116):

> " * * * * * * But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication. * * * * *"

Applying this rule in the Bybee case, supra, the Court held that the State Board of Equalization had implied authority to employ a stenographer at the expense of the state to take evidence at its hearings.

Also, in the case of Walker v. Linn County, 72 Mo. 650, the court held that a county court has implied authority to insure county buildings under "its express duty to manage and control county property, and take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

CONCLUSION

From the foregoing, we are of the opinion that the commissioners of a special road district in the class to which you refer, have both the express and implied power to vote bonds and use the proceeds thereof for the purpose of purchasing necessary road machinery to be used in constructing, maintaining bridges and culverts within their districts

and for working, repairing, maintaining and dragging such roads.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANN M. KILGO
(Acting) Attorney General

TWB:NS

TAXATION: 1. Redemption, after two years, from a certificate issued in 1938, is passed upon by a former opinion.

2. Interest at the rate designated by a collector in a certificate of title shall run from the date of issuance of such certificate for a period of two years and six months thereafter.

March 10, 1942

Mr. Stanley Creed
Collector, Callaway County
Fulton, Missouri

3-14

FILE
20

Dear Mr. Creed:

This is an acknowledgment of your request for an opinion under the Jones-Munger Law and addressed to the General on March 4, 1942, which is as follows:

> "Would you kindly give your oppinion on a matter that came up in this office recently.
>
> If a party buy's property in the 1938, land sale and as yet has not demanded a deed for this property, can the party who this property was assessed to redeem it even though the two years redemption period is up? If so what percent should be charged and over what period of time?
>
> Should the percent be charged on the full length of time or just two years?"

I

The right of an owner of real estate to redeem property sold under the provisions of the Jones-Munger Law and the period in which he may redeem such property, was passed upon by this department in an opinion rendered to Mr. W. H. Carney, collector within and for Phelps County, on August 28, 1941, which, in conclusion, held:

> "Therefore, there being no statutory provision defining the property rights of a holder of a certificate of purchase, it seems that the rule is that, until the delivery of a deed, he takes

neither a legal nor an equitable title in and to the land.

Therefore, until the delivery of such deed the owner would have the right of redemption in the manner provided by the statutes relating to such subject."

The above conclusion was based upon the decision of the Supreme Court in the case of Hilton v. Smith, 134 Mo., 499, 509. In the case of City of St. Louis v. Baumann, 153 S. W. 2d, 31, 34, such court modified the Hilton decision but only with respect to the office of a certificate of title, holding that, after the redemption period, such certificate conveyed an equitable title rather than a mere naked interest. A copy of said opinion is enclosed.

II

Section 11133 R. S. Mo., 1939, is in part as follows:

"After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be <u>designated</u> as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, <u>interest</u> and costs, and the year or years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract." * * * * * * * * * Such certificate of purchase shall also contain the true date of the sale and the time when the purchaser will be entitled to a deed for said land, if not redeemed as in this law provided, and the rate of interest that such certificate of purchase shall bear, which rate of interest shall not

exceed the sum of ten per cent per annum"(Underscoring ours.)

Section 11145 R. S. Mo., 1939, is in part as follows:

" * * * * * together with interest at the rate specified in such certificate, not to exceed ten per centum annually, * * * * * * * * * * * * * * In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time." (Underscoring ours.)

Under the provisions of section 11133, supra, a certificate of purchase shall be issued by the collector with designated interest and such certificate shall bear interest from the date of the issuance thereof not to exceed ten per cent per annum.

Section 11145, supra, provides that unless a tax deed is obtained "for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

CONCLUSION

Therefore, the collector shall designate in the face of the certificate interest at a specified rate not to exceed ten per cent per annum.

Such interest , in the absence of the redemption by parties entitled to redemption and, in the absence of delivery of a deed to a certificate holder within six months after the expiration of the redemption period of two years, shall continue to run until the expiration of said two years and six months from the date of the execution and delivery of the certificate of purchase and no longer.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

SVM:FS
Enc.

TAXATION: SPECIAL LEVY ORDERED BY THE CIRCUIT COURT:

Special levy of taxes ordered by the Circuit Court Judge are subject to the limitation prescribed by the constitution.

March 24, 1942

3-31

FILE 20

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camden County, Mo.

Dear Sir:

This is in reply to your letter of recent date wherein you submit the question of whether or not the special levy of taxes to pay the levy ordered by the Circuit Court by the provisions of Section 11041 R. S. Mo., 1939, are subject to the limitation prescribed by the constitution.

The authority for such a levy is found in section 11041 R. S. Mo. 1939 which provides in part as follows:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court of judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with

> the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: * * *

Your inquiry goes to the question of whether or not such a levy is limited by the foregoing provisions of the Constitution. In the case of Brooks v. Schultz, 178 Mo. 222, the question before the court was whether or not the "library tax" which the city was authorized to impose, was limited by the foregoing constitutional provisions. In that case the court said, l. c. 228:

> "In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuation of taxable property in its jurisdiction; that was the limit of its taxing power, and therefore this special tax of two mills on the dollar for library purposes is illegal, unless it can be brought, as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes."

The act authorizing the "library tax" was statutory and in the above case the court held that this tax was limited by the provisions of said section 11 of article 10 of the Constitution.

Said Section 11041 R. S. Mo., 1939 was before the Supreme Court in State ex rel. Philpott, Collector of Revenue, v. St. Louis-San Francisco Railroad Company, 247, S.W. 182. The constitutionality of the levy there involved was not in issue because it was for only thirty cents on the one hundred dollars assessed valuation. The question of whether or not this section was limited by what is now the provisions of section 11046 R. S. Mo., 1939, which prescribes a limit to which the county court may go in making a levy, was at issue. In that case the court said at l. c. 184:

> "The revenue collected to pay past indebtedness must be applied to that purpose and may not be apportioned under section 12866 for current county expenditures. State ex rel. v. Hortsman, 149 Mo. 290, 297, 50 S. W. 811. Current

> county expenditures, mean expenditures for the year for which the taxes were levied. State ex rel. V. Payne, 151 Mo. 663,673, 52 S.W. 412. The only tax that a county court may levy on its own initiative is that for the payment of county current expenditures, as authorized by section 12859, R. S. No other tax for any purpose shall be assessed, levied or collected, except as authorized by section 12860. In this case the additional 10-cent levy was made by the order of the circuit judge in vacation.
>
> "Respondent contends that section 12865, as amended by the act of 1921, places the limit on the tax that may be levied by the county court for county purposes in any one year. This section as amended has no relation to the special additional levy that may be ordered by the circuit court or judge in vacation under the authority of section 12860. These sections have different objects and purposes; that of one is to raise revenue to pay current expenses, that of the other is to pay past indebtedness. One is a general, the other a special, statute ingrafting an exception on the former. 'To the extent of any necessary repugnancy between them, the special will prevail over the general statute.'* * * *"

While this case is not authority on the question, it does shed some light on the purpose of the levy authorized by said section 11041, namely, to raise revenue to pay past indebtedness. Even if the provisions of said section 11041, did not specifically state that it is subject to the provisions of the Constitution, the same principle would apply because, we think the County Court or the Circuit Court in making the levies for current and past indebtednesses, is still subject to the constitutional provisions.

CONCLUSION

From the foregoing, it is therefore the opinion of this Department, that the levy authorized by Section 11041 R. S. Mo., 1939, must be made subject to the provisions of Section 11, Article 10 of the Constitution of Missouri, and that the total amount of the levy made by the County Court for current county expenses and the Circuit Court for past indebtedness, may not exceed the amount authorized by said Section 11 of Article 10 of the Constitution.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

FEES: Expense of extradition paid only by the State.

April 15, 1942

Hon. Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

FILE
20

Dear Sir:

We are in receipt of your letter of April 8, 1942, containing the following request for an opinion:

> "We have before the County Court a matter concerning costs that is not clear in my mind.
>
> "It is the situation where our Sheriff goes into another state to bring back a prisoner, and is required by those in charge to pay a certain sum in the way of jail costs before they will release the prisoner. These amounts range from Ten to Twenty-five Dollars. The question is how he may be reimbursed for these amounts."

In reference to the payment of expenses incurred in bringing back fugitives to the state, the legislature enacted Section 3977 R. S. Missouri, 1939, which reads as follows:

> "The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate,

> be allowed and paid out of the state treasury, as other demands against the state."

Under the above section the expenses must be paid by the state and we find no law which permits the county to pay such expenses.

It is solely in the discretion of the Governor as to the reimbursement of the expenses paid out by the messenger. It was so held in the case of State ex rel v. Allen, 180 Mo. 27, l. c. 31, where the court said:

> "Under the statute quoted (sec. 2744, R. S. 1899) the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, and all his acts as such are in that capacity, and hence he can not be interfered with in the discharge of his duties by the courts. (State ex rel. Robb v. Stone, 120 Mo. 428; State ex rel. v. Meier, 143 Mo. l. c. 447; Albright v. Fisher, 164 Mo. l. c. 62; State ex inf. v. Shepherd, 177 Mo. l.c. 236.)
>
> "The relator has performed a service for which he is entitled to be paid. The amount claimed is exactly such as is allowed a sheriff for similar services, and hence is not only prima facie reasonable, but is is such as the lawmakers have declared to be reasonable, and if this court had any power it would not hesitate to order the bill paid. But this court has no power in the premises. The Governor

> alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor can not lawfully issue a warrant therefor. The peremptory writ of mandamus is therefore denied. * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department that where the messenger pays jail costs in another state, in order to release a prisoner, the expenses can only be paid by the State upon the order of the Governor.

It is further the opinion of this department that the county is not permitted to pay these expenses.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SCHOOLS: Consolidated district may change location without the vote of taxpayers.

April 17, 1942

Mr. Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

FILE
20

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"For a number of years the Waynesville Consolidated School District has maintained a grade school and a high school in the same building in the City of Waynesville. It is now proposed to convert this building into a high school only. It is further proposed to erect two grade school buildings, one of these to be erected one mile east of the present City of Waynesville and the other is to be erected 1½ miles west of the present City of Waynesville. Thus, when the proposal is carried out the grade school children in Waynesville will have to travel at least one mile farther than they do at the present time.

"The Board of Education proposes to make these proposed changes without submitting the question to a vote and without having the proposals voted on by the electorate of the District. The proposed buildings

are to be constructed by direct Federal grants without using any of the District money.

"The question is, does the Board of Education have the power in the absence of the vote of the electorate to so abolish the present site of the grade school and to establish new grade school sites at other points in the District?"

Article 5, Chapter 72 of the Revised Statutes of Missouri, 1939, relates to consolidated schools. Section 10471 of that article provides as follows:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and

> the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

Section 10574, R. S. Mo. 1939, provides in part as follows:

> "In all such school districts as are mentioned in article 5 of this chapter that have or that may hereafter have a population exceeding five thousand and not exceeding one hundred thousand inhabitants, the board of education of such school districts shall have full power, by an affirmative vote of not less than two-thirds of all the members of such board, to locate and direct and authorize the purchase of sites for schoolhouses, libraries, school offices and public parks and playgrounds adjacent to the schoolhouse site or elsewhere in said school district, and, by a like vote, to direct and authorize the sale of any real estate or other property belonging to such school district; * * *

of Appeals, through Judge Bailey, said, at l. c. 676, 677:

> "There is little dispute as to the facts, which tended to prove the allegations of the petition. Plaintiffs have assigned numerous errors involving principally questions of law. These may be considered, however, as embracing but three points, the principal one of which is thus stated:
>
> "'That under the admitted and undisputed facts of this case that the Board of Education had no authority to change the location of the grade and high school building, from the site upon which the district had established and maintained such building, and to abandon the same and locate said such new school building for both the grade and high school upon a new and different site, without the authorization of the qualified voters of said district, as provided in subdivision 11 of section 11210, R. S. Mo. 1919. The Court erred in dismissing plaintiffs' petition and denying affirming injunction, as prayed therein.'
>
> "This same proposition was briefly considered by this court in the case of State ex rel. Gehrig v. Medley et al., 28 S. W. (2d) 1040, which was a mandamus proceeding to compel the directors of this consolidated district, which plaintiffs now are attempting to enjoin in the present action, to erect and equip a school building on the old site. In the Gehrig Case we said:

"'It seems to be contended by relators that the school board in a consolidated district has no power to change a school site unless authorized by a vote of the resident taxpayers. There is no merit in that contention. The board in a consolidated or city school district has the power to change the site without a vote of the taxpayers. Section 11241, R. S. Mo. 1919; Gladney v. Gibson, 208 Mo. App. 70, 233 S. W. 271; Young v. Consolidated School District No. 3, 196 Mo. App. 419, 193 S. W. 627; Velton v. School District, 222 Mo. App. 997, 6 S. W. (2d) 652.' Loc. cit. 1042 of 28 S. W. (2d).

"We are of the opinion the court was correct in thus stating the rule. Appellants have very forcefully and insistently attempted to show that the board of a consolidated district has no such power as here attempted to be exercised in selecting a new site when the district already owns a site theretofore used for a common school. It is said that the only power the board of a consolidated district has to select a schoolhouse site is derived from section 11241, Rev. St. Mo. 1919, and that where that section is inapplicable the change of site must be upon a vote of the qualified voters as provided by section 11210, Rev. St. Mo. 1919. The latter section sets forth the powers of the qualified voters of a common school district when assembled at the annual meeting. However much in error we may have been in ruling on the question of the power of the school board of a consolidated district to change a school house site, we are firmly convinced

section 11210 has no application whatever to consolidated school districts. We consider that matter definitely settled in the Gladney Case, supra, wherein the St. Louis Court of Appeals in considering that section of the law, said:

"'That section relates alone to common school districts, and has to do with the powers of the qualified voters of such districts "assembled at such meeting." It manifestly has no application to a town school district where no such annual meetings are held, but where elections, to vote upon propositions that may be lawfully submitted, are required to be by ballot and conducted in the same manner as elections for state and county officers. See section 11251, Rev. St. 1919. If, as appellant contends, we must look to the "general school laws" to determine where the authority for selecting or changing a high school site, in districts such as this, is vested, we regard it as clear that the provisions of section 11210, supra, cannot be said to be general in character, applicable to districts other than common school districts. Not only is it a section found in an article which is expressly made applicable to common school districts, but the very terms of the section are such as to render it inapplicable to a district such as that here involved.' Loc. cit. 79 of 208 Mo. App., 233 S. W. 271, 273."

CONCLUSION

It is, therefore, the opinion of this department that the board of a consolidated school district may change the

location of a school without a vote of the taxpayers of the district.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

MOTOR VEHICLES;
PUBLIC SERVICE COMMISSION: Employee of Fort Leonard Wood transporting other certain employees to the Fort is not a "motor carrier" or "contract hauler."

May 11, 1942

5-16

FILE 20

Honorable Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

We are in receipt of your letter dated May 7, 1942, requesting an official opinion from this department, as follows:

"I would like to have your special opinion upon the following matters, to-wit:

"Richland, Missouri, in this County, is approximately 25 miles from Fort Leonard Wood. Quite a number of the inhabitants of Richland and the adjacent territory are employed by the Government in civilian work at Fort Leonard Wood. These employees have been commuting under an arrangement whereby some four or five employees would ride in the automobile of another employee and each pay a per diem to the driver of 50¢ for the transportation. Until recently no public service vehicle operated between Richland and Fort Leonard Wood. Recently the Public Service Commission issued a certificate of convenience and necessity to an individual resident of Richland and on April 27, 1942, this individual began operating a bus be-

tween Richland and Fort Leonard Wood and intermediate points, pursuant to the Public Service Commission authority aforesaid, and is making four round trips each day between Richland and Fort Leonard Wood.

"A great many of the employees are continuing to commute in private conveyances in the manner above described and are operating along the line now traveled by the Public Service vehicle. A few of the owners of the private vehicles purpose to lease their vehicles to the persons who would otherwise be their passengers.

"My first question is: Are the owners of these private vehicles who are transporting employees on a per diem basis in violation of the criminal law and thus subject to criminal prosecution?

"My second question is: If such owner of a private vehicle executes a lease to certain of the civilian employees, these lessees pay the agreed rental in the lease and use the vehicle for transportation to and from their place of employment, said travel being along the line serviced by the Public Service vehicle above mentioned, is such owner, and are the purported lessees, violating the criminal law and as such subject to criminal prosecution?"

The Public Service Commission has no power over property for private use, it was so held in the case of State ex rel Buchanan County Power & Transmission Co., v. Baker, 9 S. W. (2d) 589.

The Public Service Commission's powers are limited to those conferred by the Public Service Commission Act. (State ex rel Rutledge v. Public Service Commission, 289 S. W. 785, 316 Mo. 233.)

The law applicable to your request is Section 5720, Laws of Missouri, 1941, page 522. This section repealed Section 5720, Article 8, Chapter 35 of the Revised Statutes of Missouri, 1939, and was re-enacted for the purpose of preventing trade barriers at the respective state lines. The only additional definition appears in Section 5720, Laws of Missouri, 1941, supra, in the last provision of paragraph (b) of the section.

Paragraph (b), of Section 5720, Laws of Missouri, 1941, page 522, partially reads as follows:

> "The term 'motor carrier,' when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier: * * * * * * * * * *."

This part of Section 5720 was in Section 5720 R. S. Missouri, 1939, which was the re-enacted Laws of 1931, page 304.

Paragraph (b) of Section 5720 R. S. Missouri, 1939, was construed in the case of State v. Witthaus, 102 S. W. (2d) 99, l. c. 101, where the court after setting out what

is now paragraph (b) of Section 5720, Laws of Missouri, 1941, page 522, said:

> "* * * This definition gives the term 'motor carrier' a meaning equivalent to that of a common carrier. Schwartzman Service, Inc., v. Stahl et al., supra.
>
> "In State ex rel. v. Public Service Commission, 275 Mo. 483, 205 S. W. 36, 42, 18 A. L. R. 754, the following from 1 Wyman on Public Service Corporations, 227, was quoted with approval: 'The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: "Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract." * * * .'" (Underscoring ours.)

Under the facts in your request, and according to the above holding, the employee who hauls other specific employees to Fort Leonard Wood is not a "common carrier" for the reason that he is not offering to carry every one, but carries only specific persons to the place where he is employed.

The court in the above case has held that where the operator of the motor vehicle held himself out as a carrier of either goods or persons to anyone who would

employ him he would then come within the Public Service Commission Act. The court, in that instance, said:(l.c. 101)

> "' * * * This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier."' * * * * "

The main question is whether or not the owner of the automobile is dealing as a carrier for transportation of persons with the public, or whether or not he is dealing as a carrier of persons for transportation with specific persons. In the case of State v. Witthaus, supra, the court, in passing upon that subject said: (l. c. 102)

> "* '* * We are dealing with a case where the carrier made the transportation of household goods part of its regular business, advertised that business in a way to solicit custom from the general public. An unavoidable implication arises that it holds itself in readiness to engage with any one who might apply.' The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. White v. Smith, 189 Pa. 222, 42 A. 125,

> 43 L. R. A. 498. 'It follows that the use must be so extensive as to imply an offer to serve all of the public, or that there be other circumstances from which it may be reasonably inferred that the carrier was undertaking to serve all to the limit of his capacity. One, however, does not become a public carrier because he is engaged exclusively in transporting persons or property or because the person or persons whom he serves take all his facilities. The test is whether he has invited the trade of the public.' Klawansky v. Public Service Commission, 123 Pa. Super. 375, 187 A. 248, 251. But, 'the public does not mean everybody all the time.' Spontak v. Public Service Commission, 73 Pa. Super. 219, loc. cit. 221 citing Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075. If the carrier carries goods as a public employment, undertaking to carry goods for persons generally, and holds himself out to the public as ready to engage in that business as a business, and not as a casual occupation, he comes within the definition of a common carrier. Story on Bailments, sec. 495."

There is no question but that paragraph (b) of Section 5720, Laws of Missouri, 1941, supra, only applies to "motor carriers" and not to "contract haulers." It was so held in the case of State v. Sanderson, 128 S. W. (2d) 277, Par. 2, where the court said:

> "It is the contention of the prosecution in this case, which contention we

> think is correct, that the word 'carrier' in Section 5277 means 'common carrier', and not 'contract hauler' as defined in Section 5264(c) of the same act. It is our conclusion that the provisions of Section 5277 apply to common carriers only and not to contract haulers. The evidence clearly shows that the defendant did not make application for a certificate or permit within ninety days after the present law went into effect, as provided by the latter part of said Section 5277."

Paragraph (c) of Section 5720, Laws of Missouri, 1941, Page 522, reads as follows:

> "The term 'contract hauler,' when used in this article, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

It will be specifically noted that Paragraph (c) contains the following phrase:

> "The term 'contract hauler,' when used in this article, means any person, firm or corporation engaged, as his or its principal business, * * * ."

Under the facts in your request, you state that four or five employees commute from Richland to Fort Leonard Wood in the car of another employee. We are presuming that the employee, when carrying the other employees to Fort Leonard Wood is also employed at the Fort and performs his duties at the same time the other employees do.

Since the carrying of the other employees is not his principal business he is not considered as a "contract hauler."

Paragraph (c) of Section 5720, supra, is unambiguous and requires no construction. Under the holding in the case of State v. Witthaus, supra, it is a question of fact as well as law, whether or not the owner of the automobile, as described in your request, is dealing with the public at large, or with certain individuals. If he is dealing with the public at large he comes within the powers of the Public Service Commission, as set out in Section 5726, paragraph (d), of the Revised Statutes of Missouri, 1939, which gives the Public Service Commission power over contract haulers, but, since we are holding that the employee is not a "motor carrier," as defined by Section 5720, supra, and since he is not a "contract hauler," as set out in paragraph (c) of said Section 5720, supra, he does not come within the powers of the Public Service Commission.

CONCLUSION

In answer to your first question, it is the conclusion of this department that owners of private vehicles who are employed at, and are employees of, Fort Leonard Wood themselves, and who are transporting employees on a

per diem basis, but when such transportation is not their principal business, are not subject to criminal prosecution under the Public Service Commission Act, for the reason that it is a matter of special contract with certain individuals and is not the promiscuous hauling of the public in general.

In answer to your second question, it is the opinion of this department, that, since the employee of Fort Leonard Wood is not a "motor carrier" and is not a "contract hauler," the other employees who enter into an agreement with him for transportation on a per diem basis are not subject to prosecution under the Public Service Commission Act.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SCHOOLS: Four questions regarding elections under Section 10484, R. S. Mo. 1939.

- -

September 22, 1942

9-26

FILED

20

Mr. Lieu Cunningham, Jr.
Prosecuting Attorney
Camdenton, Missouri

Dear Sir:

We have your request for an opinion, which request reads as follows:

"We have a Common School District in this County which has been trying for several years to annex to an adjoining Town School District, they hold special meetings or elections regularly, and each one is hard fought and they sometimes almost reach the violence stage. I have been requested to obtain an opinion from your office as to the conducting of such special meetings.

"First: There is no provision for judges of election, the meeting elects a temporary Chairman and a Secretary who preside over the meeting and certify the vote, however do they have the power to refuse the right to vote to voters who are not qualified voters or cast out improperly cast ballots?

"Second: They desire your opinion as to just who is a qualified voter at such a meeting.

"Third: They desire to know whether the filing of the petition provided for in Section 10,484, with the Clerk of the Board of Directors makes the calling of

the Special Meeting mandatory upon the Board.

"Fourth: Do the Statutes providing for the criminal prosecution of persons who make false statements to vote or vote knowing they are illegal voters of the District apply to such meetings and the persons attending?

"I will greatly appreciate your opinion upon these matters in the near future, as the residents of the district are filing another petition for a Special meeting, and the election will no doubt be held in the next three weeks."

I

Section 10484, R. S. Mo. 1939, provides that the proposition of proposed annexation to a city or town district shall be submitted at a special meeting. Section 10361, R. S. Mo. 1939, provides how special meetings shall be organized in the following language:

"* * * and when assembled, the meeting shall be organized by the election of a chairman and a secretary, who shall keep a correct record of the transactions of the meeting, said record to be signed by the secretary, attested by the chairman, and filed with the district clerk, who shall enter the same upon the records of the district; * * * * * * * * * * * * *"

Section 10484, R. S. Mo. 1939, after providing for the calling of a special meeting, provides as follows:

"The voting at said special school meeting shall be by ballot, as provided for in section 10467, and the ballots shall

> be 'for annexation' and 'against annexation,' when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read 'for release' and 'against release.'"

Turning to Section 10467, R. S. Mo. 1939, we find that the method of voting is prescribed as follows:

> "* * * and each person desiring to vote shall advance to the front of the chairman and deposit his ballot in a box to be used for that purpose. When all present shall have voted, the chairman shall appoint two tellers, who shall call each ballot aloud and the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are 'for organization,' the chairman shall call the next order of business."

Section 10420, R. S. Mo. 1939, defines who are qualified voters at school elections on propositions presented at meetings (there are special qualifications on certain propositions which are not material to the question here), in the following manner:

> "A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

From the foregoing statutes we conclude that in order for a person to vote at school meetings he must possess the qualifications set forth in Section 10420. It must follow, that at such school meetings someone must determine who pos-

sesses those qualifications. If only qualified voters are permitted to vote, then there must be some way to determine who those qualified voters are. It will appear from the foregoing sections of the statutes that special meetings are organized by the election of a chairman and a secretary. No further provisions are made as to how the meetings shall be conducted thereafter, except that the chairman and secretary shall sign and attest the record of the proceedings. The school meeting is provided for by law, but the details of how it conducts itself are not set forth in the statute. The school meeting as thus assembled is a deliberative assembly and should proceed as any other similar body.

In the case of Petrie v. Common School Dist. No. 5, 255 Pac. 318 (Idaho), the court was considering the nature of a district school meeting which was provided for under statutes very similar to those quoted above. The court, l. c. 322, said:

> "A reading of these sections of the statute leads to the conclusion that the annual school meeting was empowered by the Legislature to exercise the functions of a deliberative assembly, at which the qualified electors of the common school district might discuss and dispose of general questions pertaining to the school and its interests.
> *"

We think the statutes contemplate that the school meeting shall be conducted under the supervision of the chairman. The natural procedure would be for the chairman to determine in the first instance who were the qualified voters at the meeting. If he found that someone offered to vote who, in his judgment, did not possess the legal qualifications, it would be his duty to refuse to allow such person to vote. If that person was dissatisfied with the ruling of the chairman, he could appeal to the meeting and obtain a vote of the members present as to whether he was entitled to vote. Of course, the decision of the meeting would prevail and ultimately determine whether the particular person was entitled to vote.

CONCLUSION

It is, therefore, the opinion of this office that at a meeting of the voters of a common school district, the chairman would have the right in the first instance to pass upon the qualifications of those offering to vote, but that his ruling would be subject to a majority vote of the entire assembly.

II

Under the answer to question one, we pointed out that the qualifications of a voter at a school meeting were set out in Section 10420 of the statutes. That section prescribes that voters at the school meetings must have the same qualifications as persons who are authorized under the general laws to vote in the county and state for county officers and who have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote. The qualifications of voters under the general laws are found in Section 11469, which reads as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people: Provided, each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided further, no idiot, no insane person, and no person while kept in any poorhouse at public expense, except the Soldiers' Home at

> St. James and the Confederate Home at Higginsville, or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

CONCLUSION

It is, therefore, the opinion of this office that a qualified voter at a school district meeting is a voter who possesses the qualifications prescribed by Section 11469, R. S. Mo. 1939, and, in addition, has resided in the district thirty days next preceding the meeting at which he offers to vote.

III

Section 10484, supra, provides in part as follows:

> "Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said pur-

> pose by giving notice as required by section 10418. * * * * * * * * * *"

It will be noted by the foregoing section that the calling of a special meeting to vote upon the proposition of annexing the district or a part of the district to a town or city school originates with the voters of the district desiring to be annexed. The board does not seem to have the authority to call a special election unless a petition is filed by the required number of qualified voters of such district. It therefore seems clear that when the required number of qualified voters present a petition to the board of directors it is mandatory upon the directors to call the special meeting. While we do not find any case in which our courts have passed directly upon whether the school board is required to call the special meeting upon receipt of the proper petition, yet we find that in the case of Farber Consolidated School District v. Vandalia School District, 280 S. W. 69, 71, the court, in passing upon the sufficiency of a certain annexation proceeding, said:

> "It is provided in section 11252, Revised Statutes Missouri 1919, that city districts--and such are the Vandalia and Laddonia districts--may acquire the whole or a part of the adjoining districts on a successful vote. This election could be called for by ten or more citizens of the adjoining district, such as the Farber district here, which is to be attached. * * * *"

We think the court clearly recognized that ten or more of the qualified voters of the district could <u>call for</u> the election.

CONCLUSION

It is, therefore, the opinion of this office that upon receipt of a proper petition provided for by Section 10484,

it is mandatory upon the board of directors to call a special meeting to consider the proposition of the proposed annexation mentioned in said petition.

IV

The next question is as to whether the statutes providing for criminal prosecution for illegal voting apply to illegal voting at special meetings of school districts under Section 10484.

No particular statutes are referred to, but we presume you have reference to Sections 4355 and 4356, R. S. Mo. 1939. Said sections read as follows:

> "Sec. 4355. Fraudulent voting.--Every person who shall, at any election held in pursuance of the laws of this state, or of any city or other municipality thereof, vote more than once, either at the same or a different place, or shall knowingly cast more than one ballot, or shall vote at any such election knowing that he is not a qualified voter and is not entitled to vote, and every person who shall knowingly advise or procure any person to vote who is not entitled to vote, or shall knowingly advise or procure any illegal vote to be cast at any such election, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars, or by both such fine and imprisonment."

> "Sec. 4356. Attempt to cast illegal vote.--Every person who shall attempt to vote at any election held in pursuance

> of the laws of this state, or in any city or other municipality thereof, knowing that he is not entitled to vote at such election, shall be deemed guilty of a misdemeanor."

It will be observed that in Sections 4355 and 4356, supra, voting "at any election held in pursuance of the laws of this state" is referred to and covered. There is no question but what the school meetings and elections provided for by Section 10484 are elections held in pursuance of the laws of this state. Such elections are provided for by statute and could not be held without such statutory provisions. It would seem clear, therefore, that persons who vote knowing that they are not legal voters, or who attempt to vote knowing that they are not entitled to vote at such elections, would be guilty under these sections.

In the case of State v. Hingley, 52 Pac. 89 (Ore.) the court had before it the question of whether a defendant could be prosecuted for unlawfully voting at a legally authorized election when he was charged with voting illegally at a school election. The defendant was making the contention that a district school meeting was not such an election as was contemplated by the criminal statute against illegal voting. In passing on this contention the court said:

> "The second question involves a construction and application of section 1846. 1 Hill's Ann. Laws, under which the indictment was drawn. It reads as follows: 'If any person shall vote, or offer to vote, at any legally authorized election in this state, knowing himself not entitled by law to vote thereat, or shall vote, or offer to vote, at any poll or in any precinct at any such election, knowing himself not entitled to vote at such poll or in such precinct, such person, upon conviction thereof, shall be punished,' etc. Is this statute broad enough to comprehend a school meeting held for the purpose of electing a

director and a clerk of the district in which such meeting is held? Section 2599, 2 Hill's Ann. Laws Or., authorizes the election of the officers named at such a meeting. They are to be selected by the electors qualified to vote thereat, as prescribed by section 2609, supra. This, within the authorities, constitutes an election. Bouv. Law Dict. tit. 'Elections'; Lathen v. Campbell (Kan. App.) 51 Pac. 931; 6 Am. & Eng. Enc. Law, 260. Section 1846, supra, which defines the crime and affixes the penalty, is found in the Code of Criminal Procedure, and was not enacted as a part of the election laws which govern general and special elections within the state, and is not restricted to such elections. It is a general statute, constituting it an offense for any person to vote at any legally authorized election, knowing himself not entitled by law to vote at such election. The election in question was legally authorized, and is therefore within the purview of the statute. * * *"

We think the reasoning of the court in the foregoing case would apply equally to school meetings called under Section 10484.

CONCLUSION

It is, therefore, the opinion of this office that Sections 4355 and 4356, R. S. Mo. 1939, apply to special meetings of qualified voters called by virtue of Section 10484, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

HARRY H. KAY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General
of Missouri.
HHK:CP

CRIPPLED CHILDREN SERVICE: (1) Salaries of the employees under the Crippled Children Service shall be paid from the appropriations for such service and not from the appropriations for the Confederate Home; (2) Transportation may be furnished for crippled children and their nurses under the Crippled Children Service appropriation but not by the Confederate Soldiers' appropriation.

September 23, 1942.

10-5

FILED
20

Mr. John C. Croswhite
Superintendent
Confederate Home of Missouri
Higginsville, Missouri

Dear Mr. Croswhite:

The Attorney-General wishes to acknowledge your letter of September 18th in which you request an opinion of this Department. Your letter, omitting caption and signature, is as follows:

> "Please render an opinion on the following matter:
>
> "Items B and C of Section 34, of House Bill 581 provide for the prorating of funds appropriated to the Confederate Home, with the Crippled Childrens service as instituted here. This specifies the use 'Repairs and Replacements' and 'Operations'.
>
> "Item A provides for salaries of the Confederate Home but makes no reference to the personnel necessary to the maintenance of the Crippled Childrens Hospital.
>
> "Can we then, legally pay these salaries at the Crippled Childrens Hospital?
>
> "I make this request for an opinion at the insistence of the auditors and the Governors secretary, Mr. Arens, who assume that the salaries should be met by House Bill 583, section 3, which appropriates

> the sum of $125,000.00 for the Crippled Childrens work, which includes salaries and transportation to and from the hospitals and the convalescent homes.
>
> "Are we legally entitled to maintain and operate a vehicle for transporting the children and their nurses to and from the hospital in Kansas City, and to and from the city of Higginsville for shoping purposes?
>
> "I shall appreciate your early consideration of these questions and thank you in advance."

It appears that there are two questions which you wish answered, the first of which is - Can the Confederate Home of Missouri legally pay the salaries of the employees at the Crippled Children's Hospital? And the second is - Whether the Confederate Home of Missouri is legally entitled to maintain and operate a vehicle for transporting children and their nurses to and from the hospital in Kansas City, and to and from the city of Higginsville for shopping purposes?

In answer to your first question I wish to call your attention to the fact that in your letter you speak of Items B and C of Section 34 of House Bill 581, Laws of Missouri, 1941. Such section does not have an Item B and I assume that you have reference to Items C and D of such section. Proceeding under that assumption, I will first cite you to Section 34 of House Bill 581, found at page 195 of Laws of Missouri for 1941 (for reasons apparent we will omit Item A of such section):

> "Confederate Soldiers' Home.--There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Ninety-two Thousand Five Hundred Dollars ($92,500.00) to pay the salaries, wages and per diem of the officers and employees and other expenses of the Confederate Soldiers' Home of Missouri, for the years 1941 and 1942, as follows:
>
> * * * * * * * * * * *

"C. Repairs and Replacements:

"Labor, material and supplies for the repair of buildings, building equipment, light plant, water supply and plumbing. Operating equipment consisting of laundry, cleaning and sanitation equipment, plant machinery and equipment, production and construction equipment, other and miscellaneous equipment. As buildings are turned over to the Board of Curators of the Missouri University for Crippled Children's program, then the amount set forth in this item shall be prorated between the two boards 7,500.00

"D. Operation:

"General expenses: consisting of communication, printing and binding, transportation of things, travel, other general expenses. Material and supplies: consisting of clothing and dry goods, farm and garden supplies, grounds and roadway material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and other supplies, insurance and premiums on bonds, and other necessary expense. As buildings are turned over to the Board of Curators of the Missouri University for the Crippled Children's program, then the amount set forth in this item shall be prorated between the two boards $40,000.00

* * * * * * * * * *. "

Also in connection with this matter I wish to further cite you to Section 3 of House Bill 583, found on page 274 of the Laws of Missouri for 1941, which section reads as follows:

"Expense of work for crippled children.-- There is hereby appropriated out of the

> State Treasury chargeable to the General Revenue Fund the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) for the work of the Crippled Children Service; to be administered by the Missouri State University, including the transportation of children to and from the hospitals and convalescent homes and transportation for nurses, attendants and doctors in the operation of the service, and the maintenance of the children in the hospitals and convalescent homes, including medicines, appliances, treatments, nursing, drugs, dressings, X-rays, printing costs, salaries and wages, instruction and training and the purchase and repair of equipment, and other necessary expenditures for the Crippled Children Service in this State and the University of Missouri is hereby designated as the State agency to cooperate with, to receive and expend allotments from the appropriate department or bureau of the Federal Government that may be authorized to allot Federal funds for the care of crippled children."

As can be seen from the above two appropriation measures there is an appropriation made for the Confederate Soldiers' Home and also an appropriation for the expenses of work for crippled children.

I further wish to cite you at this time to Section 15130, R. S. Mo. 1939, which is contained in Chapter 124 pertaining to "Soldiers' Homes." This section reads as follows:

> "The board of trustees shall elect a president, treasurer and secretary from their number and fix the amount of bond which the treasurer shall be required to give, which bond shall be approved by the governor and deposited with the secretary of state. No member of the board of trustees shall either directly or indirectly furnish any supplies towards the maintenance of said home, or its buildings or grounds, nor be directly nor indirectly interested in any corporation furnishing such supplies under

penalty of dishonorable dismissal from his trust by either the board or the governor of this state. Said board shall, on or before the third Wednesday of January, 1935, and on the same day every two years thereafter, furnish a detailed report of its work to the general assembly, accompanied by a statement under oath of the treasurer of the board of the financial transactions of the two preceding years, giving a detailed statement of all moneys and property received on account of such home and an itemized account of its disbursements. Said board of trustees shall have power and authority to make all necessary rules and regulations for the control and maintenance of said home and for the admission and discharge of the inmates thereof, and shall also provide for a superintendent who shall be a descendant of a soldier or a sailor who shall have served in the army or navy of the Confederate States of America, and for other necessary employees. The board of managers of said home shall set aside to be used by the board of curators of the university of Missouri for the hospitalization and care of crippled children such portion of said home as shall in the judgment of said board of managers be not necessary for the maintenance and care of ex-confederate soldiers and sailors and wives, widows and orphans, and the portion so set aside shall be under the exclusive jurisdiction and control of said board of curators of the university of Missouri. The members of the board of trustees shall receive compensation at the rate of $5.00 per day for not more than one day per month for meeting actually attended, and also their actual traveling expenses, to be paid out of the appropriation for said institution."

The above provision provides that the board of managers of the Confederate Home located at Higginsville, shall set aside

to be used by the Board of Curators of the University of Missouri for the hospitalization and care of crippled children such portion of said home as shall in the judgment of said board of managers be not necessary for the maintenance and care of ex-confederate soldiers and sailors and wives, widows and orphans, and the portion so set aside shall be under the exclusive jurisdiction and control of said Board of Curators of the University of Missouri. Of course, the purpose of this provision is to provide a home for the crippled children, and in view of the fact that eventually the residents of the Confederate Home will be gone, such home will provide a suitable place for such crippled children. It further appears that if the demands of the confederate soldiers and their wives, widows and orphans become fewer that such portion of the Confederate Home that is not used shall be turned over to the Board of Curators of the Missouri University for the use of the crippled children aforesaid.

Therefore, under Items C and D of Section 34 of House Bill 581, cited above, the expenses and upkeep of such buildings, as they are placed at the disposal of the crippled children, shall be shared by the Confederate Home and the University of Missouri acting on the part of the crippled children. In reading this appropriation act it can be seen that no where in the two items mentioned is there any provision made for the payment of salaries of employees, if any, of the crippled childrens administration. However, by reading Section 3 of House Bill 583, cited above, we find that the appropriation set out in that provision shall be used for "the transportation of children to and from the hospitals and convalescent homes and transportation for nurses, attendants and doctors in the operation of the service, and the maintenance of the children in the hospitals and convalescent homes, including medicines, appliances, treatments, nursing, drugs, dressings, X-rays, printing costs, salaries and wages, * * *."

In view of the fact that appropriation measures must be under the law strictly construed, it is our opinion that the salaries at the crippled childrens hospital shall be paid from the appropriation set up in Section 3 of House Bill 583 and not from the appropriation of the Confederate Soldiers' Home as set out in Section 34 of House Bill 581.

Your second question is as to whether you are legally entitled to maintain and operate a vehicle for transporting children and their nurses to and from the hospital in Kansas City, and to and from the city of Higginsville for shopping purposes.

In answer to your question I will again call your attention to Section 15130, supra, in which it states that the portion set aside at the Confederate Home for the use of the crippled children shall be under the exclusive jurisdiction and control of the Board of Curators of the University of Missouri. The Board of Curators of the Missouri University have control of the appropriation in the amount of $125,000.00 for the work of the Crippled Children Service and this appropriation specifically states that this is to be administered by the Missouri State University for "the transportation of children to and from the hospitals and convalescent homes and transportation for nurses, attendants and doctors in the operation of the service, * * *"

We believe that under the provisions of Section 15130 and also under the provisions of Section 3 of House Bill 583, that the Missouri State University, acting through the Board of Curators, can, if such board deems it expedient, maintain and operate a vehicle for transporting the children and their nurses to and from the hospital in Kansas City, and to and from the city of Higginsville for shopping purposes, provided such shopping purposes are confined to the general business of such Crippled Children Service. However, we do not believe that under Section 34 of House Bill 581, cited above, that the Confederate Home at Higginsville, can, under its appropriation, furnish transportation for the purposes as set out above. There is a definite appropriation made, as stated above, for the transportation of the patients to the University of Missouri and it is our opinion that such transportation shall be paid out of that appropriation and not the appropriation made to the Confederate Home.

Conclusion

Therefore, it is the opinion of this Department that the salaries of the employees of the Crippled Children Service

shall be paid from the appropriation under Section 3 of House Bill 583, found at page 274 of the Laws of Missouri, 1941, and should not be paid from the appropriation made for the benefit of the Confederate Home. It is further our conclusion that the Missouri State University, acting through the Board of Curators, may furnish a vehicle for the transportation of children and their nurses from the hospital in Kansas City to the Confederate Home in Higginsville if they deem it expedient to do so. However, we do not think that the Confederate Home can furnish such transportation from the appropriation made under Items C and D, Section 34 of House Bill 581, cited at page 194, Laws of Missouri, 1941.

Yours very truly

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

SCHOOLS: School property may be disposed of if no longer required for school purposes.

November 27, 1942.

11-30

FILED
20

Hon. Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Craig:

The Attorney-General wishes to acknowledge receipt of your letter of November 24th in which you requested an opinion of this Office. This request, omitting caption and signature, is as follows:

> "A small country school in this County has 2 acres of ground, most of which has been permitted to grow up in weeds and waste. The Church in that community desires to purchase 1½ acres for Church purposes. Both the School District and the Church would like to make the transaction.
>
> "I would like to know whether or not the school district has authority to sell a portion of their property where it is not essential for school purposes."

There seem to be two statutes that will govern your request as to whether a school district may dispose of a portion of its property where it is not essential for school uses. I will first cite you to Section 10403, R. S. Mo., 1939, which reads as follows: 166.010

> "The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented

> for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

It will be seen from a study of this section that no property used for a schoolhouse or school site shall be abandoned or sold until another site or schoolhouse is provided for such school district. Apparently this statute is complied with in your matter since the district does not contemplate selling or doing away with the schoolhouse itself or with one-half acre of the ground adjacent thereto.

In view of that section I will next cite you to Section 10419, R. S. Mo. 1939. This section has to do with the powers of the voters at the annual school meeting and is rather lengthy, and in view of the fact that there is only one sub-section that will apply in this matter, I will cite you to said sub-section:

.16 S 203

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:
>
> * * * * * *
>
> "Seventh--To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds.
>
> * * * * * * "

It can be seen from the last cited section of the statute that the voters in the school district have the right

to dispose of property owned by the school district which is of no value to such district. Your letter states that " a small country school in this County has 2 acres of ground, most of which has been permitted to grow up in weeds and waste." Apparently this one and one-half acres which the church desires to purchase, is of no value to the school district in view of the fact that it is allowed to grow up in weeds. Of course, that is a matter of fact which this Department cannot pass upon.

CONCLUSION.

Therefore, it is the conclusion of this Department that if the property of the school district, which the Church contemplates purchasing, is no longer required for the use of said school district, the voters in such district, at the annual meeting, shall have the power by a majority of the votes cast to sell such property.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

TAXATION:
SALES TAX:

The sales tax should be collected on tangible personal property sold to the county court if the seller is engaged in the business of selling such property.

February 6, 1942

2-7

FILE 21

Hon. Wilbur F. Daniels,
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Daniels:

Replying to your letter of recent date, wherein you request an opinion from this department on the following statement of facts.

> "I would like an opinion on the following: Does the County Court have to pay a sales tax on lumber purchased from individual farmers, said lumber to be used by the County Court in the construction of roads and bridges?"

Apparently, from your letter, you are under the impression that the sales tax should not be collected on purchases of lumber made by the County Court from farmers for two reasons: first, that the counties are not liable for payment of such tax and; second, that farmers are not engaged in the business of selling lumber at retail.

Under section 11407 R. S. Mo., 1939, the term "person" is defined in subsection "a" thereof as follows:

> "'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department), estate, trust, business trust, receiver or trustee appointed by the State or Federal

> Court, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

From this definition, it is apparent that counties are included within the term "person".

Section 11408 of said act, and amended by Laws of Missouri, 1941, page 701, requires sales tax to be imposed on each retail sale of tangible personal property. Section 11412 makes it the duty of every person making a purchase or receiving a service which is taxable under the act to pay the amount of the tax to the person making the sale. Since the act by the definition of the term "person" includes a county, then there is no question but that a county under the provision of said section 11412, would be required to pay the amount of the tax to the person making the sale or rendering the service.

On the question of whether or not the farmer, in selling his lumber to the county court is engaged in a business which is taxable under the act, we call your attention to the definition of the term "business" under subsection "C" of said section 11407 which reads as follows:

> "'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this article. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this article."

It will be noted that the last sentence of this paragraph defining "business" states that the isolated or occasional sale of tangible personal property by a person not engaged in such business does not constitute engaging in business within the meaning of the sales tax act.

In volume 29 of the Permanent Edition of Words and Phrases, at page 120, we find where the term "occasional" was defined as follows:

> "'In the federal law, the carrying on of business within a state means something more than a casual or occasional purchase of goods; the business must be continuous or at least of some duration.' St. Louis Wire-Mill Co. v. Consolidated Barbed-Wire Co., 32 F. 802. The conclusion would have fitted the facts if the judge in writing that opinion had used the word 'isolated' instead of the words 'casual or occasional.' New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605, 609."

Applying this rule to the facts which you have submitted it would not seem that a farmer would be classed as one who is engaged in the business of selling lumber to the County Court unless the business is continuous or of some duration. Of course, each particular case would have to be determined upon the facts as they apply. The fact that the County Court uses this lumber for the construction of roads and bridges would not be determinative of your question.

CONCLUSION

From the foregoing, it is the opinion of this department that the retail sales of tangible personal property, including lumber sold to a County are, subject to the provision of the sales tax act, if the person making such sale is engaged in the business of selling lumber at retail. We are further of the opinion that if such seller, being a farmer who is selling surplus lumber from his premises, makes only occasional sales and if he is not engaged in the business of selling lumber at retail, then such transactions are not within the provision of the sales tax act.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General
TWB:AW

TAXATION:
MOTOR VEHICLE FUEL TAX
COUNTIES:

Counties which purchase motor fuel or diesel fuel are required to pay the tax imposed by H.B. 516 Laws of Missouri 1941 page 448.

March 2, 1942

3-5 FILE 21

Hon. George N. Davis
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the following statement of facts:

> "State Inspector of Oils, George Metzger, sent W.A. Tibbs, Circuit Clerk of Macon County, Missouri, a user's license, 20-098, under House Bill 516. The vehicles intended to be covered by this license are roadgraders using diesel fuel. It is contemplated that the monthly report will have to be furnished by the county showing the total gallons of such fuel used. This is for the purpose of assessing tax against the county which will probably amount to approximately $100 a month for roadwork on the county highways.
>
> "I am doubtful as to the right of the legislature to assess such tax against Macon County, and I am writing to ask your opinion as to whether or not Macon County can be required to pay such taxes."

The pertinent portion of H.B. 516 which applies to your question is found in Laws of Missouri 1941 page 448, as follows:

> "For the purpose of this article: 'Motor Vehicles' shall mean and include all vehicles, engines, machines, or mechanical contrivances which are propelled by internal combustion engines or motors.
>
> "'Fuel' shall mean and include all volative and inflammable liquids totally refined, partly refined or unrefined, (1) 10% of which has not been recovered when the thermometer reads 347 degrees F. and (2) 95% of which has not been recovered

when the thermometer reads 464 degrees F. when subject to distillation in accordance with 'Standard Method of Tests for Distillation of Gasoline, Naphtha, Kerosene, and similar Petroleum Products' (ASTM designation: D-86) of the American Society for Testing Materials. Fuel shall also mean and include liquefied gases which are in a gaseous state at 60 degrees F. at a pressure of 14.7 pounds per square inch absolute, denatured alcohol, wood alcohol, Ethyl, Alcohol, ether, turpentine, acetate, and products having a Reid Vapor Pressure of 30 pounds or more at 100 degrees F.

"'Public Highways' shall mean and include every way or place, of whatever nature, generally open to the use of the public as a matter of right for the purpose of vehicular travel and notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair.

"'Person' shall mean and include natural persons and partnerships, firms, associations, joint stock companies, syndicates, and corporations, and any receiver, trustee, conservator, or other officer appointed pursuant to law or by any court, state or federal; also counties, municipalities, and other political subdivisions of this state, singular or plural and the State of Missouri. The use of the singular number shall include the the plural number.

"'Use' shall mean and include the consumption of fuel by any person in a motor vehicle for the propulsion thereof upon the public highways of this State.

"'User' shall mean any person who uses or consumes fuel within this state in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this State.

"'Duly Licensed User' shall mean and include any user holding an unrevoked license issued under this Act."

By the definition of the term "person" supra, there can be no doubt that the lawmakers have intended to impose this tax on counties in cases where they purchase "Diesel Fuel" to be used in internal combustion engines for the generation of power to propel motor vehicles on the public highways of the state.

Your inquiry seems to go more to the authority of the Legislature to impose this tax on counties than to the question of whether or not the tax is imposed by the act.

This is an excise tax and we think the question of whether or not such a tax may be imposed on the State and political subdivisions such as counties, municipalities etc., has been considered by the Supreme Court of this state, in the case of State ex rel v. Smith 90 S. W. (2d) 405. The court in speaking of the nature of the "Missouri Sales Tax" said l. c. 406:

> "* * * Under these general difinitions of the term, as well as upon the authority of many adjudicated cases, we think it so clear as not to be open to question that the tax in controversy is an excise, and not a property, tax.* * * * * *"

By the same rule the tax here under consideration is an excise tax.

On the question of the authority of the State to impose the provisions of the "Sales Tax" on the State and its agencies, the court in the Smith case supra, said l.c. 406:

> "It is elementary that the power of the Legislature in matters of taxation for public purposes is unlimited, except in so far as restrained by the State or Federal Constitution or inherent limitations on the power to tax.* * * * * **"

If the State is authorized to make the tax applicable to itself and its agencies then it would be authorized to make the tax applicable to any political subdivision of the state. Also in the case of State v. Hallenberg-Wagner Motor Co., 108 S.W. (2d) 398, 402, the court in speaking of the authority and limitation of the General Assembly to levy taxes said:

> "The inherent power of the Missouri General Assembly to levy taxes, independent of constitutional grant, is subject only to limitations prescribed in the Federal and State Constitutions."

We find no provisions of the Federal or State Consitution which would prohibit the state from making this tax applicable to counties.

CONCLUSION

From the foregoing, it is the opinion of this department that the General Assembly is not prohibited by the provisions of the Federal and State Constitutions from making the provisions of the Motor Fuel Tax imposed under H. B. 516 Laws of Missouri 1941, page 448 applicable to counties, and that the act does apply to counties.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

TWB:AW

OFFICERS: County collector liable for loss in burglary or holdup.

March 19, 1942

3-24

FILE 21

Hon. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "It is the practice in this County for the County Collector to purchase Burglary and Holdup Insurance to protect the funds which he collects and banks as Collector for the various Political subdivisions.
>
> "Will you please advise me of the County Collector's liability in case of the burglarizing or the holdup of the Collector."

Under the Section 11056 R. S. Missouri, 1939, the collector is required, before entering upon the duties of his office, to give a bond.

Under Section 11098 R. S. Missouri, 1939, the collector is required to file with the county clerk a detailed statement, verified by affidavit, of all taxes collected during the preceding month. This statement should be made monthly and he should pay the money, less his commissions, into the state and county treasuries.

Section 11098, supra, does not contain any exceptions as to burglary and robbery, and for that reason the full amount must be paid into the county treasury.

The county collector is an insurer of the money collected by him. It was so held in the case of City of Fayette v. Silvey, 290 S. W. 1019, Par. 2, where the court said:

> "* * * The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomsen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.
>
> "In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

This case was followed in the case of First National Bank in St. Louis v. West End Bank, 129 S. W. (2d) 879, l. c. 883, where the court said:

> "* * * Until he settled with the City, it was in the sole custody of the collector and he was, under the statutes relating to cities of the fourth class, entitled to keep it where he saw fit; he and his bondsmen being liable as insurers for failure to account therefor and pay over at the proper time. City of Fayette v. Silvey, Mo. App., 290 S. W. 1019. * *"

CONCLUSION.

In view of the above authorities, it is the opinion of this department, that the county collector is liable for ~~all~~ money collected by him as taxes, and it should be paid monthly into the county treasury. He and his sureties are liable on their bond, even if the money is lost in a burglary or holdup.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

1. COUNTY COURTS -1. Can reduce rate of interest below
2. PUBLIC OFFICERS - 6% by order on protested warrants for accounts accruing after order.

2. Cannot agree to less than 6% on proetested salary warrant.

May 19, 1942

6-3

Honorable G. A. Danner
Treasurer
Ripley County
Doniphan, Missouri

FILE
21

Dear Sir:

We are in receipt of your letter of May 19, 1942, in which you request an official opinion, as follows:

> "The County Court of Ripley County has made an order setting the interest on School Fund Loans at 5% per annum.
>
> "The Court has also made an order setting the rate of interest on protested warrants issued on Ripley County at 5%. The Prosecuting Attorney of this County informs me that the County Court has no authority to set the rate of interest on said warrants at less than 6%.
>
> "I desire information from you as to whether in view of the Court Order, I should pay the interest at 5% or at 6% on the protested warrants of Ripley County on the various revenue funds."

Since you mentioned in the first paragraph of your request that the county court has set the rate of interest of school loans at 5% per annum, we are setting out the law applicable to such a loan, which permits the county court to set the rate of interest at 5% per annum on such a loan.

Section 10381 R. S. Missouri, 1939, gives the county courts the care and management of the school

funds.

Section 10376 R. S. Missouri, 1939, limits the rate of school loans between four and eight per cent.

Section 10384 R. S. Missouri, 1939, provides that when the school fund shall be loaned out by the county courts under the following specification:

> "* * * In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; * * * ."

Under the above partial section the county court sets the rate of interest and therefore it is within its power to set the rate of school fund loans at 5% per annum.

Also in the second paragraph of your request you state that the county court had set the rate of interest on protested warrants issued on Ripley County at 5%.

Section 13833 R. S. Missouri, 1939, reads as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Under the above section if there is no money in the treasury for the payment of a warrant that has been issued by the county court, the treasurer shall certify that there is no money in that fund to pay the warrant, which is the same as the protesting of a county warrant.

Until the warrant is presented for certification, or protest, the county is not liable for the interest on the claim. It was so held in the case of Skinner V. Platte County, 22 Mo. 437.

Section 3226 R. S. Missouri, 1939, reads as follows:

> "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

Under that section when an account has become due, and demand of payment is made, and no other rate is agreed upon, the account bears interest at the rate of six per cent per annum from the date of the demand.

Under Section 13833, supra, which applies to county warrants, no rate of interest is mentioned and, therefore, the rate of interest on a protested county

warrant cannot be more than six per cent, nor less than six per cent. That the rate of interest is six per cent on a county warrant was held in the case of Isenhour v. Barton County, 190 Mo. 163, where the court said at l. c. 170:

> "County warrants are creatures of the statute, and can only be issued in accordance therewith, but when no rate of interest is prescribed upon their face, they bear interest at the rate of six per cent per annum, as provided by section 3705, Revised Statutes 1899, after presentation to the treasurer of the county by which issued, and failure to pay because of there being no money in the treasury for their payment. (Robbins v. Lincoln County Court, 3 Mo. 57; Skinner v. Platte County, 22 Mo. 438; State ex rel. v. Trustees, 61 Mo. 155.) * * * * ."

Section 3226, supra, contains the following phrase:

> "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, * * * * ."

County Courts are declared to be courts of record by Section 36, Article VI of the Constitution of Missouri.

In your request you have stated that the county court made an order setting the rate of interest on protested warrants issued on Ripley County at five per cent. Since the county court is a court of record this order is a public record and any persons transacting business with the county court, such as sales of supplies, and who thereby allows the county court to become indebted to them,

should take notice of the order made by the county court. Since the order has been made by the county court setting the rate of interest on protested warrants at five per cent per annum, a person who deals with the county court is agreeing as to the rate of interest of the warrant if it is protested.

The above holding only applies where supplies have been sold to the county after the date of the order of the county court reducing the rate of interest on protested warrants from the lawful rate, where the statutes set out no rate, to five per cent per annum.

The above ruling does not apply to public officers elected or appointed for the reason that the Supreme Court of this State has held that it would be against public policy to permit public officers elected, or appointed, to receive, by agreement or otherwise, a less compensation, for their services, than fixed by law.

It was so held in the case of Reed v. Jackson County, 142 S. W. (2d) 862, Par. 2,3, where the court said:

> "In view of our statute and court decisions, especially the Rothrum case, it seems clear that to permit public officers, elected or appointed, to receive, by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to the public policy of the state. * * * * "

Since the legislature did not see fit to set a rate of interest for protested county warrants, and, since the Supreme Court has held that public officers cannot, by agreement, receive a less compensation for their services, then we must revert to the general law which sets the rate of interest on past due claims, where there is no agreement on the rate, at six per cent per annum.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court of Ripley County cannot make an order reducing the rate of interest on protested warrants issued on Ripley County at a rate of interest of five per cent on accounts consummated and which were due and payable previously to the time of the making of the order.

It is further the opinion of this department that the county court of Ripley County can make an order reducing the rate of interest on protested warrants from six per cent to a rate of five per cent per annum on accounts consummated and which became due and payable after the date of the making of the order, for the reason that the rate of five per cent has been agreed upon when the holder of the warrant transacted business with the county court.

It is further the opinion of this department that the county court cannot, by an order, reduce the rate of interest from six per cent to five per cent per annum on protested warrants for salary due public officers of the county who are either elected or appointed and the protested warrants for such salary must bear six per cent per annum.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

LOTTERIES: Prizes and theater schemes in connection therewith.

June 15, 1942

6-17

FILE 21

Honorable George N. Davis
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a scheme proposed by the theater for the operation of a drawing and ask whether or not this scheme would be in violation of the criminal statutes.

Section 4704 R. S. Mo., 1939, provides as follows:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a businessor avocation in this state, or shall advertise or make public, or cause to be advertised or make public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In referring to this section, our Supreme Court in the case of State v. Emerson, 1 S.W. (2d) 109, 111, stated as follows:

> "The crime denounced is statutory. In passing upon a charge based upon that part of this statute which denounces the aiding and assisting of the establishment of a lottery or a scheme in the nature of a lottery, we have held it sufficient to employ the language in which the offense is defined. * * * * *.
>
> "The people inframing the state Constitution (section 10, art 14) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State ex rel. Hughes, supra, loc, cit. 534 (253 S.W. 229). In State v. Becker, supra, loc. cit. 560 (154 S.W. 769), in line with our former rulings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word, and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme, or device whereby anything of value is disposed of by lot or chance."

The elements of the offense under this statute are: consideration, chance and prize. In examining the proposal which has been submitted to you, we find that the consideration is; the person attending the theater obtains a ticket - the chance is that such person may draw one of the lucky numbers, the prize which is given away at the drawing being either

five dollars, ten dollars or fifteen dollars. The fact that the person who draws the lucky number and obtains the money is required to work for the theater is merely a subterfuge.

CONCLUSION

We are therefore of the opinion that the proposed plan would be in violation of the foregoing statute.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

TAXATION: Additional levy authorized by voters of special
LEVY: road district is effective for one year.

October 20, 1942

10-26

FILED
21

Hon. George N. Davis
Prosecuting Attorney
Macon, Missouri

Dear Mr. Davis:

This is in reply to your letter of recent date wherein you submit the following request:

> "The Lingo Special Road District last fall voted a twenty-five cent extra levy under the provision of Section 8617, R. S. Missouri 1939 and Section 23 Article 10 of the Constitution.
>
> "They were under the impression that this levy having been once voted was levied each succeeding year until another election was called and another vote had. My notion is the levy must be voted each year but I told them I would write and ask you for a ruling on this question."

Section 23 of Article X of the Constitution of Missouri provides as follows:

> "In addition to the taxes now authorized to be levied for county purposes, under and by virtue of Section 11 of Article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by Section 22 of Article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road

> district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

Section 11 of Article X of the Constitution authorizes county courts to fix the rate of levies for county purposes up to a certain amount.

Section 22 of Article X of the Constitution authorizes such courts to make a levy for road purposes in addition to that provided by Section 11 of Article X, supra.

Then, Section 23, supra, provides for a levy in addition to that authorized by Sections 11 and 22, supra. The levies made under Sections 11 and 22, supra, are made each year. It could not be ascertained whether or not a levy under said Section 23, supra, is necessary until the levies under Sections 11 and 22 have been made. These levies are made annually. Sections 11045, 11046, 8527 and 8528, R. S. 1939.

An annual or continuing levy, is made when there is a fixed outstanding obligation such as the levy authorized by Section 12, Article X of the Constitution, to retire bonded indebtedness of a county or municipality; the levy for highway bonds when other funds are not available, Sec. 44a, Article IV, Constitution of Missouri; the Soldier's Bonus bonds, 44b of Article IV, Constitution of Missouri; and, Sec. 44d of Article IV of the Constitution providing for the bonds for Eleemosynary Institutions.

CONCLUSION

From the foregoing, it is the opinion of this department that a special election should be held annually to vote this levy.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:NS

TAXATION: Surplus from sale of lands in foreclosure of delinquent tax lien must be paid to person entitled thereto. In case of doubt or dispute, such surplus must be paid into county treasury for benefit of person entitled thereto.

November 9, 1942

11-16

FILED
21

Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Mr. Dalton:

This is an acknowledgment of your request for an opinion, dated November 6, 1942, relating to a surplus resulting from sale of lands for delinquent taxes and which is as follows:

> "I recently held my tax sale on November 3, 1942, and at that time, there was spirited bidding between two parties and the amount of the bid exceeded the taxes, interest and costs which was on the first sale. As there is now a surplus over the taxes, interest and costs, I am wondering what distribution to make of the same, as I have not had a similar case on the first sale.
>
> "Will you please advise me as to this matter at your earliest convenience, I am, "

Section 11127, R. S. Mo., 1939, relating to a first sale or offering of lands in foreclosure of a lien for delinquent taxes on real estate, is in part as follows:

> "On the day mentioned in the notice, the County Collector shall commence the sale of such lands, and shall continue the same from day to day until so much of

> each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, or chargeable to such person in said county. The person offering at said sale to pay the required sum for the least quantity of any tract shall be considered the purchaser of such quantity: ***"

Section 11128 thereof is as follows:

> "When more than one tract or lot belonging to the same person shall be for sale at the same time, in the same municipal corporation or township, a part of one of said tracts or lots shall be offered, first for the payment of the whole sum due from such owner on all such delinquent lands or lots, or otherwise; and if no person shall bid off a part of such tract or lot the sum required, the said tract or lot shall then be offered to the highest bidder for cash, and if any amount shall yet remain due, or if no person bid for a part or all of one tract or lot, each of the other tracts or lots shall be offered in like manner until the required sum is realized; and if no one bids upon a part or all of said tracts or lots separately, enough to pay the amounts due, then the whole of said tracts and lots shall be offered together and sold to pay the taxes, penalty, interest and costs thereon: Provided, however, this section shall be construed directory in character and a failure to comply therewith shall not of itself invalidate any sale." (Underscoring ours.)

Section 11132 thereof is in part as follows:

> "Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has

> doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. ***" (Underscoring ours)

Section 11133 thereof is in part as follows:

> "After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the year or years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract. If the purchaser bid for any tract or lot of land a sum in excess of the delinquent tax, penalty, interest and costs for which said tract or lot of land was sold, such excess sum shall also be noted in the certificate of purchase, in a separate column to be provided therefor.***"

While it is the duty of the county collector to collect all taxes, penalty, interest and costs, under a first sale of lands for delinquent taxes, by selling all the lands to which the tax lien attaches, if necessary, yet, under the provisions of Section 11128 supra, he has the duty of selling no more than is necessary to discharge the tax lien. However, under the proviso embodied in such section, a sale of all the land in foreclosure of the lien for a sum in excess of the amount due thereunder would not of itself invalidate the sale because such proviso construes the duty of the collector to be merely, "directory in character."

CONCLUSION

THEREFORE, it is our opinion that when lands are sold, at such first sale, by a collector in foreclosure of a delinquent tax lien on real estate, for a sum in excess of the amount due under such lien, he shall pay such surplus "to the person entitled thereto or if he has doubt, or a dispute arises as to the proper person the same to be paid into the county treasury, to be held for the use and benefit of the person entitled thereto."

Respectfully submitted,

SVM:LeC

S. V. MEDLING
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

CORONER'S INQUEST: Body of person killed on railroad right of way should be removed and some representative of railroad left with remains until coroner arrives.

July 13, 1942

7-18

FILED
22

Hon. Jasper DeMaria
Attorney for Coroner
815 Lathrop Building
Kansas City, Missouri

Dear Mr. DeMaria:

We are in receipt of your request for an official opinion from this department. This request reads as follows:

"As the attorney for Dr. Cecil Leitch, Coroner for Jackson County, Missouri, I am respectfully asking you for an opinion under the following facts:

"When a train kills some person upon its right of way, should the progress of the train be delayed until the coroner arrives to remove the remains, or should the body be removed from the tracks in order that the train may proceed, and a representative of the railroad be left with the remains until the coroner arrives.

"This question is of unusual importance in the present day emergency, in view of the absolute necessity of trains meeting schedules in the transportation of the personnel of the armed forces, and equipment and property belonging to the armed forces.

"In so far as I have been able to ascertain, the question is not covered or in any way touched upon in the statutes pertaining to coroners. We have heretofore allowed them to remove the body and

leave a representative with the information, and for the train to proceed, but I would appreciate very much an official opinion from you under these particular facts."

At the outset, we wish to set forth Sections 13231, 13232 and 13236, Revised Statutes of Missouri, 1939, which provide as follows:

"Sec. 13231. - Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

"Sec. 13232. - Every such constable to whom such warrant shall be directed shall forthwith execute the same, and shall repair to the place where the dead body is, at the time mentioned, and make return of the warrant, with his proceedings thereon, to the coroner who granted the same."

"Sec. 13236. - As soon as the jury shall be sworn, the coroner shall give them a charge, upon their oaths, to declare of the death of the person, whether he died by felony or accident; and if of felony who were the principals and who were

> accessories, and all the material circumstances relating thereto; and if by accident, whether by the act of man, and the manner thereof, and who was present, and who was the finder of the body, and whether he was killed in the same place where the body was found, and, if elsewhere, by whom, and how the body was brought there, and all other circumstances relating to the death; and if he died of his own act, then the manner and means thereof, and the circumstances relating thereto."

It will be noted from a reading of each of the above sections, as well as other sections contained in Chapter 91, Laws of Missouri 1939, which chapter has to do with inquests of Coroners, that the law makes no provision or direction that the dead body be left at the scene and a jury summoned and an inquest held at that place, but said sections provide that the coroner shall make a warrant, and in said warrant is directed the time and place of the inquest, and at the place designated the body is to be present in order that the jury may view the body.

We wish further to point out that there does not appear in the statute at any place, either under Chapter 91, supra, or the several sections having to do with railroads, any provision whereby the body must remain at the scene of the tradgedy until a coroner's inquest is held. A section comparable to Section 8401, Par. (f), R. S. Missouri, 1939, which is found under the Motor Vehicle Laws, (Leaving the scene of an accident section) is not contained in the statutes with reference to railroads.

We are mindful, however, of Section 5621, R. S. Missouri, 1939, which provides as follows:

> "The commission shall investigate the cause of all accidents on any railroad or street railroad within this state which result in loss of life or injury to persons or property, and which in its judgment shall require investigation.

> Every common carrier, railroad corporation and street railroad corporation is hereby required to give immediate notice to the commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within this state in such manner as the commission may direct. Such notice shall not be admitted as evidence or used for any purpose against such common carrier, railroad corporation or street railroad corporation giving such notice in any suit or action for damages growing out of any matter mentioned in said notice."

From a reading of the section above, it is our view that there is no direct duty upon a railroad company to hold the train where a person is killed by a train in this state. However, it is unthinkable that the railroad officials and employees would leave the person upon the right of way without some agent or official of the railroad with the body, in order that full details and information could be furnished the county coroner, and a complete list of witnesses in order that the coroner might cause to be subpoenaed such persons to appear to give testimony at the inquest when one is had.

In the case of State v. Bartley, 337 Mo. 229, 84 S. W. (2d) 637, l. c. 639, the court said:

> "* * * A coroner's inquest is not a part of a criminal prosecution, whether the prosecution be by indictment or information. * * * * * *"

CONCLUSION

From the foregoing it is the opinion of this department that when a train kills some person upon its right of

way, the progress of the train need not be delayed until the coroner arrives to remove the remains, but such body should be removed from the right of way and some agent or official of the railroad left with the remains until the coroner arrives.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:NS

STATE BARBER BOARD - Rules and regulations requiring barber lather brushes to be replaced with mechanical appliances in cities over 20,000, are reasonable if a necessity exists to safeguard public health.

January 5, 1942

1-12

Mr. L. N. Dixon
Secretary
State Board of Barber Examiners
Princeton, Missouri

FILE
23

Dear Sir:

We are in receipt of your recent request for an official opinion, which reads as follows:

> "I have been requested by Harry G. Sloan, Pres. and William J. Kloppenberg, Treas. of the State Barber Board; also Dr. Stewart, to get an opinion from your office in regard to the following:
>
> "Would it be constitutional or legal under our Sanitary Rules and Regulations to insert a rule requiring all barbers to install and use electric lather mixers in cities of the first and second class and those cities operating under special charter; or in cities with a population of 20,000 or more?
>
> "It was suggested that all barbers be required to do away with the lather brush and mug and install lather mixers. I insisted that the country barbers didn't have the money to buy them as they cost from $20.00 to $35.00. Dr. Stewart agreed with me on this, and then the other plan was suggested and they asked me to write for an opinion."

Also, your request for additional information under date of December 19, 1941, which reads as follows:

"Your letter of the tenth just received today as I have been in the southern part of the state since December 7.

"The equipment referred to in my letter is operated by electricity.

"There a number of shops in the state that do not have electric current. In addition to the above under our present war status, it would not be possible for the manufacturer to supply the lather mixers to a great extent and the cost which would average about $30.00 would be hard for the average barber to meet."

Section 10128 R. S. Missouri, 1939, provides in part as follows:

"* * * Said board shall, with the approval of the State Board of Health, prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious or contagious diseases. * * * "

It will be noted from reading the excerpts, which are pertinent in furnishing you the information requested by you, that the State Board of Barber Examiners, may prescribe sanitary rules, with reference to the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. However, such rules, if made under the authority of Section 10128, supra, must be approved by the State Board of Health. This being the case, we think the law applicable to the powers and duties of the State Board of Health must be followed. We therefore call attention to the case of State v. Clark, 9 S. W. (2d) 635, wherein the court sets forth the following, at l. c. 638:

> " * * * Nevertheless it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. 29 C. J. Sec. 30, p. 248, also section 6, p. 243. While boards of this character cannot act arbitrarily, or without substantial evidence (State ex rel. v. Adcock, 206 Mo. 550, loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681), yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be inferfered with. State ex rel. Granville v. Gregory, 83 Mo. 123, loc. cit. 136, 53 Am. Rep. 565. * * * "

The State Board of Health has widespreading powers in safeguarding the public health, and, as was pointed out in the above excerpt, if there is any substantial evidence or reasonable necessity upon which to base a rule of the Board of Health, then it cannot be said to have acted arbitrary and unreasonable in making the rule.

We are confronted in this opinion, first, with the situation that Chapter 67 R. S. Missouri, 1939, does not provide for a rule in one community and a more lax rule in another. In other words, the legislature has not seen fit to inaugurate legislation which confers greater powers upon the Barber Board in municipalities. In this connection we call attention to 7 Amer. Jur., Par. 6, at page 616, which reads, in part, as follows:

> "It is competent for the legislature to classify barbers according to the population of the communities within which they conduct their business and, as classified, to prescribe different

> regulations governing their occupation. Such a law does not violate constitutional requirements that laws of a general nature shall have uniform application throughout the state. One reason for permitting such classification is that the spread of disease by insanitary barbers or barbershops affects more people in large towns or cities than in small ones; another is that the character of barbers and barbershops is more generally known in villages than in large towns. * *" (Cases cited).

The legislature would have the right to pass legislation giving greater power to the Barber Board to make rules and regulations governing municipalities, if it saw fit, but the court, in the case of International Harvester Co. v. Missouri, 234 U. S. 199, l. c. 212,215, said:

> "* * * This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation, and we decided in Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, that it may depend upon degrees of evil without being arbitrary or unreasonable. * * * * * * * * * * *
>
> "* * Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. (Cases cited.) * * * "

At the present time we find that the legislature has not made this discrimination but that the powers and duties conferred upon the Barber Board are of a general nature and apply equally to the State as a whole. No doubt the legislature

in its inauguration of Section 10128, supra, wherein it provided that the State Board of Health should first approve the sanitary rules intended that it should be a safeguard against an arbitrary and unreasonable rule being invoked in some particular community. On the other hand, it is easy to visualize where a condition or pestulance might develope and the assistance of the State Board of Health would be of much benefit to the State Board of Barber Examiners, in enforcing and carrying out some measure. The determination whether or not the State Board of Barber Examiners, with the approval of the State Board of Health, would have the right under Section 10128, supra, to inaugurate a rule or sanitary measure invoking upon the barbers of the State of Missouri the absolute duty to purchase and use exclusively a lather mixer, as described in your opinion request of November 22, devolves upon the sole question of whether or not such rule, if so made would be a reasonable rule. It is easy to visualize a situation where some pestulance would develope which could be transmitted through the use of a barber brush. Should this situation arise, then no doubt there would be substantial evidence,or reasonable necessity would exist, to sustain a rule requiring all barbers of the State of Missouri to purchase the mixer, or one similar.

However, in your letter of December 19, supra, we find that there are barber shops in the State of Missouri which do not have electricity, which, of course, is essential to the operation of a lther mixer, and further, that on account of the present war it would be utterly impossible to supply all of the barbers of the State of Missouri.

We call attention to amendment XIV of the United States Constitution, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of Spielman Motor Sales Co. v. Dodge, 8 F. Supp. 437, l. c. 440:

> "'It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. * * * * *"

Also, at page 442 of this case the court said:

> "* * * But a business which is of little public consequence to-day may become affected with public interest in later years, and a business vital to-day may well become obsolete tomorrow. Thus the regulation may be valid for business of one sort in given circumstances and invalid for another sort or for the same sort of business in different circumstances. The test has always been one of reasonableness, * * * * * *."

In the case of Duncan v. Missouri, 152 U. S. Reports 377, l. c. 382, the court said:

> "* * * But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and

> essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; * * * "

From a reading of the cases supra it willbe noted that the Board of Health has widespreading powers in the making and enforcing of rules and regulations to safeguard the public health. Therefore, if the State Barber Board and Board of Health found that a necessity existed for the eradication of the use of the barber brush in cities having a population greater than 20,000, and made a rule requiring that some practical appliance be used instead of the barber brush, and such appliance would be available to all barber shops, then we believe that such rule would not be unreasonable and arbitrary and could be enforced.

CONCLUSION

We are of the opinion that if the State Barber Board and State Board of Health found a necessity to exist for the eradication of the use of barber brushes in cities over 20,000 population that such rule would be reasonable if adequate appliances could be procured in accordance with the rule.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

BOARD OF PHARMACY: The Governor and Attorney-General, when reviewing decision of Board, must affirm or overrule in toto, cannot modify.

February 12, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Honorable Roy McKittrick
Attorney-General
Jefferson City, Missouri

Gentlemen:

By Section 10007, R. S. Missouri, 1939, the Governor and Attorney-General of Missouri are constituted the officers to whom appeals lie, with respect to the disciplinary action that may be taken by the State Board of Pharmacy relative to licensed pharmacists. The Board of Pharmacy is authorized to "refuse to grant a license" and to "revoke a license" granted, for certain specified reasons. Section 10007 provides in part:

> "* * * An appeal from the action of the board in refusing to grant or in revoking a license for such cause may be taken to the governor and attorney-general the decision of which officers, either affirming and overruling the action of the board shall be final."

The question has arisen as to the scope of the authority of the Governor and Attorney-General under this statute. This is: Must they "affirm or overrule" or may they modify?

It will be noted that the only authority granted the Board of Pharmacy is to refuse to grant or to revoke a license theretofore issued, and we do not feel that on the original hearing by such board that it could take any action except

outright refusal to grant or absolute revocation of a license.

The reason for this view is apparent. The Board of Pharmacy is a creature of statute (Sec. 10010, R. S. Mo. 1939), and as such has only such powers as are conferred upon it by statute. This rule has been repeatedly stated by the courts. In Wright v. Board of Education, 246 S.W. 43 (Mo. Sup.), it is said of the powers of a school board, l.c. 45:

> "* * * Under a well-recognized cannon of construction, such powers, * * * can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; * * *."

Again, in Consolidated School District No. 6 v. Shawhan, 273 S. W. 182 (Mo. App.) it is said, l.c. 184:

> "Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. * * *."

The authority to refuse to grant or to revoke a license is expressly conferred upon the Board of Pharmacy. No other power exists by implication for the reason that, that rule is only invoked where necessary to make effective powers granted. Here the power granted is to prevent the unqualified or unfit from becoming pharmacists or to remove the unfit from that profession. The power to refuse or revoke licenses renders that power completely effective, and therefore no additional powers can be implied.

Also, another rule of construction is pertinent. In State ex rel. Barlow v. Holtcamp, 14 S. W. (2d) 646 (Mo. Sup.)

it is said, l. c. 650:

> "'Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise.'"

This is nothing more than the well known rule that the expression of one thing is the exclusion of another. State v. Sweaney, 270 Mo. 685.

Under these rules of construction and because "public policy requires that all officers be required to perform their duties within the strict limits of their legal authority" (Lamar Township v. City of Lamar, 261 Mo. l. c. 189), it necessarily follows that we are correct in asserting that the Board of Pharmacy is only authorized to refuse outright a license or to absolutely revoke a license. There can be no middle ground such as suspension or conditional grant of the same.

With this understanding of the background we take up the immediate question.

Webster's New International Dictionary, 2d Ed. defines the word "affirm" to mean: To confirm or ratify. To assert as valid an order brought before an appellate court for review. To maintain as true.

The same authority defines "overrule" to mean: To rule or determine in a contrary way; to decide or rule against. To set aside or reverse a previous decision.

In the construction of statutes, words in common use are construed in their natural and ordinary meaning (Betz v. Kansas City S. Ry. Co., 284 S. W. 455), and we think the above definitions so reflect the ordinary accepted meaning of the words "affirm" and "overrule." Such meanings do not admit of a construction that either means "modify."

The powers of the Governor and Attorney-General here, are subject to the same rules of construction previously set out relative to the powers of the Board of Pharmacy. They are acting under the statute and not in their capacity as constitutional officers. The statute uses the words "affirming or overruling" and thereby negatives the idea that it can mean "modify." While it is true that such terms are the alpha and omega of the authority that might have been granted, nevertheless this does not mean that all the authority that lies between such terms was also meant to be included. Such would completely ignore the rule that mention of one power excludes the exercise of another.

Further, to say that such terms include the word "modify", and that therefore the Governor and Attorney-General may modify an order of the Board of Pharmacy refusing to grant or revoking a license, would be to confer on these two officers greater authority than the body whose action they are reviewing. Such conception of the authority of a reviewing tribunal is completely foreign to the judicial mind. Appellate courts cannot even grant relief or take action that could not have been taken by the tribunal whose action is under review. And the fact that appellate courts exercise power to modify judgments does not sanction its exercise here. The jurisdiction and scope of a court's action has a constitutional origin and the statute (Section 1229, R. S. Missouri, 1939) expressly provides that appellate courts may "award a new trial, reverse or affirm * * * * * * or give such judgment as * * * ought to have (been) given."

A somewhat analogous situation exists in connection with appeals to circuit courts from decisions striking persons from the Old Age Assistance rolls. The statute granting such right of appeal (Section 9411, R. S. Missouri, 1939) provides:

> "* * * the circuit court shall determine whether or not a fair hearing has been granted the individual. If the court shall decide for any reason that a fair hearing and determination of the applicant's

> eligibility and rights under this law was not granted the individual * * * * * the court shall, in such event, remand the proceedings for redetermination of the issues by the State Commission. * * * * * * * * * * *."

Under this section, if the court finds there was a fair hearing and determination of the applicant's rights, such is an affirmance of the Commission's decision. If the court finds otherwise, such is an overruling of the Commission's decision. (Here the analogy ends because of the difference in the statute on what shall occur after the appellate tribunal has acted.)

In Howlett v. Social Security Commission, 149 S. W. (2d) 806 (Mo. Sup.) the circuit court remanded an old age assistance appeal for "redetermination in accordance with this (the circuit court's) decision." On appeal it was contended that such a remand exceeded the power given to the court, because the above statute provides only for a remand for "redetermination" and does not permit the circuit court to control such redetermination by requiring it to be in accordance with the circuit court's decision. The court said, l. c. 809:

> "The power and jurisdiction of a court upon such appeal is limited to that granted by the terms of the statute which creates the right."

The court then held that the words of the circuit court judgment "in accordance with this decision", might be treated as surplusage, and that it was nothing more than a simple remand to follow the law on such redetermination, which the Commission would have to do anyway. The court then said, l. c. 810:

> "* * * the trial court may not be reversed for the sole reason that it exceeded its statutory or constitutional powers in the manner in which it framed its judgment in this case."

As we read the above case, the court held that had the judgment of the trial court been an attempt to control the redetermination as to the facts, or as a direction to make a particular finding, it would have been void because not authorized by the statute.

Applying the above to the instant question, we think it points conclusively to the result that in Section 10007 "affirming or overruling" cannot be held to permit a modification of the Board of Pharmacy's decision.

Another reason that sustains our view is the fact that nothing in the act regulating pharmacists prevents a person whose application for a license has been refused or whose license has been revoked from making application for another license. If this is done, and the applicant is refused by the board, on appeal the Governor and Attorney-General, by overruling such decision, could, if they felt the man had made atonement for his sins, cause a license to be issued. Thus, since the law clearly permits a man to be punished by revocation of his license, and also permits him to be reinstated by issuance of a new license, there exists no reason why the Board of Pharmacy should have power to do anything other than refuse to grant or revoke a license and no reason exists why the Governor and Attorney-General should have power to do anything other than affirm or overrule the decision of the Board of Pharmacy.

CONCLUSION.

It is, therefore, our opinion that the Governor and Attorney-General, when reviewing a decision of the Board of

Pharmacy relative to issuance or revocation of a license, have only the authority to affirm or overrule, in toto, said decision.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

LLB/rv

GOVERNOR:
DEFICIENCY APPROPRIATION: Agreement of the Governor to sign a deficiency appropriation violates certain provisions of the Constitution and Statutes.

February 19, 1942

FILED
24

Honorable Forrest C. Donnell
Governor
Jefferson City, Missouri

Dear Governor Donnell:

We acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "Enclosed is copy of letter of February 10 from Mr. Turner B. Morton, Grain Warehouse Commissioner, to myself. You will observe that, due to an earlier misunderstanding as to the length of time the appropriations were to cover, Mr. Morton finds the department in a condition of financial stringency. Mr. Morton feels that a deficiency is inescapable in operations. As I understand, from a conference with him, the printing company is willing to sell merchandise in reliance on a deficiency appropriation for such merchandise being made provided the Governor makes an agreement that he will approve such deficiency appropriation if the same shall be made by the Legislature. I ask of you your official opinion whether there would be, in the Governor making such an agreement, any violation of law. I call especially to your attention, in this connection, Section 48 of Article IV of the Constitution of Missouri though I do not mean to imply that said Section is the only

> portion of the law which requires examination in order to provide me with the desired official opinion."

59 C. J., Section 286, page 172, reads as follows:

> "Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. * * *"

Section 285 of the same authority reads in part as follows:

> " * * * The governor and other executive officers of a state have no general authority to contract in its behalf and can bind the state only within the power specially conferred on them by law."

In the case of Aetna Ins. Co. v. O'Malley, 124 S. W. (2d) 1164, the court, at l. c. 1166, said:

> " * * * Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature."

Section 48 of Article IV of the Constitution of Missouri provides:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Under the above constitutional provision, contracts or agreements made without express authority of law, attempting to bind the State, are null and void, and the General Assembly is prohibited from paying or authorizing the payment of any such claim.

A diligent search fails to reveal any constitutional or statutory provision authorizing you to make an agreement to approve a deficiency appropriation for printing furnished the Grain Inspection and Weighing Department in excess of its appropriation, and we have no hesitancy in holding that such an agreement made by you would be null and void and not binding upon the State. We think a number of other statutory and constitutional provisions, however, should be considered in answering your request.

If the agreement about which you inquire should be construed as a contract between the Printing Company and yourself or the Grain Inspection and Weighing Department to purchase printing and material in excess of the appropriation for that purpose, it would be a contract made without express authority of law, and, in fact, in violation of law, and the Legislature would be prohibited, under the provisions of Section 48 of Article IV of the Constitution, supra, from paying or authorizing the payment of any claim arising thereunder.

Under the provisions of Article 1, Chapter 120, R. S. Mo. 1939, the contract for State printing, including the printing for executive departments, must be let by the Commissioners of Public Printing.

The case of State v. Hackmann, 282 S. W. 1007, was an original proceeding in mandamus to compel the State Auditor to issue a warrant to pay for certain printing alleged to have been furnished the State Highway Commission. The printing and stationery was furnished the State Highway Commission without compliance with any of the provisions regulating public printing, and the Auditor refused to issue his warrant because the Commission was without power to bind the State for such an account. The Supreme Court upheld the contention of the State Auditor and in its opinion, at l. c. 1013, said:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose. And it might be said in passing that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law, and section 48 of article 4 of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or con-

> tract made without express authority of law, and that all such authorized contracts shall be null and void."

If the furnishing of printing or other materials to the Grain Inspection and Weighing Department upon your agreement to sign a deficiency appropriation was construed as a contract to furnish such printing and materials under the contract already let by the State Printing Commissioners, we still think that Section 48 of Article IV of the Constitution, supra, would prohibit the Legislature from paying or authorizing the payment of such claim.

Under the provisions of Section 14992, R. S. Mo. 1939, all work to be executed for the executive departments must be ordered through the Commissioners of Public Printing, after a requisition is first obtained in advance signed by the head of the department ordering such work, and said requisition must be approved by the Commissioners of Public Printing.

Under the provisions of Section 14995, R. S. Mo. 1939, the accounts for such printing must be carefully examined by the Commissioners of Public Printing and compared with the voucher and the order therefor, and when the account is corrected and endorsed by the Commissioners, the State Auditor is required to draw a warrant upon the treasury for the amount thereof, "payable out of any moneys appropriated for that purpose."

According to your letter, the work to be furnished the Grain Inspection and Weighing Department is or will be for an amount in excess of the appropriation for such purpose. In other words, the printing to be furnished, whether under the contract with the State Printing Commission or under a separate contract with you or the Grain Inspection and Weighing Department, will amount to more than the money appropriated by the Legislature for the present biennium for that purpose.

In the case of Clas v. State, 220 N. W. 185, the Supreme Court of Wisconsin said:

> "The department of agriculture is an agency of the state, and the duties of

> the commissioner are clearly defined by statute. In the expenditure of the public moneys he is strictly limited to the sums appropriated by the Legislature for a given purpose. No discretionary power is vested in him to exceed such appropriations. This is the law not only in this state, but elsewhere, and it is incumbent not only upon the department to take cognizance thereof and to act in accordance therewith, but every individual or corporation transacting business with the department is legally governed thereby, whether a contract provides for it or not."

In the case of Dickinson v. Edmondson, 178 S. W. 930, the Supreme Court of Arkansas, at l. c. 931, said:

> " * * * The power of the General Assembly with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. The constitution provides, too, that no appropriation shall be for a longer period than two years, and thus a period is fixed over which the lawmakers hold complete control over the purse strings of the state."

The case of Fergus v. Brady, 115 N. E. 393, was an injunction suit against the Auditor of Public Accounts and Treasurer of the State of Illinois to prevent the payment of various sums appropriated by the General Assembly to boards and individuals for claims created without express authority of law and either without a previous appropriation or in excess of the appropriation. The Supreme Court

of Illinois, in passing upon constitutional and statutory provisions similar to our own, at l. c. 396, said:

> "These provisions of the Constitution and statute are clear and unambiguous in terms, and their purpose and object cannot be misunderstood. Section 18 prohibits appropriations in excess of the revenue authorized by law to be raised in the period for which appropriations are made, but necessarily revenue, whether derived from one source or another in the future, must always be estimated and never can be a fixed and certain sum. Circumstances may occur that will cause the reasonable expectations of the General Assembly as to the amount of revenue to miscarry or not to be fulfilled so that there may be a temporary deficiency. To meet that condition which may arise from failure in making collections of taxes or result from decreased revenue from other sources, the section provides that in case of failure of revenue the General Assembly may contract debts, never to exceed $250,000. This debt is only to be created by borrowing money--not by incurring debts or making contracts--since the section requires that the moneys thus borrowed shall be applied to the purpose for which they were obtained or to pay the debt thus created, and to no other purpose. No other debt can be contracted, except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, except upon a vote of the people at a general election. By section 19 the General Assembly is prohibited from authorizing the payment of any claim, or part

> thereof, created against the state under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts are null and void, with the exception that the General Assembly may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection. By the Criminal Code the making of a contract in excess of the amount of an appropriation subjects the offender to a fine not exceeding $10,000 and removal from his office, trust, or employment. No right whatever can grow out of the commission of a crime, and by the plain language of the Constitution every claim or contract is utterly void if not within the amount of appropriations already made, unless there is express authority of law for the creation of the debt or claim or the making of the contract. * * *"

In the case of Thatcher v. City of St. Louis, 122 S. W. (2d) 915, our Supreme Court recognized that an officer cannot bind the State in excess of appropriations made for the particular purpose. At l. c. 917 it was said:

> " * * * Although he cannot obligate the state beyond appropriations made for such purposes, our Attorney General does have authority to employ special assistants. * * *"

The case of State v. Weatherby, 129 S. W. (2d) 887, was an action by the State to recover legal fees paid the defendant as counsel for the Insurance Department out of appropriations for the Legal Department, and also to recover fees paid for writing opinions other than for the Insurance Department. The court upheld the contention of the State that the fees paid the defendant for writing the opinions at the request of the Attorney General could be recovered for the reason that there was no available funds appropriated to pay such a claim. In regard to the defendant's contention

that he could offset the value of his services performed for the Insurance Department against the claim of the State for money paid out of the Attorney General's fund, the court held that such a right would depend on whether or not there remained a sum sufficient to discharge defendant's claim out of the appropriation for the Insurance Department properly available for the payment of defendant's services and expenses. The court, at l. c. 893-4, said:

> " * * * By its appropriation, the Legislative Department clearly limited the lawful extent of the State's obligation to pay for services rendered and expenses incurred on behalf of the Insurance Department. Our Statute respecting set-offs against the State and the common law principle of recoupment contemplate the assertion of legal, not unauthorized and unlawful, claims. To permit defendant to recoup payments made, absent available funds for lawful payment, would accomplish by indirection what could not be lawfully done directly, would make unlawful payments legal, infuse validity into the State Auditor's unauthorized warrants, encroach upon the legislative function of our State government and smack of judicial tyranny. * * *"

In view of the above, it is our opinion that a contract for printing in excess of the amount appropriated therefor, whether made by the State Printing Commission or otherwise, would be made without express authority of law, and therefore void.

There is another provision of the Constitution that should be considered. Section 44 of Article IV reads in part as follows:

> "The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue

> bonds or other evidences of indebtedness thereof, except in the following cases:
>
> * * * * * * * *
>
> "Second, On the occurring of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the Governor first had, shall not exceed the sum of two hundred and fifty thousand dollars for any one year, to be paid in not more than two years from and after its creation. * * * *"

Under the above constitutional provision, the General Assembly has the power to contract or to authorize the contracting of a debt or liability, on the occurrence of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the Governor first had, shall not exceed the sum of two hundred fifty thousand dollars for any one year. We fail to find, however, that the General Assembly has authorized you or the Grain Inspection and Weighing Department to contract any liability for printing or for any other purpose.

The General Assembly has a right to anticipate the revenue for the biennium, and an appropriation in anticipation of the current revenue is not a debt within the meaning of the Constitution. 59 C. J., Section 369, p. 223. However, by the great weight of authority an obligation in excess of the anticipated revenue is a debt within the meaning of the Constitution. 59 C. J., Section 368, p. 222. See, also, annotations contained in 92 A. L. R., pp. 1299 to 1315.

59 C. J., Section 367, p. 222, reads as follows:

> "Agreements creating a liability against the state without express authority of law are void where in violation of a constitutional inhibition, and the same is true in the case of an agreement made without express

> authorization by an officer of the state exceeding a proper appropriation or of an indebtedness incurred without an appropriation for the specific purpose. Where funds involved are public funds raised by the state, directly through taxation, they cannot be impaired by hypothecation by the officers in charge, unless there is express authority therefor."

In view of the above, we think that the purchase of printing in excess of the appropriation, not having been authorized by the Legislature under the provisions of Section 44 of Article IV, supra, would be incurring a debt in violation of said constitutional provision.

We call your attention also to the State Budget Law. Section 10907 of said Act, R. S. Mo. 1939, reads as follows:

> "The auditor shall keep accounts showing the appropriations and allotments. Such accounts shall show all charges and obligations incurred against such appropriations and allotments. No expenditure shall be made and no obligation incurred by any department without the certification of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same. The auditor shall be liable personally and on his bond for any certification in excess of any allotment or in excess of the cash balance available. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable

> on his bond for the amount of such expenditure or obligation. For any department maintaining its principal office outside of Jefferson City, the auditor shall be authorized to establish a system for certification of obligations and expenditures so as to prevent inconvenience and delay."

The above section specifically provides that no expenditure shall be made and no obligation incurred by any department without the certification of the Auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid. Said section makes any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the Auditor personally liable and liable on his bond for the amount of such expenditure or obligation.

Section 10895, R. S. Mo. 1939, makes it the duty of the Governor to enforce observance of the appropriations made by the Legislature and the provisions of the State Budget Act. Said section reads in part as follows:

> "The Governor shall have full authority to carry out the provisions of this article and to do all things necessary thereto. He shall be responsible for the preparation of the budget and its presentation to the legislature and shall enforce observance of the appropriations made by the legislature and the provisions of this article with reference thereto. * * *"

CONCLUSION

In view of all of the above, it is our opinion that an agreement by you to approve a deficiency appropriation, if the same was made by the Legislature, for printing fur-

nished the Grain Inspection and Weighing Department in excess of its appropriation would be without authority of law, and therefore void and not binding upon the State.

It is our further opinion that a contract for printing to be furnished the Grain Inspection and Weighing Department in excess of the appropriation for that purpose, whether made by the State Printing Commission or by you or the Grain Inspection and Weighing Department, would be made without express authority of law, and therefore void, and the Legislature, under the provisions of Section 48 of Article IV of the Constitution of Missouri, would be prohibited from paying or authorizing the payment of any such claim.

It is our further opinion that a contract for printing in excess of the appropriation would be a debt within the meaning of Section 44 of Article IV of the Constitution, and such debt, not having been authorized by the Legislature in conformity with the provisions of said section, would be in violation thereof and therefore void.

We further hold that the incurring of an obligation in excess of the appropriation, either by the State Printing Commission, the Grain Inspection and Weighing Department or yourself, is prohibited by Section 10907, R. S. Mo. 1939, and that the agreement in question, if made by you, would violate your duties under the provisions of Section 10895, R. S. Mo. 1939, to enforce the observance of the appropriations made by the Legislature and the provisions of the State Budget Act.

Respectfully submitted

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:HR

BOARD OF ELE' ON COMMISSIONERS: When term of off expires.

March 9, 1942

8 13

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

FILE
24

Dear Governor Donnell:

We acknowledge receipt of your letter requesting an opinion, which reads as follows:

> "On February 4, 1938 Governor Lloyd C. Stark appointed James L. McGuie, Democrat, 229 North Kirkwood Road, Kirkwood, Missouri, as a member of the Board of Election Commissioners for the County of St. Louis, Missouri, for a term ending January 15th, 1942, and until his successor is duly appointed and qualified.
>
> "On February 4, 1938 Governor Lloyd C. Stark appointed Herbert D. Condie, Republican, 40 North Elizabeth Avenue, Ferguson, Missouri, as a member of the Board of Election Commissioners for the County of St. Louis, Missouri, for a term ending January 15, 1942, and until his successor is duly appointed and qualified.
>
> "Section 11928 of the Revised Statutes of Missouri of 1939, in reference to a board of election commissioners for counties having more than 200,000 inhabitants and less than 400,000 inhabitants, provides as follows:

> '.... After this article shall become a law, the governor, by and with the advice and consent of the senate shall appoint for each of such counties four members of such board of election commissioners who shall hold their office until January 15, 1937, and until their successors are commissioned and qualified .....'

"An opinion as soon as possible is respectfully requested on the following question:

> "What should be specified in the Commission as the expiration of the term of each of the persons who shall be appointed to succeed respectively the above mentioned James L. McQuie and Herbert D. Condie?"

Section 11928 of Article 18, Chapter 76, R. S. Mo. 1939, provides in part:

> "There is hereby created a board of election commissioners for each county governed by the provisions of this article composed of four members who shall be appointed as follows: After this article shall become a law, the governor, by and with the advice and consent of the senate shall appoint for each of such counties four members of such board of election commissioners who shall hold their office until January 15, 1937, and until their successors are commissioned and qualified. * * *"

Said section further provides:

> " * * * Successors shall be appointed in like manner and their terms of office shall be four years and until their successors are commissioned and qualified. * * *"

Said section also contains the following proviso:

> " * * * Provided, that nothing herein shall be construed as in any way interfering with or discontinuing the term of office of any person or persons now serving in any such counties as a member or members of the board of election commissioners until the term for which he or they shall have been appointed shall have expired. Such members now in office shall hereafter receive the salary and be required to perform the extra services herein provided for in this article."

Your question, as we understand it, is whether the successors of James L. McQuie and Herbert D. Condie should be appointed for a term expiring January 15, 1945, by reason of the above statutory provisions, or whether such successors' term should expire January 15, 1946, by reason of the fact that, according to the commission of McQuie and Condie, their term did not expire until January 15, 1942.

Section 11928, supra, was enacted by the General Assembly in 1935 (Laws of 1935, page 229). Prior to that time, counties now affected by Article 18, Chapter 76, R. S. Mo. 1939, were governed by Article 15, Chapter 61, R. S. Mo. 1929, which related to registration and elections in counties of 150,000 or more inhabitants. Section 10536 of said Article read in part:

> " * * * After this article shall become a law, the governor, by and with the advice and consent of the senate shall appoint for each of such counties four members of such board of election commissioners who shall hold their offices until January 15, 1922, and until their successors are commissioned and qualified. Successors shall be appointed in like manner and their term of office shall be four years and until their successors are commissioned and qualified. * * * "

The above section also contained a proviso identical with the proviso contained in Section 11928, supra, quoted above.

By virtue of Section 10536, R. S. Mo. 1929, supra, the term of office of members of the board of election commissioners appointed thereunder would not expire in the regular course of events until January 15, 1938, and, according to the proviso contained in Section 11928, R. S. Mo. 1939, supra, their term of office was not discontinued until the term for which they were appointed had expired; in other words, they continued to hold office under their original appointment. Said proviso, however, by its wording, only applied until the expiration of the terms of the commissioners appointed under Section 10536, R. S. Mo. 1929.

Since the proviso only applied until the terms of the commissioners theretofore appointed had expired, we must look to the body of Section 11928, supra, to ascertain the terms of the commissioners appointed after the effective date of said section. Said section provided that after the article became a law, the Governor, by and with the advice and consent of the senate, was to appoint four members as a board of election commissioners in all counties to which the article was applicable, and provided further that they were to hold their office until January 15, 1937. Of course, by virtue of the proviso heretofore considered, which is merely an exception to the above provision fixing the term of office, members of the board of election commissioners already serving in such counties

were to continue to serve until the expiration of the term for which they were appointed, but said proviso did not make a different term for those appointed to succeed such commissioners. In other words, in our opinion, the term of the board of election commissioners first appointed under Article 18, supra, was to expire January 15, 1937, and, by the plain wording of the statute, their successors were to be appointed in like manner for a term of four years, and until their successors were commissioned and qualified.

In the case of State ex inf. v. Williams, 222 Mo. 268, the court, at l. c. 278, quoted with approval from the opinion of State ex rel. v. Stonestreet, 99 Mo. 361, as follows:

> "'Going to the standards of our language we find that a term means "the time for which anything lasts; any limited time; the term of life." (Webster's Dict.) And turning to the authorities, they announce that "the expression, term of office, uniformly designates a fixed and definite period of time." (Anderson's Law Dict. 1023; People v. Brundage, 78 N. Y. 403, 407; Baker, Governor, v. Kirk, 33 Ind. 517.) So that whether we take the phrase, "term of office," in its ordinary or popular sense, or in its technical import, it means one and the same thing: "A fixed and definite period of time."
>
> "'Of course, every such period of time, in order to be "fixed and definite," must have a point of beginning and a point of termination equally fixed and definite. Now, if it can be ascertained when the "term of office" of the first appointee of the Governor under the revision of 1879 began, it would seem not difficult to reach a correct conclusion as

> to when the terms of office of the successive and subsequent appointees of the Executive began and ended.'"

The above case dealt with the term of office of an appointee where the statute did not fix the commencement of the term, and it was held that the term was fixed by the appointing power. The court, however, at l. c. 279, stated:

> "'* * * But if the Legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years. This must be true, or else the premises from which this conclusion is drawn, sustained as it is by authority, that a "term of office uniformly designates a fixed and definite period of time," must be false. * * *'"

Applying the above announced principles to the instant case, we see that the term of office of the members of the board of election commissioners, under the provisions of Section 11928, supra, first expired January 15, 1937, and their successors were to be appointed for a term of four years. The commissioners serving before the effective date of said section were to hold over until the expiration of their term, but a different term than the four-year term commencing on January 15, 1937, was not provided for their successors, and it is our opinion that their successors should have been appointed for a term expiring January 15, 1941, in order to have complied with the provisions of the statute fixing the commencement and necessarily the expiration of said terms. It is unbelievable, under the wording of the above section, that the legislature intended to have the terms of the various election commissioners of a county commence and expire at different dates, and undoubtedly the reason for changing the commencement date of said terms to the odd year was to have the appointments made while the legis-

lature was in session so that they could be submitted to it immediately without waiting a year for its approval.

In the case of State ex inf. v. Williams, supra, the court, at l. c. 280, said:

> "' * * * The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. * * *'"

And, further, it was said:

> "'Under statutory provisions substantially identical with these under discussion, it has been held that the true rule was to construe the word "term" as designating consecutive periods of six years, following each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. * * *'"

CONCLUSION

In view of all of the above, it is the opinion of this department that the term of a member of the board of election commissioners of a county containing 200,000 to 400,000 population is a four-year term, which term originally commenced January 15, 1937, and expires every four years thereafter; that the commissioners serving in 1935, when Section 11928, supra, was adopted, held over until the expiration of their term, but that their successors should have been appointed for the term fixed by statute

and ending January 15, 1941. It is, therefore, our opinion that the persons appointed to succeed James L. McQuie and Herbert D. Condie should be appointed for a term expiring January 15, 1945.

Respectfully submitted

JOHN E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:HR

GRAND JURY: Notes taken before grand jury cannot be furnished to Attorney General of the United States or anyone other than the prosecuting officer of the county.

Supreme Court Rule 24.24 should be cited when this opinion is sent out. 4-7

March 28, 1942

FILE 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Re: Sikeston, Missouri-Cleo Wright Matter.
>
> "This confirms my request made to you last Saturday afternoon for an official opinion as to whether it will be permissible under the law for the notes which Assistant Attorney General Harry Kay took in the Grand Jury room, or the typewritten statement which he prepared from said notes, to be delivered to Honorable Frances Biddle, Attorney General of the United States.
>
> "Attached hereto is copy of self-explanatory letter of March 21 this morning received from General Biddle with respect to the Sikeston matter."

The question you present is one which has not been directly passed upon by the courts of this state. In answering it, therefore, we must reason from general principles of law involved and from precedents in other jurisdictions.

It has been the policy of the law from early times that the proceedings of a grand jury are secret. Professor Wigmore in his work on Evidence, Section 2360, says:

> "That the proceedings of the grand jury, in hearing testimony and in deliberating, must be held in privacy, has been the customary practice from early times."

The reasons ascribed by that author for the secrecy of grand jury proceedings are:

> "(a) The grand jurors themselves are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion.
>
> "(b) The complainants and the witnesses summoned are to be secured in freedom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the State may secure willing witnesses.
>
> "(c) The guilty accused is not to be provided with such clues as will enable him to flee from arrest or to suborn false testimony or tamper with witnesses.
>
> "(d) The innocent accused, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused."

This policy of the law and the reasons therefor were firmly established in the common law of England and have been recognized by the courts of this country from the beginning of our jurisprudence. Reference to the early statutes of Missouri will show that the legislature of this state from the beginning undertook to guarantee the secrecy of grand jury proceedings. Reference to the present statutes will show that the secrecy of grand jury proceedings is still the policy of the law of this state.

Section 3905, R. S. Mo. 1939, provides the form of oath to be administered to grand jurors. This oath is substantially in the form used in the early days in England (Wigmore on Evidence, Section 2360), and contains the following:

> " * * * the counsel of your state, your fellows and your own, you shall truly keep secret. * * *"

Section 3906, R. S. Mo. 1939, requires that witnesses before a grand jury, in addition to being sworn to tell the truth, shall also be required to take the following oath:

> "You do further solemnly swear, or affirm, that you will not after your examination here, directly or indirectly, divulge or make known to any person or persons the fact that this grand jury has or has had under consideration the matters concerning which you shall be examined, or any other fact or thing which may come to your knowledge while before this body, or concerning which you shall here testify, unless lawfully required to testify in relation thereto."

A violation of this oath by a witness subjects him to prosecution for a crime. (Section 3907, R. S. Mo. 1939.)

Section 3923, R. S. Mo. 1939, provides as follows:

> "No member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question."

In fact, all statutes which permit in any way the divulging of what transpired before a grand jury are considered by the courts as modifications of the common law rule that all such proceedings are absolutely secret.

In the recent case of State v. McDonald, 119 S. W. (2d) 286, [illegible], the Supreme Court of Missouri in passing upon statutes which provide that a grand juror may be compelled to testify in certain instances as to what transpired before the grand jury, said:

> "So far as here involved the common law rule preserving the secrecy of grand jury proceedings has been modified by statute in this state only to the extent indicated."

Likewise, in the case of State v. Thomas, 99 Mo. 235, 258, the court said:

> "The ancient rule excluding the evidence of a grand juror as to any matter that transpired in the jury room, while the grand jury was in secret session in the discharge of its duties, founded upon considerations of public policy, the nature of the tribunal, and a tender regard for a juror's conscience, has been much relaxed in modern practice in those states in which the limitations upon such disclosures are measured only by the oath of secrecy which the grand juror is required to take, notable illustrations of which will be found in the following cases, as well as cogent reasons therefor: (Citing cases.)
>
> * * * * * * * * * * *
>
> "The evil sought to be remedied, by this legislation, was the immunity, which witnesses might enjoy under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance, on trial, in open court, of evidence different from that delivered under oath before the grand jury. * * * * * *

> The extent, to which these common-law rules of exclusion has been relaxed, is to be measured by the terms of the statute, and extends only so far as, first to permit a grand juror, who has heard a witness testify before the grand jury, to give evidence of what that witness testified to, upon a complaint against such witness for having committed perjury in such testimony, or upon his trial for such perjury, and, second, when a witness, who has testified before the grand jury, is being examined in the trial court, in regard to the same matter, and has testified thereto, and it is sought to impeach his evidence (after laying a proper foundation therefor) by showing that he testified differently before the grand jury. * * *"

It should be observed here that the notes taken by the Assistant Attorney General of testimony heard before the grand jury are in no way "official notes." Section 3911, R. S. Mo. 1939, reads as follows:

> "Every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall be given to the attorney prosecuting in the county."

The foregoing is the only provision in our statutes which authorizes or directs anyone to make minutes and notes of the evidence heard before the grand jury. We do not mean to say that there would be anything improper in the prosecuting attorney, his assistant, or any grand juror other than the clerk taking notes of evidence heard before the grand jury. Such notes would likely assist the grand jury in keeping facts, figures and dates before them, and no rule of secrecy would be violated by the mere making of such notes. However, it is clear that notes made by a grand juror other than the clerk, or by a prosecuting officer, are not recognized as official notes of the grand jury, and there is no provision that they be preserved.

The notes made by the clerk of the grand jury are for the assistance of the attorney prosecuting in the county. The Supreme Court in the case of State v. Whelehon, 102 Mo. 17, 22, in referring to the section of the statutes providing for the taking of notes by the clerk of the grand jury, said:

> "That section merely authorizes the grand jury to appoint one of their number clerk to preserve the minutes of their proceedings and of the evidence given before them, which minutes the statute declares shall be given to the attorney prosecuting in the county. This provision is enacted with the view to the convenience and information of prosecuting officers and to enable them to prepare and try the causes."

The courts of our state have ruled that such notes and minutes cannot be introduced or used as evidence in court. In the case of State v. Thomas, 99 Mo. 235, 261, the Supreme Court said:

> " * * * The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just and orderly way of getting at the evidence that was actually given before the grand jury.
>
> "While the statute permits 'every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall be given to the prosecuting attorney' (sec. 1780, supra), it has nowhere authorized the admission of these minutes as evidence, anywhere, or for any purpose. They are not required to be signed, and are not sworn to by anybody. They are not the statement, deposition or affidavit of the witness, but simply

> a memorandum, by which, perhaps, a grand juror's memory might be refreshed, but upon which could not be shifted the responsibility of the juror's oath as to what the witness did actually testify. * * *"

From the foregoing, we believe two things are evident: (1) That it is the policy of the law of this state to make the proceedings of grand juries absolutely secret except in certain particulars where the common law rule has been relaxed or modified by statute, and (2) that notes or minutes made by the clerk of the grand jury are for the use of the attorney prosecuting in the county and do not become a matter of public record.

Turning now to the statutes, we find that in certain particulars the common law rule as to secrecy of grand jury proceedings has been modified or relaxed. Section 3922, R. S. Mo. 1939, reads as follows:

> "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense."

Likewise, Section 3924, R. S. Mo. 1939, provides in part as follows:

> "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; * * *"

It will be observed that the foregoing sections do not lift the veil of secrecy of grand jury proceedings so as to permit grand jurors to testify in <u>any</u> court proceeding, but only

in certain designated cases and proceedings. The courts have held that these sections do not permit a grand juror to testify in civil cases between individuals. For instance, in the case of Tindle v. Nichols, 20 Mo. 326, the court held that in an action for slander on a charge of false swearing before a grand jury, a grand juror could not testify as to evidence given before the grand jury touching the matter at issue.

Likewise, in the case of Beam v. Link, 27 Mo. 261, which was an action for malicious prosecution in which it was alleged that the defendant appeared before the grand jury and without probable cause caused plaintiff to be indicted for perjury, the court held that a grand juror could not testify and disclose the name of any witness who appeared before the grand jury.

It is apparent, therefore, that not only by common law, but by positive statutes, grand jurors in this state cannot disclose any evidence given before the grand jury, nor the name of any witness who appeared before that body, except when called upon as a witness in certain specific cases. It follows, therefore, that members of the recent grand jury in Scott County, Missouri, could not lawfully furnish to any person any evidence given before said grand jury, nor the names of any witnesses who appeared before them. The only question which remains now is as to whether the same prohibition applies to an Assistant Attorney General or the Prosecuting Attorney who attended the grand jury during its sessions.

By Section 3912, R. S. Mo. 1939, it is made the duty of the prosecuting attorney, when required by the grand jury, to attend the grand jury for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter, and by Section 3913 the prosecuting attorney is given the right to appear before the grand jury whenever he desires to (except, of course, during the deliberations and voting by the jurors). In the case of State ex rel. Graves v. Southern, 344 Mo. 14, 124 S. W. (2d) 1176, the Supreme Court held that a circuit judge could not exclude the prosecuting attorney from the grand jury room. These provisions show that the prosecuting attorney is in reality an integral part of the grand jury--an arm of that body, so to speak.

By Section 12898, R. S. Mo. 1939, it is made the duty of the Attorney General, or one of his assistants, to aid any prosecuting or circuit attorney in the discharge of his duties in the trial courts and in examinations before grand juries. In the case in question, as Your Honor knows, we did have a written direction to aid the Prosecuting Attorney of Scott County in connection with grand jury proceedings then contemplated. In addition, an order was made by the circuit court authorizing an Assistant Attorney General to appear before the grand jury. Therefore, the law which is applicable to prosecuting attorneys in this connection is likewise applicable to an assistant attorney general who assists him.

There is no statute which requires the prosecuting attorney to take an oath before commencing his duties in connection with the grand jury that he will not disclose what transpires before the grand jury, nor is there any statute which positively forbids his disclosing evidence which he hears before the grand jury. The statutes are silent as to his obligations in regard to such matters. It might be suggested, therefore, that since there is no substantive law which prohibits the prosecuting attorney from divulging evidence which he heard before the grand jury, he is free to divulge such evidence. However, such a suggestion would at once provoke a question as to why the law is so specific and exact in prohibiting members of the grand jury and witnesses before same from divulging evidence heard in the grand jury proceedings, and yet leave the prosecuting attorney free to divulge the very things which such laws seek to keep secret. The statutes which seal the lips of the grand jurors and witnesses (except in a few specific cases) would be useless if the prosecuting attorney were free to reveal the very things which those statutes require to be kept secret. The purposes for which grand jury proceedings are kept secret would be thwarted if the prosecuting attorney were left free to divulge secrets of the grand jury proceedings.

The courts of Missouri, as stated above, have not ruled definitely upon the question at hand, but in the early case of Tindle v. Nichols, 20 Mo. l. c. 330, the Supreme Court, in discussing the right of a grand juror to divulge the secrets of the grand jury, said this:

> "Any person who may be present on the occasion is bound not to disclose what may transpire, and the jurors themselves

> are by the terms of their oath, laid under the same obligation; and if they transgress it they are finable."

Again, in the case of State v. Pierson, 337 Mo. 475, 85 S. W. (2d) 48, the Supreme Court of this state had before it the question of the right of a defendant to inquire into the nature and amount of testimony which the grand jury heard as a basis for returning an indictment. In the course of the opinion the court said (337 Mo. l. c. 480):

> "Defendant sought to prove by the foreman of the grand jury that had returned the indictment that no witness had testified 'to any facts concerning an incendiary origin of the fire' and that 'the only evidence that the fire was of incendiary origin was the written statements' of Cotham and Meadows, who did not personally appear before the grand jury. The court sustained the State's objection and refused to permit the grand juror to relate what testimony had or had not been heard by the grand jury.
>
> "Defendant called the circuit attorney and assistant circuit attorney, each of whom had attended the grand jury sessions at times during its investigation of the alleged offense, and by each attempted to prove in substance and effect the same thing he had offered to prove by the grand juror. The court refused to permit the witnesses to state what evidence had or had not been given. It did permit them to say whether or not the grand jury had heard any evidence, but declined to go into the question of the sufficiency thereof to justify an indictment."

While the court did not definitely rule upon the exact question we have before us here, we think the ruling of the court in that case does show the attitude of our own Supreme Court toward protecting the secrecy of grand jury proceedings, and we think the holding is susceptible of the inference

that the prosecuting attorney or his assistant stands in the same position with regard to divulging the secrets of grand jury proceedings as do the individual grand jurors.

The courts of other states, however, have passed upon the question at hand, and we call attention to some of them. In the early case of State v. Hamlin, 47 Conn. 95, the court announced the doctrine that the rule as to secrecy of grand jury proceedings applied to all persons who are before the grand jury in its proceedings, including the prosecuting officer. The court in that case said, l. c. 115:

> "It was contended upon the argument in the case of The State v. Fassett, that the witnesses called before the grand jury, as they were not sworn to secrecy, might testify to what took place before that body, although the grand jurors might not. In answer to that claim, Chief Justice Williams said: 'Such a practice would nullify the rule. If it be the object of the law to keep secret the proceedings before the grand jury, it is necessary that the law should impose silence upon those whom it compels to be before them. If it intends they shall be public, then the doors of the grand jury room as well as of the court room should be open to all. If others called there by law may testify to what took place within those walls, it would be idle to close the mouths of the grand jury. * * * And we can have no hesitation in saying that the principle which would prevent disclosure by a grand juror must extend to all persons required by law to be present; for such persons are equally interested in the administration of the penal law. 1 Greenl. Ev., sec. 288. They are not permitted to disclose who agreed to find the bill of indictment, or who did not agree; nor to detail the evidence on which the accusation was founded. Sykes v. Dunbar, Selw. N. P., 815 (1059); * *.'"

Again, in the case of State v. Kemp, 126 Conn. 60, 9 A. (2d) 63, the same rule was announced in the following language (9 A. (2d) l. c. 68):

> "The purpose of the requirement of secrecy is to prevent the knowledge of matters taking place in the grand jury room from reaching others than those having an official part in the proceedings. The state's attorney and his assistants are just as much bound to preserve that secrecy as are the members of the grand jury." (Underscoring ours.)

In the early case of Clark v. Field, 12 Vt. 485, it was said:

> "It is the duty of the jurors, the attorney for the state, and witnesses, not to divulge what passes in the grand jury room, unless required so to do in a court of justice."

Likewise, in the case of State v. Richard, 23 So. 331 (La.), the court said:

> "The practice of admitting the presence of the prosecuting officer at times during the proceedings must, in the order of things, require secrecy of him as well as of the members of the grand jury. The rule as to secrecy includes the grand jurors themselves and the prosecuting officer."

To the same effect are the cases of State v. Britton, 60 So. 379 (La.), and State v. Hopkins, 40 So. 166 (La.).

In the case of Gitchel v. People, 146 Ill. 175, 187, the court said:

> "The same principle, which forbids disclosure by the grand jurors, applies to all persons authorized by law to be present in the grand jury room, whether it be their clerk, or the officer in charge, or the prosecuting attorney."

The foregoing case was followed on this proposition in the later case of People v. Nall, 242 Ill. 284.

From all of the above, we believe it is inescapable that testimony taken before a grand jury must be kept secret by grand jurors and all others who are required to be present before the grand jury except where the statutes require such persons to divulge such evidence when called as witnesses in certain specific cases.

Reference was made in the letter of Attorney General Biddle to the practice in some states of furnishing grand jury notes to his office when the judge in whose jurisdiction the grand jury functioned so ordered. There are some states where statutes provide that notes of the grand jury can be furnished to others upon order of the proper judge. For instance, in New York the Code of Criminal Procedure provides for the taking of testimony given before a grand jury by a stenographer duly appointed for that purpose, and furnishing the District Attorney a copy of such testimony. The section further provides that no other person can see said testimony or take a copy of same except upon the order of court. (See Dworetzky v. Monticello, 12 N.Y.S. (2d) 270.) Upon the authority of such statute, the minutes of grand juries have been furnished the Attorney General of the United States upon order of the court. (See in re Attorney General of the United States, 291 N.Y.S. 5.) As pointed out above, no such provisions are found in the statutes of Missouri.

CONCLUSION

It is, therefore, the opinion of this office that it is not permissible under the law of this state for the notes which an Assistant Attorney General took in the grand jury room to be delivered to the Attorney General of the United States or to any other person other than the prosecuting officer of the county in which the grand jury was convened.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

DEFENSE AREAS:
CONSTITUTIONALITY
OF ACT:

Act providing for formation of defense areas and setting up therein public service districts is constitutional.

April 20, 1942

FILED
24

Hon. Phil M. Donnelly
State Senator
Lebanon, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this department on the Constitutionality of an act of the sixty-first General Assembly relating to defense areas; Laws of Missouri 1941, page 493.

The purpose of this Act was to establish areas in the vicinity of military encampments, providing for certain "undertakings" which include building of hospitals, water systems, sewer systems, etc., and for the governing and financing of such undertakings.

Subsection "a" of Section 1 of the Act, defines a defense area as follows:

> "A 'defense area' shall constitute the territory within a radius of fifty miles of a camp, encampment, cantonment, fort, depot, or other establishment of the armed forces of the United States of America within which not less than ten thousand persons are stationed, except the territory contained in any county now or hereafter having a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants."

Subsection "c" of the Act, defines a municipality as follows:

> "The term 'municipality' shall mean any county, school district, city, town, village, township, road district, public

> water supply district or drainage district located in whole or in part within a defense area, except any county now or hereafter having a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants and also except any school district, city, town, village, township, road district, public water supply district or drainage district or other political subdivision or public corporation located within any such county."

Section 2 of the Act, authorizing the governing bodies of such municipalities to acquire, construct, maintain and operate the undertakings described in subsection "b". These undertakings include, hospitals, water systems, and sewer systems.

The Act authorizes the governing body to issue revenue bonds to finance in whole or in part, the costs of acquisition, construction, reconstruction, improvement, betterment or extension of any such undertaking. However, the Act limits the obligation incurred by the issuance of such revenue bonds in the following language, l. c. 495:

> "* * * * provided, no encumbrance, mortgage or other pledge of property of the municipality is created thereby, and provided no property of the municipality is liable to be forfeited or taken in payment of said bonds, and provided no debt on the credit of the municipality is thereby incurred in any manner for any purpose, * * * *."

Section 10 of the Act provides as follows:

> "Revenue bonds issued under this act shall not be payable from or charged upon any funds, other than the revenue pledged to the payment thereof, nor shall the municipality issuing the same

> be subject to any pecuniary liability thereon. No holder or holders of any such bonds shall ever have the right to compel any exercise of the taxing power of the municipality to pay any such bonds or the interest thereon, nor to enforce payment thereof against any property of the municipality, nor shall any such bonds constitute a charge, lien or encumberance, legal or equitable, upon any property of the municipality. Each bond issued under this Act shall recite in substance that said bond, including interest thereon, is payable solely from the revenue pledged to the payment thereof, and that said bond does not constitute a debt of the municipality within the meaning of any constitutional or statutory limitation."

It will be noted that this section of the law is in keeping with the "Special Fund" idea of obligations issued by municipalities. In other words, the holder or such bonds have no right or authority to compel the taxing power of such municipality to pay the bonds or interest thereon or to enforce payment thereof against the property of the municipality nor to consider these bonds as a charge, lien, or encumbrance, legal or equitable, upon the property of the municipality. Such bonds are payable solely from the revenue pledged for the payment thereof and they do not constitute a charge within the meaning of constitutional or statutory limiation.

Section 7 of the Act requires the governing body to create a sinking fund with the earnings of the undertaking for the purposes of paying the bonds and interest thereon, etc.

The first question to be considered here is: Does the Act violate Section 12 of Article 10 of the Constitution? It will be noted from the Act that by Section 3 thereof, before such bonds may be issued, the governing body must have the approval of two-thirds majority of qualified voters.

Section 1 of Article 4 of the Constitution authorizes the General Assembly to enact legislation such as is here under consideration, subject to the limitations of said Section 12 of Article 10 of the Constitution. Said Section 12 of the Constitution limits municipalities in the amount of taxes they may impose and the amount of indebtedness they may incur. If the obligations incurred under the provisions of this Act are debts

of the municipality which would obligate the governing body of such municipality to levy taxes for the payment of same, then it would be in violation of said Section 12 of Article 10 of the Constitution, providing the amount of the bonds exceed the limitation prescribed in said section.

On the question of whether or not the bonds issued under the provisions of this act are obligations of the governing body, such as are contemplated under said Section 12 of the Constitution, we find that a statute containing similar provisions was before our Supreme Court. The court in the case of Sager et al. v. City of Stanberry et al. 336 Mo. 213, 78 S.W. (2d) 431, in speaking of the "special fund doctrine" in that case, the court said, l. c. 438:

> "'Special fund doctrine' is recognized in Missouri, under which city does not create 'indebtedness' within constitutional prohibition by obtaining property to be paid for solely and exclusively from special fund derived from income of property with no liability on part of city to pay such purchase price or any part thereof directly or indirectly with funds raised by taxation.
>
> "Contract for purchase of generating equipment by city created 'indebtedness', within constitutional provision, notwithstanding special fund doctrine, where city obligated itself to purchase electricity from itself paying therefor into special fund, since such payments must come from funds raised by taxation, * * *"

Toll bridge revenue bonds issued under the provisions of Laws of Missouri 1933 pages 363, 364, which contains language similar to the language in this act held not to be debts of the municipality. In State ex rel. City of Hannibal v. Smith, State Auditor 74 S. W. (2d) 367.

This department is therefore, of the opinion that the provisions of this Act authorizes the incurring of obligations and the issuance of bonds therefor, come within the "special fund doctrine", and that the act does not violate Section 12 of Article 10 of the Constitution.

On the questionof whether or not this Act violates Section 53 of Article 4 of the Constitution which prohibits the General Assembly from passing any local or special law, we refer to the portion of the definition of "defense area" supra, which is as follows:

> "* * * except the territory contained in any county now or hereafter having a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants."

We also refer to a portion of the definition of the term "municipality", supra, which is as follows:

> "* * * except any county now or hereafter having a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants and also except any school district, city, town, village, township, road district, public water supply district or drainage district or other political subdivision or public corporation located within any such county."

From an examination of a law, we observe that the only county within the state which comes within this excepted class is St. Louis County. For that reason it might be argued that this is class legislation and in violation of said Section 53, supra.

In the construction of a law, we observe the rule that a statute duly enacted by the Legislature is presumed to be constitutional until the contrary appears beyond a reasonable doubt. State v. Cantwell 179 Mo. 261, Ex Parte Long 168 Mo. 203, State v. Aloe 152 Mo. 477.

In the case of Davis v. Jasper County 300 S.W. 493, constitutionality of an act pertaining to the salary of the prosecuting attorney was before the court. This section had a provision in it which applied to certain officers "of all counties in this state, which now contain or may hereafter

contain 80,000 or more inhabitants or less than 150,000 inhabitants, in which circuit court is held in two or more places in said county." (Section 11080 R. S. Mo., 1919)

At the time of the enactment of that Section, Jasper County was the only county in the State which had a population over 80,000 and less than 150,000, in which circuit court was held in more than one place. The court in that case held that the Act did not violate said Section 53 of Article 4 of the Constitution; at l. c. 495 the court quoted from State ex inf. v. Southern, 265 Mo. loc. cit. 286, 177 S. W. 643, as follows:

> "'The rule that a statute which relates to a class of persons or a class of things is general, while one which only applies to particular persons or things is special, has been generally announced in this and other jurisdictions. State ex rel. v. Taylor, 224 Mo. loc. cit. 477, 478 (123 S. W. 892), and cases cited; Elting v. Hickman, 172 Mo. 257 (72 S. W. 700), and cases cited; State ex rel. Dickason v. County Court of Marion County, 128 Mo. 427 (30 S. W. 103, 31 S. W. 23); Lynch v. Murphy, 119 Mo. 163 (24 S. W. 774); State ex rel. Lionberger v. Tolle, 71 Mo. loc. cit. 650.
>
> "'It is, however, an essential adjunct of this rule that the classification made by the Legislature shall rest on a reasonable basis and not upon a mere arbitrary division made only for purposes of legislation. State ex rel. v. Roach, 258 Mo. loc. cit. 563 (167 S. W. 1008); Hawkins v. Smith, 242 Mo. loc. cit. 696 (147 S. W. 1042). When this is borne in mind, and a statute is enacted upon a basis justifying its classification and is made to apply to all persons who may hereafter fall within its purview, it is not special legislation.
>
> "'The clause of the statute now under review classifies the counties of the state as they should then or thereafter contain more than fifty thousand inhabitants, and should have then or thereafter taxable wealth exceeding forty-five million dollars, or as

> they should adjoin or contain then or thereafter a city of more than one hundred thousand inhabitants.
>
> "'It has been repeatedly decided in this state that classification according to population was sufficient to render an act containing such a classification a general law. State ex inf. Crow v. Continental Tobacco Co., 177 Mo. 1 (75 S. W. 737); State ex rel. v. County Court, 128 Mo. loc. cit. 442 (30 S.W. 103, 31 S. W. 23); State ex rel. v. Bell, 119 Mo. 70 (24 S.W. 765). Nor has the rule as to such a standard been altered by the fact that such an act has been found applicable only to one city." (Citing Cases)

The reason for the legislation under consideration here was to provide for such undertakings as are therein described and we submit that the Legislature in making this exception was justified in assuming that such legislation was not necessary in a county such as is described in the exception clauses.

In one of the most recent discussions of this rule by our court, as found in the case of Hull v. Baumann, 131 S. W. (2d) 721, paragraphs 3 and 4, the court said:

> "The appellant contends that the above does not apply because the city of St. Louis is the only city in the state not within a county and, therefore, in the future there can never be a city, not within a county, which has in excess of 700,000 inhabitants, We think the appellant overlooks the fact that the act applies to counties which have or may hereafter have in excess of 700,000 inhabitants, as well as to cities not within a county which have in excess of 700,000 inhabitants. It is certainly possible in the future that we may have a county in this state that may come within the provisions of this act by virtue of its having in excess of 700,000 inhabitants. We think this fact makes the act a general and not a special law. This act deals with the collection

> of delinquent taxes on real estate. The collection of taxes on real estate has been delegated to the various counties of this state. While it is true the city of St. Louis is a city, yet it performs many functions that are performed by a county. For instance, it has a collector, assessor, recorder and sheriff, the same as all the counties of this state. In so far as its classification is concerned, the act is a general and not a special law.
>
> "'But a law general so far as population is concerned may be a special law if the classification made therein is unnatural, unreasonable, and arbitrary so that the act does not apply to all persons, objects, or places similarly situated. State ex rel. Saline County v. Wilson, 288 Mo. 315. 232 S. W. 140.' State ex rel. Hollaway v. Knight, supra, 21 S. W. 2d 767, loc. cit. 769."

It cannot be successfully maintained that this legislation is not prospective because it provides any county now or hereafter coming within that class would be exempted from the provisions of the act.

In volume 12 C. J. page 1150, section 880, the rule concerning discrimination as to localities is stated as follows:

> "Municipal regulations or statutes applying to certain localities only, and not to others, based on the practical necessities of administration in dealing with a population unequally distributed over the state, do not conflict with the equality clause of the fourteenth amendment. Thus different rules may be prescribed by statute for territory included in municipal corporations

> and that not so included. Also counties and municipal corporations may be divided into classes based on population, and laws may be enacted to apply only to those of a certain class. Such a statute is not rendered void by reason of the fact that a class of municipalities as defined by statute includes only a single member, and a statute which applies to one city only, by name, does not deny the equal protection of the laws where it is based on some real distinction between the city named and the other territory of the state. * * *"

Another reason for the lawmakers having exempted such counties is that House Bill 329, Laws of Missouri 1941 page 557, was before the General Assembly at the same time. This bill, provides for a sewer system in counties of the class excepted in said Senate Bill 171, under which your city is attempting to operate.

CONCLUSION

We are, therefore, of the opinion that this Act is general in its nature and is not discriminatory and is not in violation of Section 53 of Article 4 of the Constitution.

In your letter, which was received after the above opinion had been dictated, you ask the question of whether or not a city owning its own municipal plant can issue revenue bonds for the purposes mentioned in the Act. The writer having been familiar with the case of Bell v. City of Fayette, 28 S.W. (2d) 356, particularly calls your attention to that case. In the above case, the city owned its own municipal plant. It contracted for the purchase of diesel engines which engines were to be paid for out of the earnings of these engines. The contract prevented any of the general revenue or property of the city of Fayette from being pledged to pay for the installments on the engines. In that case, the court held that even though the city owned its own municipal plant, it could enter into contract for the purchase of additional equipment, the payment for which was to be made out of the earnings of the new equipment.

We think that this Act is so drawn that a municipality which owns its own plant and extends same may provide for such extension and the payment therefor, out of the earnings of the extension. We think such an obligation would not be a debt, such as is contemplated by Section 12 of Article 10 of the Constitution.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

ATTORNEY-GENERAL: The Attorney-General is to furnish legal assistance to the prosecuting attorneys and circuit attorneys in preliminary examinations in criminal cases when so ordered and directed by the Governor.

May 11, 1942

J-13

FILE 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Your letter of May 9, 1942 directed to the Attorney-General, requesting an opinion, has been referred to me. This request is as follows:

> "Attached hereto is copy of letter of May 8, 1942 from Honorable Michael W. O'Hern, Prosecuting Attorney of Jackson County, Missouri to myself. You will observe that in said letter, Mr. O'Hern requests your presence at the preliminary hearing of defendant George W. Welsh, Jr., before Justice Dougherty. Following said request Mr. O'Hern makes of me the following inquiry:
>
> "'Would you be kind enough to direct General McKittrick to come to Kansas City and assist in the preparation and trial of this preliminary hearing?'
>
> "Section 12898 of the Revised Statutes of Missouri of 1939 reads as follows:
>
> "'When directed by the governor, the attorney-general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed

> by the trial court, he may sign indictments in lieu of the prosecuting attorney.' (My emphasis.)
>
> "I request of you your official opinion on the following question:
>
> "If the governor shall issue to the attorney-general a direction that the attorney-general, or one of his assistants, shall aid the prosecuting attorney of Jackson County in the discharge of his respective duties in the preliminary hearing before Justice Dougherty of a person charged with murder, is there by such direction created a duty on the part of the attorney-general to, or to cause one of his assistants to, aid said prosecuting attorney in the discharge of his respective duties in the court of the said Justice Dougherty in the preliminary hearing of said person?"

We will first cite Section 12898 R. S. Mo., 1939, which reads as follows:

> "When directed by the governor, the attorney-general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

As has been seen, the above statute specifically sets out "trial court". In the case of Ex Parte Bedard 106 Mo. 616, the court held that a preliminary examination is a criminal proceeding.

However, in the case of State v. Ancell 62 S.W. (2d) 443, the court held thata Justice of the Peace sitting in a preliminary hearing does not "act in the capacity of a court." Therefore, it would probably be construed, and we so think, that a preliminary examination is not a proceeding in a "trial court." This conclusion is reached by the two decisions cited above; also by the fact that in a preliminary examination before a Justice of the Peace, a defendant is not placed in jeopardy. However, the statute cited above, specifically sets out as one of the duties of the attorney-general, the furnishing of assistance and aid to prosecuting attorneys and circuit attorneys in examination before a grand jury. An examination before a grand jury reaches the same result as a preliminary examination before a Justice of the Peace. It is a hearing to decide whether or not a person accused of crime should be held for trial in a trial court. If an accused is bound over in a preliminary hearing, an information is then signed and filed in the circuit court or trial court. If a true bill is found by a grand jury, the indictment is then signed by the foreman and is filed in the circuit court or trial court. Consequently the same result is reached in either case and we feel that this statute should be construed so that it will apply to preliminary examination as well as "examinations before grand juries." We also feel that the common law powers of the attorney-general would give him the authority to furnish legal assistance in a preliminary examination if directed to do so by the governor.

In support of this view, we will cite the following, 6 C.J. 809 par. 13:

> "The office of attorney-general has existed from an early period, both in England and in this country, and is vested by the common law with a great variety of duties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt specifically to enumerate them; and where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto under

> the common law. A grant by statute of the same or other powers does not operate to deprive him of those belonging to the office under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred. As the chief law officer of the state, the attorney-general may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. Any duties which he may perform personally may of course be performed by his regularly authorized assistants.* * *"

Again, at 7 C. J. 1213, we find the following:

> "An attorney general is the chief law officer of a state government or of the federal government, as the case may be. His office as well as his designation or title is one which is derived from the common law of England where from an early date the attorney general has been the chief legal representative of the sovereign whose duty it is to represent the crown in civil and criminal matters in the courts. * * * *"

Again, at page 1222 in the same volume, we find the following:

> "The powers and duties of attorneys general are primarily executive and administrative and consist in those expressly or impliedly conferred by constitutional or statutory provisions together with, in the absence of express exclusion thereof, the powers attached to the office at common law.

Also, at page 1226 in the same volume, the authority of the attorney-general is stated thus:

> "The attorney general, as the chief legal representative of the state, may institute all legal proceedings necessary to protect the interests of the state, and may defend all actions affecting the public interest.
>
> "As the chief law officer of the state, the attorney general may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws, the preservation of order, and the protection of public rights. He is also generally charged by law with the duty of representing the people of the state in all cases in which the State is a party or is interested, or in which the wrong or injury complained of affects the public generally. He may maintain an action in such case, even though he is not required to do so unless other officers whose duty it is to sue have not done so. * * * * * * * *"

In the case of Barrett v. Boeckler Lumber Co., 302 Mo. l.c. 205, 206, the court said:

> "* * * * It is generally held in this country that the office of Attorney-General is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law. 'A grant by statute of the same or other powers does not operate to deprive him of those belonging to the office under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred.' (6 C. J. 810). This view has been tacitly accepted, and acted upon, in this State

> for many years. (St. Louis v. McAllister, 281 Mo. 26; State v. Saline County Court, 51 Mo. 350; State v. Hays, 23 Mo. 287; State ex rel. v. Vandalia, 119 Mo. App. 506). The Attorney-General of this State is therefore invested with all the powers and duties pertaining to his office at common law, except such of them as have been expressly conferred upon the circuit and prosecuting attorneys; the latter offices have, so to speak, been carved out of that of Attorney-General. (State v. Ehrlick, 65 W. Va. 700.) The duties of the Attorney-General at common law were so varied and numerous that they have perhaps never been specifically enumerated. There can be no question, however, but that the Attorney-General had the power, and it was his duty; (1) By information to bring certain classes of persons accused of crimes and misdemeanors to trial; and (2) by writ of quo warranto to vacate the charter to annul the existence of a corporation for violation of its charter. (People v. Miner, 2 Lans. (N.Y.) 396.) * * *"

As a final citation on this matter, we will cite the case of Darling Apartment Company v. Springer, 137 A. L. R. 803, which was a Delaware case decided in October 1941. In that case the court took up the matter of the common law powers of the attorneys general and stated as follows:

> "In England the office is of ancient origin. It was vested by the common law with a great variety of duties. The Attorney General was the law officer of the Crown, and its only legal representative in the courts. 2 Thornton, Attorneys at Law, 1131; 5 Am. Jur. 234; 11 Ill. Law Rev. 394; Rex v. Austin, 9 Price 142; Attorney General v. Brown, 1 Swanst 294; Rex v. Wilkes, 4 Burrows 2570. We derive our system of jurisprudence from England, and we adopted the office of Attorney General as it existed in England as a part of the governmental machinery necessary for the protection of public rights and the enforcement of public duties by proper proceedings in courts of justice.

> The powers and duties of the office of Attorney General are so numerous and varied that neither the framers of our several constitutions nor the legislatures have ever undertaken exhaustively to enumerate them, and where not defined by statute those powers and duties must be sought for in the common law. State v. Valent, 3 W. W. Harr. 399, 138 A 640. The authorities substantially agree that, in addition to those conferred on it by statute, the office is clothed with all of the powers and duties pertaining thereto at common law; and, as the chief law officer of the State, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interests may from time to time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute. 7 CJS, Attorney General, Sec. 8, p. 1226; 5 Am. Jur. 235; 2 Thornton, Attorneys at Law, 1149; Withee v. Lane & Libby Fisheries Co. 120 Me. 121, 113 A. 22; State v. Finch, 128 Kan. 665, 280 P. 910, 66 ALR 1369; Hunt v. Chicago, etc., Ry. Co. 121 Ill. 638, 13 NE 176; State ex rel. Ford v. Young, 54 Mont. 401, 170 P. 947; People v. Miner, 2 Lans., NY, 396, 399."

We do not feel that the intention of the legislature at the time of the enactment of Section 12898, R. S. Mo., 1939, cited above, was to exclude preliminary examinations in view of the fact that in the procedure before a grand jury the results are ultimately the same. Also, in view of the decisions with reference to the common law powers of the attorney-General, cited above, we believe that it is within the power of the attorney-general to furnish legal assistance to the various prosecuting attorneys and circuit attorneys in the conduct of preliminary examinations throughout the State when directed to do so by the governor.

As to the power of the governor to direct the attorney-general to furnish such legal assistance, we will cite Section 4 of Article 5 of the Constitution of Missouri, which is as follows:

> "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri.'"

Also, the Governor receives the power to do this by Section 12898, R. S. Mo. 1939, cited above.

CONCLUSION

It is, therefore, the opinion of this Department, that if the Governor of the State of Missouri, directs the attorney-general or one of his assistants to aid the prosecuting attorney of any county, in the discharge of his respective duties in a preliminary hearing before a Justice of the Peace, it is the duty of the attorney-general to furnish such assistance.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:AW

MOTOR VEHICLES: Section 8483(c) R. S. Mo. 1939, authorizing the issuance of overweight permits, was not repealed by implication in the enactment of Section 8406, R. S. Mo. 1939.

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May 20, 1942

5.20

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

FILE
24

Dear Governor Donnell:

You have requested our opinion on the following:

> "May the Commissioner of Motor Vehicles, with the written approval of the state highway engineer, issue permits permitting the operation of overweight vehicles from the highways of Missouri."

Section 8384 R. S. Missouri, 1939, contains numerous subdivisions. The two with which we are concerned are subdivisions "(b)" and"(e)", and they are as follows:

> "(b) No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 28,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 42,000 pounds, and no motor vehicle having a greater weight than 22,400 pounds on one axle, and no motor vehicle having a load of over 800 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall

> be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load: Provided, that in special cases motor vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided.
>
> * * * * * *
>
> "(e) The commissioner may, with the written approval of the state highway engineer, in his discretion issue special permits for the operation of vehicles whose sizes and weights exceed the limits prescribed under this section, but such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration, and shall designate the highways and bridges which may be used under the authority of such permit: Provided, however, such permits may be issued by the officer in charge of maintenance of streets of any municipality for the use of the streets by such vehicles within the limits of such municipalities."

(These provisions were enacted in Laws of 1921, 1st Extra Session, page 91, section 20.)

It is clear from reading subdivision "(e)" that the Commissioner of Motor Vehicles has authority to issue such special permits, if said subdivision is still effective. In Laws of 1925, page 295, there appears an act, a portion of which is carried in the Revised Statutes of 1939 as Section 8406. Said section is as follows:

> "No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more

> than 24,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 38,000 pounds, and no motor vehicle having a greater weight than 16,000 pounds on one axle, and no motor vehicle having a load of over 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load."

A comparison of Section 8406 and subdivision "(b)" of Section 8384, clearly shows that a conflict exists, in that, Section 8406 reduces the weight limit on motor vehicles. That being so, subdivision "(b)" of Section 8384 was repealed by implication on the enactment of Section 8406.

However, it will be noted that there is nothing in Section 8406, supra, pertaining to weight, which conflicts with the provisions of subdivision "(e)" of Section 8384, supra. Neither do we feel that it was the intention of the Legislature to repeal subdivision "(e)" by implication by enacting in 1925, Section 8406, pertaining to weight limits. The absence of such intent becomes fairly evident when we consider that in Laws of 1925, page 296, Section 3, the Legislature, by express language, continued on in force subdivision "(b)" of Section 8384 as applicable to cities now or hereafter containing 75,000 inhabitants or more. That section in full is as follows:

> "The provisions of this act shall not apply to motor vehicles operating ex-

> clusively within the corporate limits of cities now or hereafter containing 75,000 inhabitants or more; provided, however, the maximum size, width, length and weight, including load, limits of such motor vehicles operating exclusively within the corporate limits of such cities shall in no case exceed the limits prescribed in paragraphs (a) and (b) of section 20 of the act of the first extraordinary session of the 51st general assembly approved July 30, 1921, known as the 'Motor vehicle law of 1921' and found at pages 76 to 107 both inclusive of the session laws of Missouri, 1921, 1st extra session."

It seems to us that by making this provision the Legislation expressly recognized that by the enactment of what now appears as Section 8406, they were repealing by implication subdivision "(b)" of Section 8384 only(subdivision (a) was similarly treated by enactment of Section 8405), and only, as applied to all parts of the state except within the limits of cities containing 75,000 inhabitants or more. It is apparent that they intended subdivision "(b)" to continue in force and effect in such cities. Therefore, it cannot be said there was an outright repeal by implication, but rather only a limitation has been placed in the application of said subdivision. The placing of such limitations on the application of subdivision "(b)" however, does not affect subdivision "(e)". As heretofore stated, no conflict exists between the provisions of subdivision "(e)" of Section 8384 and Section 8406, which now fixes the weight limit. It is well settled in this state that repeals by implication are not favored and will only be held to occur when there is an irreconciliable conflict between an earlier and later statute. We think no conflict exists here because subdivision "(e)" of Section 8384 is in perfect harmony with the provisions of Section 8406. As we view it, Section 8406 merely changed the weight limit from that which had existed in subdivision "(b)" of Section 8384, and that subdivision "(e)" of said

section still continues in force permitting the granting of special permits for overweight vehicles.

It has been suggested, however, that certain positive language in Section 8406 creates conflict between these sections. The language referred to is, "no motor vehicle * * * the gross weight of which * * * is more than 38,000 pounds, * * * shall be operated on the highways of this state." It is contended that this is an absolute prohibition and that since it appears in a later statute it prevents the language of subdivision "(e)" of Section 8384 from being invoked to authorize the granting of a permit to a vehicle of over that weight. Such is a conceivable construction, but we think the answer to such suggestion appears in Section 8384, as originally enacted by the Legislature. That section in subdivision "(b)" contained the identical positive language as follows:" no motor vehicle * * * the gross weight of which * * * is more than 42,000 pounds, * * * shall be operated on the highways of this state." It thus appears that even though such positive language was used by the Legislature yet in subdivision "(e)" of the same section there was express authorization for the issuance of special permits to vehicles weighing more than 42,000 pounds. In view of this it can hardly be contended that when the Legislature used that identical language in Section 8406, supra, it intended it to be any more positive or absolute than it did when it used such language in subdivision "(b)" of Section 8384.

CONCLUSION

It is, therefore, our opinion that subdivision "(e)" of Section 8384, R. S. Missouri, 1939, has not been repealed by implication, and that the same is effective and authorizes the Commissioner of motor vehicles, with the written approval of the state highway engineer, to issue special permits, for overweight vehicles as provided in said section.

Respectfully submitted

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

LLB:RW

MOTOR VEHICLES: The Motor Vehicle Commissioner and the State Highway Commission have authority to issue oversize and overweight permits, but said permits are special and may only be issued to each vehicle.

May 29, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of the State of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor:

This will acknowledge receipt of your opinion request of May 28, 1942, which is as follows:

> "Your opinion is respectfully requested upon the three questions hereinbelow set forth:
>
> "Question 1. Does the law of Missouri authorize the issuance of a permit by which may be exceeded either (a) those certain weights or (b) that certain load per inch width of tire which are mentioned in Section 8406 of the Revised Statutes of Missouri of 1939?
>
> "Question 2. If the law of Missouri authorizes the issuance of the permit mentioned in Question 1, can such a permit be legally issued for the operation of all such vehicles and combinations the operation of which on the highways of this state is prohibited by said Section 8406, or can such a permit be legally issued only with respect to specific vehicles, or specific combinations, the operation of which on the highways of this state is prohibited by said Section 8406?

"Question 3. Can a special permit the issuance of which is authorized by Section 8405 of the Revised Statutes of Missouri of 1939 be legally issued for the temporary operation of all such vehicles and combinations the operation of which on the highways of this state is prohibited by said Section 8405, or can a special permit be legally issued only with respect to specific vehicles, or specific combinations, the operation of which on the highways of this state is prohibited by said Section 8405?"

On May 20, 1942, we rendered an opinion to you that pertained to the first question you ask and in which we held that sub-section (e) of Section 8384, R. S. Mo. 1939, was not repealed by implication in the enactment of what now appears as Section 8406, R. S. Mo. 1939. Your present opinion request, we think, necessitates something in addition to what we said in that opinion because, since the preparation of that opinion, our attention has been directed to the fact sub-section (e) of Section 8384, seems to restrict the issuance of the special overweight permits, therein authorized, to the operation of vehicles whose weights exceed the limits prescribed under this section. The suggestion has been that that language precludes resort to said sub-section (e) for authority in granting overweight permits in excess of those limits prescribed in Section 8406, R. S. Mo. 1939. Of course, all these acts are in pari materia and, while not enacted at the same time, must, nevertheless, be construed altogether. It is also important to note now that the Legislature, at the same time it enacted Section 8406, enacted what now appears in the statute Section 8405, prescribing new size limits.

In the case of State ex rel. Dean v. Daues, 14 S. W. (2d) 990 (Mo. Sup.), a large number of pertinent rules of statutory construction are set forth. We think that they are particu-

larly applicable to this situation. There the court said, l. c. 1001, as follows:

> "* * * Such a statute should be so construed as to render it a consistent and harmonious whole, and as will make its several integral sections, or parts, harmonize with each other; and hence the several and various sections, or parts, of the statute should be read and construed so that, if possible, all may have their due and conjoint effect, without repugnancy or inconsistency. Otherwise expressed, the several parts, or sections, of such a statute are to be construed in connection with every other part, or section, and all are to be considered as parts of a connected whole, and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers. 25 R. C. L. 1008, 1009; 36 Cyc. 1128, 1129; Sutherland on Statutory Construction (2d Ed.) p. 706, Sec. 368. Furthermore, it is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed). pp.731, 732, Sec. 380. Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be

operative, and did not intend any part or section of such statute to be without meaning or effect. Id., p. 919, Sec. 491.

"* * * * * * * Amendments to a statute are to be construed together with the original statute to which they relate as constituting one law, and as part of a coherent and cohesive system of legislation. 36 Cyc. 1164. And where a statute is amended only in part, or as respects only certain isolated and integral sections thereof, and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected, by the amendatory act or acts, it is presumed that the Legislature intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act; and where the unamended and unchanged sections or parts of the original statute have been construed by the highest court of the state, the Legislature is presumed to have been familiar with their judicial construction, and to have adopted, recognized, and continued such judicial construction as a part of the unamended and unchanged sections, or parts, of the statute. 36 Cyc. 1153. Moreover, in the construction of amendments to a statute, the legislative body, in enacting the amendment, will be presumed to have had in mind all existing, unamended and unchanged provisions and sections of the statute, and to have had in mind, also, the judicial construction given to such existing, unamended and unchanged provisions and sections of the statute by the highest court of the State. 25 R. C. L. 1067."

Applying the rules laid down in this case we do not think it can be said that the language in sub-section (e) supra, to the effect that the permits may be issued only for weights in excess of the limits prescribed under that section, in any way prevents said sub-section (e) from now being effective to authorize the granting of those permits. Construing this whole law in order to give effect to every part thereof and treating it as a part of a coherent and cohesive system of legislation, and keeping in mind the rule that the Legislature is presumed to have considered and known of all existing provisions of the law at the time they enacted Section 8406, we think it is reasonable to say that the special permit authorized under sub-section (e) of Section 8384 can be issued on those vehicles whose weight limits exceed the limits now prescribed in Section 8406.

On the question of legislative intent, which, of course, is controlling in the construction of statutes, we direct your attention to the provisions of Section 8405, which prescribe the size limits. It will be noted that that section in itself provides for the issuance of special permits for vehicles in excess of the size there prescribed. We think it will be conceded that it is a physical fact that in most instances where the length of vehicles increases its weight carrying capacity also increases. Taking that fact in connection with the further fact that Section 8406 was enacted at the same time as the predecessor of Section 8405, it can hardly be said that the Legislature, while intending to authorize the issuance of oversize permits, did not intend that overweight permits be authorized. Therefore, on this point we are still of the view that the Motor Vehicle Commissioner with the consent of the State Highway Engineer may issue special permits for vehicles whose weight limits exceed those prescribed in Section 8406, R. S. Mo. 1939. Concerning the authority to issue oversize permits, we think it only necessary to direct your attention to the provisions of Section 8405, providing in part " that the state highway commission may, when in its opinion the public safety so justifies, issue special permits for the temporary operation of a vehicle or combination of vehicles which, including load, shall be greater than the lengths herein specified." In connection with this we desire to say that it should be kept in mind that the special permit on size can only be issued authorizing vehicles having greater <u>lengths</u> than prescribed in that section. There is no authority for issuing special permits auth-

orizing the operation of vehicles in excess of the height and width prescribed by Section 8405. This section was enacted at a later date than sub-section (e) of Section 8384 and clearly has repealed by implication that portion of said section authorizing the issuance of special permits with respect to all size limitations.

Your second and third questions deal with the nature of the oversize and overweight permits to be issued. That is to say, must the permits be issued for each vehicle or may there be issued a blanket permit for all vehicles? We think the provisions of the applicable statutes are clear on this point and set them out as follows.

Section 8384 (e), R. S. Mo. 1939, provides:

> "The commissioner may, with the written approval of the state highway engineer, in his discretion issue special permits for the operation of vehicles whose sizes and weights exceed the limits prescribed under this section, but such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration, and shall designate the highways and bridges which may be used under the authority of such permit: Provided, however, such permits may be issued by the officer in charge of maintenance of streets of any municipality for the use of the streets by such vehicles within the limits of such municipalities."

Section 8405, R. S. Mo. 1939, is as follows:

> "No motor drawn or propelled vehicle shall be operated on the highways of this state the width of which, includ-

ing load, is greater than 96 inches, or the height of which, including load, is greater than 12½ feet, or the length of which, including load, is greater than 33 feet; and no combination of such vehicles coupled together of a total or combined length, including coupling, in excess of 40 feet shall be operated on said highways, and not to exceed two vehicles shall be operated in combination. These restrictions as to length shall not apply to vehicles temporarily transporting agricultural implements or road making machinery, or road materials or towing for repair purposes cars that have become disabled upon the highway: Provided, however, that the state highway commission may, when in its opinion the public safety so justifies, issue special permits for the temporary operation of a vehicle or combination of vehicles which, including load, shall be greater than the lengths herein specified for transporting property the nature of which will not permit of such limitation of length, but such permit shall be issued only for a single trip or for a definite period of not to exceed 60 days, and shall designate the highways and bridges which may be used under the authority of such permit: Provided, however, the provisions of this act shall not affect the dimensions of combinations of motor vehicles now in use for a period of twelve (12) months from the effective date of this act."

In St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667 (Mo. Sup.), at l. c. 669, there appears this statement:

"Where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

We think the language of the two sections last set forth are plain and unambiguous in that they require "special" permits for the operation of those vehicles exceeding the weight and size prescribed by law. It will be further noted that in Section 8384, sub-section (e), it is also provided that the permit is to be for a single trip or definite period and shall designate the highways and bridges which may be used. It is also to be noted that Section 8405 respecting oversize permits again uses the word "special" and limits the issuance of the permit for a single trip or for a definite period of not to exceed sixty days and requires that the permit designate the highways and bridges to be used. In our opinion there can be no question but that these two sections contemplate the issuance of permits to each vehicle and do not contemplate the issuance of any blanket permit authorizing all vehicles to exceed the limits required under the law.

Respectfully submitted,

LAWRENCE L. BRADLEY

W. O. JACKSON
Assistant Attorneys-General

LLB
WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General

MOTOR VEHICLES: Size and kind of plates to be used for 1943 in view of the Orders of the War Production Board.

June 2, 1942

6-11

FILE
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your request for an opinion under date of June 1, 1942, which is as follows:

> "There are enclosed (a) copy of letter dated April 7, 1942 from Maury Maverick, Chief, Bureau of Governmental Requirements and (b) copy of General Limitation Order L-32.
>
> "Subsection (a) of Section 8377 of the Revised Statutes of Missouri of 1939, in reference to number plates, provides in part as follows:
>
> > '. . . Such plates shall be metal and of a different color or shade each year and there shall be a marked contrast between the color of the numbers thereon and the background of said plates. Figures on said plates shall not be less than three inches in height and the strokes thereof not less than five-sixteenths of an inch in width: Provided, that in the case of motorcycles and motortricycles said letters and figures shall be not less than one inch in height and the strokes thereof one-eighth of an inch in width . . .'

"Subsection (c) of said Section 8377 provides in part as follows:

> '. . . On all motor vehicles one plate shall be displayed on the front and the other on the rear of such motor vehicle, . . . except that on trailers, motorcycles and motortricycles one plate shall be so displayed on the rear thereof.'

"Subsection (e) of said Section 8377 provides in part as follows:

> 'No person shall operate a motor vehicle or trailer on which there is displayed on the front or rear thereof any other plate, tag or placard bearing any number except the plate furnished by the commissioner or the placard herein authorized, . . .'

"Your opinion is respectfully requested on the following questions:

"(1) What is the effect of General Limitation Order L-32 on each of the above quoted parts of Section 8377 of the Revised Statutes of Missouri of 1939?

"(2) May the commissioner of motor vehicles legally issue and deliver to the owner of each motor vehicle or trailer a single plate, the figures on said plate being (except in the case of motorcycles and motortricycles) approximately three-fourths of an inch in height and approximately five-eights of an inch in width?

"(3) May a person legally operate, during the year 1943, a motor vehicle or trailer bearing front and rear 1942 Missouri plates and in addition thereto, a single plate furnished by the commissioner

> of motor vehicles, the figures of which single plate shall be of the height and width as indicated in question number 2?"

Article I, Section 8, Clause 11, of the Constitution of the United States, provides as follows:

> "The Congress shall have power to declare war * * *."

Article I, Section 8, Clause 16, of the Constitution of the United States, provides:

> "The Congress shall have power to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Pursuant to its constitutional powers, Congress in an Act approved June 28, 1940 (41 U. S. C. A., Note preceding Sec. 1), provided in part:

> " * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. * * *"

This same Act also provides as follows:

> " * * * The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity

with any rules and regulations which he may prescribe."

Pursuant to this statutory authority, on August 28, 1941, the President of the United States issued Executive Order No. 8875, pertaining to the duties of the Office for Emergency Management, which in Section 5 contains the following:

"Consistent with the basic defense policies of the President, the Supply Priorities and Allocations Board shall:

"a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

"b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program."

On January 16, 1942, the President of the United States issued Executive Order No. 9024, creating within the Office for Emergency Management a War Production Board, and conferred upon said War Production Board the functions and powers theretofore contained in Executive Order No. 8875.

On March 18, 1942, the War Production Board issued General Limitation Order L-32, which Order you have attached to your opinion request. That Order, in part, is as follows:

"(a) Definitions. For the purposes of this Order:

(1) 'Governmental Unit' means any State, Territory or possession

of the United States, the District of Columbia, and any political, administrative or governmental division, subdivision, corporation or agency of any of the foregoing or of the United States, including - by way of example and not of limitation - counties, townships, cities, towns, villages and special governmental districts of every kind.

(2) 'Metallic License Plate' means any type of plate, tag, emblem, insignia or marker which is or may be used by a Governmental Unit to evidence licensing or registration of any kind and for any purpose, into the physical composition of which metal, whether ferrous or nonferrous, is incorporated to the extent of five percent (5%) or more, by weight, of the finished item.

(3) 'Licensing Year' means any twelve month period which has been established as the unit of time during which there shall be in effect the licensing or registration evidenced by a Metallic License Plate.

(b) General Restrictions. Notwithstanding the provisions of any contract or of any federal, state or local statute or regulation, no Governmental Unit shall issue or use at any time Metallic License Plates greater in quantity than is specifically authorized herein or from time to time hereafter by the Director of Industry Operations.

(c) Permitted Uses.

(1) A Governmental Unit may issue or use Metallic License Plates to the

extent that, as of the date of the issuance of this Order, the cutting and stamping of the metal for the manufacture of such plates has been completed, and

(2) in addition, a Governmental Unit may, during each Licensing Year which begins after December 31, 1941, issue or use Metallic License Plates licensing or registering any thing or activity, in total quantities not exceeding ten percent (10%), by weight, of the Metallic License Plates which it issued or used during the corresponding Licensing Year ending after June 30, 1941, and before July 1, 1942, to license or register that same type of thing or activity; provided that Metallic License Plates may be thus issued or used for the following purposes and under the following conditions only:

(i) as replacement plates, that is, for the purpose of replacing Metallic License Plates which have been issued and which have thereafter been lost or destroyed,

(ii) to new licensees or registrants, that is, to persons who have not used or had issued to them during the Licensing Year immediately preceding that for which application is made, a Metallic License Plate licensing or registering the same thing or activity for which application for licensing or registration is made, and

(iii) in the case of the licensing or registering of any type of vehicle or instrumentality of transportation, in the form of 'date tabs',

> in sizes not exceeding four square inches in area, to be attached to Metallic License Plates already issued so as to change the effective dates of those plates."

From the foregoing, it appears that Congress, in exercising its constitutional power, has declared that a state of war exists; that it has, under its power to make all laws which shall be necessary and proper for carrying into effect the war powers, enacted the statutes heretofore quoted, appearing in 41 U. S. C. A., preceding Section 1, authorizing the President, in the event that fulfillment of defense requirements results in a shortage of any material for defense or "for private account," to allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense, and authorizing the President to delegate those powers to an agency of the Government. The President, pursuant to the authority vested in him by that Act, has issued Executive Order No. 8875, setting up control over such materials and directing an agency to make regulations governing allocations with respect to said materials. That power now rests, under Executive Order No. 9024, in the War Production Board, and General Limitation Order L-32 prescribes the regulations determined upon by said War Production Board.

We have no doubt but what the foregoing synopsis demonstrates that General Limitation Order L-32 is valid and within the powers which Congress has conferred upon the President, and which the President has delegated to the War Production Board.

The rule of law decisive of the question is: "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield." (Florida v. Mellon, 273 U. S. 12, 71 L. Ed. 511, 515.) More particularly, regarding the existence of a state of war, it is stated in State v. Burton, 103 Atl. 962 (R. I.), that:

> "Under the Constitution of the United States, the conduct of the war now existing between this country and Germany vests wholly in the Federal government.

> Any state law, the operation of which will hinder that government in carrying out such constitutional power, is, during the exercise of the power, suspended as regards the national government and its officers, who are charged with the duty of prosecuting the war. The principle is well established that, in respect to the powers and duties exclusively conferred and imposed upon the Federal government by the Constitution of the United States, the several states have subordinated their sovereignty to that of the nation. Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Re Waite (D. C.) 81 Fed. 359; Re Fair (C.C.) 100 Fed. 149."

Only one other legal point need be considered before a conclusion may be reached. It will be noted that the conflicts in this instance are between a rule (Limitation Order L-32) of an agency of the Government and the statutes of Missouri. However, it appears in 41 U. S. C. A., preceding Section 1, that Congress, by stating that no one shall be held liable for damages or penalties which result from his compliance with any "rule, regulation, or order issued under this section," has recognized and authorized the President to make regulations to carry into effect his powers. When Congress authorized the President to delegate these powers, the subsequent delegation, as evidenced by the Executive Orders, supra, vested in the designated agency the same rule making power that Congress conferred upon the President, and in effect said agency's act is the act of the President. In United States v. Eaton, 144 U. S. 677, 36 L. Ed. 591, 594, it is stated:

> "Regulations prescribed by the President, * * * under authority granted by Congress, may be regulations prescribed by law, * * * and may thus have, in a proper sense, the force of law."

We think that is the present status of Limitation Order L-32, and it having the force of law, and being an exercise of the constitutional powers of the Federal Government, the provisions of state statutes in conflict therewith must yield and are suspended.

Having reached this conclusion, and realizing that some difficulty in compliance with the terms of Limitation Order L-32 would arise from the four square inch size prescribed therein for date tabs, on June 3, 1942, we sent a telegram to the Honorable Maury Maverick, Chief, Division Of Industry Operations of the War Production Board, asking for a waiver on the four square inch size for date tabs if we stayed within the ten percent metal limitation. In answer to that telegram we received a letter, dated June 4, 1942, from J. S. Knowlson, Director of Industry Operations, as follows:

> "This is your authorization to manufacture a metal date tab to attach to 1942 or older license plates for next licensing year.
>
> "The amount of steel to be used in the manufacture of the above mentioned tab shall not exceed 6⅔ square inches for each tab, and the amount of steel used for the licensing year shall not exceed 10% of the amount used in manufacture of license plates for the year 1942."

In view of the foregoing, our answers to your questions are as follows:

(1) In our opinion General Limitations L-32 suspends and replaces the provisions of Section 8377, R. S. Missouri, 1939, in so far as said statute is in conflict with the Order.

(2) A close examination of the General Limitation Order L-32 does not disclose that any restriction is placed upon the number of plates (we use the word "plates" in the sense of a full size license, as required by our statutes, as distinguished from a date tab) to be displayed on a motor vehicle. The restriction is on the weight of metal used in all the new or replacement plates and date tabs with a size limitation of four square inches on the tabs. This being so, subsection (c) of Section 8377, R. S. Missouri, 1939, requiring the display of a plate on both the front and rear of a

motor vehicle, is not affected and still controls.

It, therefore, is our opinion that the Commissioner of Motor Vehicles may not deliver to the owner of a motor vehicle for the year 1943 a single plate with figures on said plate being approximately three-fourths (3/4ths) of an inch in height and five-eighths (5/8ths) of an inch in width. Our statutes require that there be a plate on both the front and rear, and that the figures thereon shall be not less than three (3) inches in height and five-sixteenths (5/16ths) of an inch in width.

(3) It is our opinion, however, that a person may legally operate during the year 1943 a motor vehicle or trailer, bearing front and rear 1942 plates and, in addition thereto, a single date tab not exceeding in area six and one-half (6½) square inches.

General Limitations Order L-32, we think, permits the following: the Motor Vehicle Commissioner of Missouri nay issue replacement plates, that is, plates for the purpose of replacing 1942 plates that have been lost or destroyed, of the size and kind required by our statutes, bearing the year date of 1942. He may also issue new plates to persons who have not had 1942 plates theretofore issued to them, of the size and kind required by our statutes, bearing the year date 1942. There may be attached to the vehicle bearing replacement or new plates, a single 1943 date tab of the size previously indicated. As to those persons already holding 1942 license plates, there may be attached to said vehicle a single 1943 date tab of the size previously indicated, providing that all the plates, both new, replacement and date tabs, may be manufactured using only ten per cent (10%) of the metal which was used during the period after June 30, 1940 and before June 1, 1942.

It would thus appear, following this procedure, that a motor vehicle in Missouri would be licensed, as required by our statutes, in that, it would display on both front and rear a license plate dated for the year 1942, of the size and kind required by the Missouri law, brought up to date with a single date tab attached to said vehicle.

With respect to the size of the figures to be used on the date tab, we venture no opinion since that, of necessity, will be governed by the six and one-half (6½) square inches in area of the date tab.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RLH
LLB/rv

MOTOR VEHICLES: Federal war regulations suspend State Weight Laws where conflicting.

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June 9, 1942

6-11

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

FILE
24

Dear Governor:

We are in receipt of your request for an opinion under date of June 1, 1942, in which you inquire whether General Orders Nos. 3, 4, 5 and 6 of the Office of Defense Transportation and the Appendix attached thereto, being a part of said Orders, supersede Missouri state laws relative to permissible weights of motor vehicles operating on Missouri state highways.

The Missouri statutes regulating weight loads on the highways are Sections 8384 (b) and 8406, which are as follows:

> "Sec. 8384 (b) No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 28,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 42,000 pounds, and no motor vehicle having a greater weight than 22,400 pounds on one axle, and no motor vehicle having a load of over 800 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the

distribution of the load: Provided, that in special cases motor vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided."

"Sec. 8406. No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 24,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 38,000 pounds, and no motor vehicle having a greater weight than 16,000 pounds on one axle, and no motor vehicle having a load of over 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load."

Section 8384 (b) has been held to apply only to cities containing 75,000 or more inhabitants. State v. Schwartzmann Service, Inc., 40 S. W. (2d) 479.

The Office of Defense Transportation was created by Executive Order No. 8989, issued December 18, 1941, by the President of the United States. The pertinent parts of that Order, which is found in Vol. 6, No. 250 of the Federal Register, dated December 25, 1941, are as follows:

"By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war and to assure maximum utilization of the domestic transportation facilities of the Nation for the successful prosecution of the war, it is hereby ordered:

"1. The term 'domestic transportation' whenever used in this Order shall include railroad, motor, inland waterway, pipe line, air transport, and coastwise and intercoastal shipping.

"2. There shall be in the Office for Emergency Management of the Executive Office of the President an Office of Defense Transportation, at the head of which shall be a Director appointed by the President. * * * * * * * * * * * * *

"3. Subject to such policies, regulations, and directions as the President may from time to time prescribe, the Office of Defense Transportation shall:

"a. Coordinate the transportation policies and activities of the several Federal agencies and private transportation groups in effecting such adjustments in the domestic transportation systems of the Nation as the successful prosecution of the war may require.

"b. Compile and analyze estimates of the requirements to be imposed upon existing domestic transport facilities by the needs

of the war effort; determine the adequacy of such facilities to accommodate the increased traffic volume occasioned by the war effort; develop measures designed to secure maximum use of existing domestic transportation facilities; and stimulate the provision of necessary additional transport facilities and equipment in order to achieve the level of domestic transportation services required; and in this connection advise the Supply Priorities and Allocation Board as to the estimated requirements and recommend allocations of materials and equipment necessary for the provision of adequate domestic transportation service.

"c. Coordinate and direct domestic traffic movements with the objective of preventing possible points of traffic congestion and assuring the orderly and expeditious movement of men, materials, and supplies to points of need.

* *

"e. Perform the functions and exercise the authority vested in the President by the following, subject to the conditions set forth in paragraph 3 of this Order:

"(1) Sec. 1 (15) of Interstate Commerce Act as amended, USC title 49, sec. 1 (15).

"(2) Sec. 6 (8) of Interstate Commerce Act as amended, USC title 49, sec. 6 (8)."

Joseph B. Eastman has been duly appointed Director of Defense Transportation pursuant to the above Executive Order and has issued the General Orders referred to by you in your request, which became effective June 1, 1942, except as to

certain provisions requiring a certain weight load on return trips. There were also a number of changes made in the Orders on May 30, 1942, by the Office of Defense Transportation, but these changes are not material to the question here involved.

Those parts of General Order No. 3, which apply under its terms to all common carriers, are as follows:

> "By virtue of the authority vested in me by Executive Order No. 8989 dated Dec. 18, 1941, and in order to assure maximum utilization of the facilities, services, and equipment of common carriers by motor vehicle for the preferential transportation of materials of war and to prevent shortages in motor vehicle equipment necessary for such transportation, as contemplated by Section 6 (8) of the Interstate Commerce Act; to conserve and providently utilize vital equipment, material, and supplies, including rubber; and to provide for the prompt and continuous movement of necessary traffic, the attainment of which purposes is essential to the successful prosecution of the war:
>
> *
>
> "501.4 Definitions. As used herein:
>
> "(a) The term 'property' means all material, equipment and supplies of every kind, capable of being transported by motor truck.
>
> "(b) The term 'motor truck' means either (1) a straight truck, (2) a combination truck-tractor and semi-trailer, (3) a full trailer, (4) or any combination thereof.

"(c) The term 'common carrier' means any person which holds itself out to the general public to engage in the transportation of property in over-the-road service by motor truck for compensation, regardless of the designation of such person under any Federal or State statute.

"(d) The term 'capacity' means the rated load-carrying ability of the tires on the motor truck (as shown in Appendix No. 1 attached hereto). Where the commodity is of light density the total space available for a load shall be the measure of capacity.

"(e) The term 'special equipment' means any motor truck the primary carrying capacity of which is occupied by mounted machinery, or by a mounted tank or tanks designed to carry bulk liquids; low-bed motor trucks, pole trailer or pipe dollies.

"(f) The term 'over-the-road' service means all operations except those wholly within any municipality, or urban community, or between contiguous municipalities or urban communities, or within a zone adjacent to and commercially a part of any such municipality or municipalities or urban communities, or except hauls not more than fifteen (15) miles in length.

"(g) The term 'circuitous route' means any route or routes or combination thereof which exceeds the most direct highway route by ten (10) per cent.

"(h) The term 'person' means any individual, firm, copartnership, corporation, company, association, including a farm co-

operative association as defined in the Agricultural Marketing Act; approved June 15, 1929, as amended, or joint association; and includes any trustee, receiver, assignee, or personal representative thereof.

* *

"501.6 Loading and operating requirements. On and after the effective date specified herein, no common carrier shall:

"(a) Operate a motor truck transporting a gross load which exceeds by more than twenty (20) per cent its capacity as defined herein.

"(b) Operate a motor truck in over-the-road service unless such truck is loaded to capacity at origin point and will be loaded to not less than seventy-five (75) per cent of capacity on the return trip; or unless loaded to seventy-five (75) per cent of capacity at origin point and will be loaded to capacity on the return trip: Provided, however, that no intermediate point at which a portion of a load has been discharged shall be deemed to be a point of origin, but the point at which the last portion of a load has been discharged shall be deemed to be the point of the beginning of a return trip; and, Provided further that when a motor truck has moved, loaded to capacity, in the direction of the heavy general flow of traffic by motor truck, it may be returned to its origin point partially loaded or empty, if there is no property in the possession of or on order to any common carrier awaiting transportation to, beyond or intermediate to said origin point to which said motor truck is returning, in a quantity which is beyond the capacity of such other carrier to transport within the time limit provided in Section 501.12 hereof."

A similar Order has been enacted applying to contract carriers (General Order No. 4) and to private carriers (General Order No. 5). Attached to each of the Orders, Nos. 3, 4 and 5, is an Appendix which is a part of each of the Orders and is as follows:

> "The capacity of any motor truck shall be determined by multiplying the number of tires, of the size and description, mounted on the running wheels of such motor truck by the number of pounds of rated load carrying ability of such tires as designated in this Appendix; from the result of this computation there shall be deducted the unladen weight of the motor truck; the remaining balance, for the purposes of this Order shall be the capacity of such motor truck as defined herein."

Following this paragraph is a long list of tire sizes with the load carrying ability of each.

There are certain exemptions set out in each of the Orders applying to vehicles hauling explosives and farm products, but we are not here concerned with these exemptions.

General Order No. 6 of the Office of Defense Transportation applies only to local delivery carriers and has no mandatory provisions with regard to load capacity. That class of carriers, therefore, cannot claim any exemption from the operation of state laws under the Eastman Orders.

Title 10, U. S. C. A. 1361, provides:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume

> control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Under the broad grant of authority contained in this section, particularly the last clause thereof, the President is empowered to completely take over, in time of war, a system of transportation. We have no doubt that, having the power to take full control, he may exercise the lesser power of regulating a system for such purposes in connection with the war effort as he may deem "needful and desirable."

The President, through the Office of Defense Transportation, apparently deems the regulation of motor transportation "needful and desirable" and has proceeded to exercise the lesser power of regulation. This regulation rises to the dignity of a law, and consequently any state laws conflicting therewith are of no force and effect.

In United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, l. c. 594, it is stated:

> "Regulations prescribed by the President, * * * under authority granted by Congress, may be regulations prescribed by law, * * * and may thus have, in a proper sense, the force of law."

The rule is well settled that state laws which conflict with Federal laws and operate to hinder the Federal government in the prosecution of a war are suspended during the existence of a state of war. In State v. Burton, 103 Atl. 962, we find the following:

> "Under the Constitution of the United States, the conduct of the war now existing between this country and Germany vests wholly in the Federal government. Any state law, the operation of which will hinder that government in carrying out such constitutional power, is, during the exercise of the power, suspended as regards the national government and its officers, who are charged with the duty of prosecuting the war. The principle is well established that, in respect to the powers and duties exclusively conferred and imposed upon the Federal government by the Constitution of the United States, the several states have subordinated their sovereignty to that of the nation. Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Re Waite (D. C.) 81 Fed. 359; Re Fair (C.C.) 100 Fed. 149."

It is to be noted, however, that the Federal Statute states that the President's power is to be exercised through the Secretary of War, while here it is being exercised through the Office of Defense Transportation. This latter office was created by Executive Order No. 8989, December 18, 1941, as a division of the Office of Emergency Management. Section 6 of said Executive Order provides:

> "To facilitate unity of policy and action and the use of existing governmental services, the heads of each of the following departments and agencies . shall designate a responsible representative or representatives to maintain

> formal liaison with the Office of Defense Transportation: The Department of War, the Department of the Navy, the Department of the Treasury, the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Labor, the Interstate Commerce Commission, the United States Maritime Commission, the Civil Aeronautics Board, the Federal Works Agency, the Federal Loan Agency, the Board of Investigation and Research appointed under the Transportation Act of 1940, the Office of Production Management, the Office of Price Administration, the Economic Defense Board, and such additional departments and agencies as the President may subsequently designate."
>
> (Underscoring ours.)

The Office of Emergency Management was created by an Administrative Order of May 25, 1940, issued pursuant to the Executive Order No. 8248, September 8, 1939. Said Administrative Order provides (5 F. R. 2109) as follows:

> "WHEREAS, I find there is a threatened national emergency;
>
> "NOW, THEREFORE, By virtue of the authority vested in me by the Constitution and the Statutes, and in pursuance of Part I of Executive Order No. 8428 of September 8, 1939, it is hereby ordered as follows:
>
> "Section 1. There is established in the Executive Office of the President an office to be known as the Office for Emergency Management which shall be under the direction of one of the

Administrative Assistants to the President, to be designated by the President.

"Section 2. The Office for Emergency Management shall:

"(a) Assist the President in the clearance of information with respect to measures necessitated by the threatened emergency;

"(b) Maintain liaison between the President and the Council of National Defense and its Advisory Commission, and with such other agencies, public or private, as the President may direct, for the purpose of securing maximum utilization and coordination of agencies and facilities in meeting the threatened emergency;

"(c) Perform such additional duties as the President may direct."

That part of the Executive Order No. 8248 under which said Administrative Order was promulgated is as follows (4 F. R. 3864; C. F. R. 1939 Supplement, p. 217):

"By virtue of the authority vested in me by the Constitution and Statutes, and in order to effectuate the purposes of the Reorganization Act of 1939, Public No. 19, Seventy-Sixth Congress, approved April 3, 1939, and of Reorganization Plans Nos. I and II submitted to the Congress by the President and made effective as of July 1, 1939, by Public Resolution No. 2, Seventy-Sixth Congress, approved June 7, 1939, by organizing the Executive Office of the President with functions and duties so prescribed and responsibilities so

fixed that the President will have adequate machinery for the administrative management of the Executive branch of the Government, it is hereby ordered as follows:

I

"There shall be within the Executive Office of the President the following principal divisions, namely: (1) The White House Office, (2) the Bureau of the Budget, (3) the National Resources Planning Board, (4) the Liaison Office for Personnel Management, (5) the Office of Government Reports, and (6) in the event of a national emergency, or threat of a national emergency, such office management as the President shall determine."

In 1939 Congress enacted what is known as the Reorganization Act of 1939 (Public No. 19, Seventy-Sixth Congress, approved April 3, 1939) referred to by the President as his authority for Executive Order No. 8248. That Act (53 Stat. 561) authorized the President to make certain reorganizations of governmental agencies in order to "group, coordinate and consolidate agencies of the government as near as may be according to major purposes" (Section 1 (a) (3)). Section 4 of the Act then provides, "whenever the President, after investigation, finds that (a) the transfer of the whole or any part of any agency or the function thereof, to the jurisdiction and control of any other agency * * * * * * is necessary to accomplish one or more of the purposes of section 1 (a), he shall" submit a plan of such transfer to Congress for approval, and upon such approval such plan becomes effective.

We are unable to find where the President has submitted for congressional approval any plan of reorganization, such as is made in Executive Order No. 8248, and from the language,

"in order to effectuate the purposes of the Reorganization Act of 1939" there used, we conclude that no such plan has been submitted, but that the President merely acted by executive order to form a policy regulating his own office. Therefore, we are unable to say that the powers vested in the President in 10 U.S.C.A. 1361, to be exercised through the Secretary of War, have been transferred to the Office of Emergency Management, and from that on down to the Office of Defense Transportation. However, under the view we take of the language of 10 U.S.C.A. 1361, we are of the opinion that no such transfer is necessary in order for the Office of Defense Transportation to exercise the power vested in the President under said Section 1361. It will be noted that that section provides, "the President, in time of war, is empowered, through the Secretary of War, to * * *" etc. The direction that such power is to be exercised through the Secretary of War, we think, is only directory and not mandatory. That must also be the view of the President, since we have shown that such power is being exercised through another, other than the Secretary of War, and there has been no plan submitted to and approved by Congress transferring such power to the Office of Defense Transportation. Another factor to be noted is that the Secretary of War does participate in the exercise of the power through a liaison office.

It is apparent, therefore, that the Eastman Orders suspend the operation of such state laws as are in conflict with their provisions for the duration of the war. It is readily apparent from an examination of the Orders that certain vehicles operating within their provisions would violate the Missouri statutes first above quoted. For example, many common carriers in this state are known to use a tire described as a "10x20" which in the Appendix has a rated load carrying capacity of 4000 pounds. The ordinary tractor and semi-trailer is equipped with the dual wheels at four points and has a total of ten tires on the ground. Under the Eastman Orders a common carrier employing such a vehicle must have a gross load of 40,000 pounds before it may operate on the highways for a haul of more than fifteen miles. Such a load clearly violates the Missouri statute prohibiting a gross load limit of more than 38,000 pounds on state highways outside certain municipal areas.

CONCLUSION

It is the conclusion of this department that the Missouri statutes, Section 8384 (b) and Section 8406, are inoperative in so far as they directly conflict with the Eastman Orders for the duration of the war, or, until the Eastman Orders are terminated by the proper authorities. We do not believe that provision of the Eastman Orders permitting a twenty per cent over-load in excess of the capacity set out in the Appendix is mandatory and, therefore, it does not suspend state laws where in conflict.

Respectfully submitted,

LAWRENCE L. BRADLEY

ROBERT L. HYDER
Assistant Attorneys-General

APPROVED:

ROY McKITTRICK
Attorney-General

RLH/LLB:CP

STATE BUILDING COMMISSION: May appropriate money from funds on hand to investigate physical defects in buildings and to estimate cost of repairs, but cannot expend funds to determine personal responsibility for defects.

June 19, 1942

6-20

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
State Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your oral communication to this department wherein you request an opinion upon the following question:

> "Would expenditure by The State Building Commission of said sum of $5,000.00, or so much thereof as may be necessary, of the funds now at the disposal of the said The State Building Commission, for the purpose set forth in the first of the resolutions adopted, as aforesaid, at said meeting held on June 17, 1942, be legal? The purpose referred to is: 'for the purpose of obtaining the following information: (1) the cause of the conditions now existing in the said cottages; (2) upon whom the responsibility for said conditions rests; (3) the ascertainment of what is necessary to be done in order to correct the defects, together with the estimated cost thereof;'"

The above question entails the examination and interpretation of the meaning of Section 44d, Article IV of the Constitution of Missouri, which section reads as follows:

> "In addition to the exceptions made in Sections 44, 44a, 44b and 44c, the General Assembly shall have power to contract or to authorize the contracting of a debt or liability on behalf of the State and to issue bonds or other evidences of indebtedness therefor, not exceeding in the aggregate Ten Million

Dollars ($10,000,000.00), for the purpose of repairing, remodeling or rebuilding, or of repairing, remodeling and rebuilding State buildings and properties at all or any of the eleemosynary or penal institutions of this State, for building additions thereto and additional buildings where necessary, such bonds to bear interest at a rate not exceeding five per centum (5%) per annum, payable semi-annually, and maturing not later than thirty-five (35) years from their date. Said bonds shall be issued by the State Board of Fund Commissioners in such amounts, from time to time, as may be necessary to carry on the building program herein provided for. The proceeds of the sale or sales of any bonds issued hereunder, together with any funds granted by or otherwise received from any agency of the Federal Government in aid of the purposes herein specified, shall be paid into the state treasury and be credited to a fund to be designated the 'State Building Fund,' and shall thereupon stand appropriated without legislative action for said purposes and for the payment of all expenses, incidental thereto. The proceeds of the sale of the Ten Million Dollars ($10,000,000) of bonds herein authorized shall be expended for the purpose of repairing, remodeling or rebuilding any of the public buildings of the State of Missouri devoted to eleemosynary and penal purposes, and for building additions thereto, and additional buildings where necessary. The said bonds and the interest thereon shall be paid out of the State Building Bond Interest and Sinking Fund, which is hereby created and which funds is to be provided by the levy and collection of a direct annual tax upon all taxable property within the State and from the levy and collection of any special tax or taxes which may be authorized by the General Assembly and by it directed to be applied to the payment of interest and maturing principal of said bonds. If at any time after the issuance of any of the said bonds it shall become apparent to the State Auditor that there

will not be sufficient monies in said State Building Bond Interest and Sinking Fund for the payment of the principal and interest maturing and accruing on said bonds during the next succeeding calendar year, it shall be the duty of the State Auditor, annually, on or before the first day of July, to determine the rate of taxation necessary to be levied upon all taxable property within the State to raise the amount of money needed for that year to pay the principal and interest of said bonds maturing and accruing in the next succeeding year, taking into consideration available funds, delinquencies and costs of collection. And the Auditor shall annually certify the rate of taxation so determined, to the clerk of the county court of each county, and to the assessor or other officer in the City of St. Louis, whose duty it shall be to make up and certify the tax books wherein are extended the ad valorem state taxes. It shall be the duty of said clerks and the said assessor or other proper officer in the City of St. Louis to extend upon the tax books the taxes to be collected, and to certify the same to the collectors of the revenue of their respective counties and of the City of St. Louis, who shall collect such taxes at the same time and in the same manner and by the same means as are now or may hereafter be provided by law for the collection of state and county taxes, and pay the same into the state treasury. All funds paid into the State Building Bond Interest and Sinking Fund shall be and stand appropriated without legislative action to the payment of principal and interest of the said bonds, there to remain until paid out in discharge of the principal of said bonds and the interest accruing thereon, and no part of said fund shall be used for any other purpose so long as any of the principal of said bonds and the interest thereon shall

> be unpaid. If at any time the balance in said State Building Bond Interest and Sinking Fund should be insufficient to pay accruing interest or maturing principal of said bonds, the Board of Fund Commissioners shall direct the State Auditor and the State Treasurer to transfer on their books from the State Revenue Fund to said State Building Bond Interest and Sinking Fund the sum required for said purposes, or either of them, and such sum so transferred shall be reimbursed to the State Revenue Fund whenever there may be a balance in the said State Building Bond Interest and Sinking Fund in excess of the amount which may then be needed to meet the accruing interest and maturing principal of the said bonds during one year next succeeding. Those institutions of the State of Missouri to which any of the proceeds of the sale of said bonds may be devoted are those eleemosynary and penal institutions whose buildings are in need of repair or remodeling or in need of being rebuilt or in need of additions or additional buildings. The General Assembly shall enact such laws as may be necessary to carry this amendment into effect."

From a reading of the amendment, supra, it may be pointed out that the wording of the amendment is unambiguous and has a clear and definite meaning, in that it provides in part that a fund of money, not exceeding in the aggregate ten million dollars, is to be used "for the purpose of repairing, remodeling or rebuilding, or of repairing, remodeling and rebuilding State buildings and properties at all or any of the eleemosynary or penal institutions of this State, for building additions thereto and additional buildings where necessary." Further, the section provides in part that the "proceeds of the sale of the Ten Million Dollars ($10,000,000) of bonds herein authorized shall be expended for the purpose of repairing, remodeling or rebuilding any of the public buildings of the State of Missouri devoted to eleemosynary and penal purposes, and for building additions thereto, and additional buildings where necessary."

The above two excerpts taken from Section 44d of Article IV of the Constitution of Missouri, are the only directions given to the Building Commission explaining and defining the purposes for which the proceeds of the bonds provided for are to be expended, and, from the reading of the excerpts set forth, supra, we find that the amendment contemplates buildings that are in existence and new buildings. We wish to point out that the Building Commission shall have the authority to repair, remodel and rebuild buildings that are in existence, and also may build additions to such buildings. Further, if the Commission finds that it is necessary, they may build additional new buildings.

Now turning to the questions propounded, we think it advisable to study and define the meaning and scope of the words set forth in the excerpts of Section 44d, supra, in order that we may arrive at the clear intent, meaning and purpose of said amendment. First, we shall study the definition and scope of the word "repairing." In the case of Fuche v. City of Cedar Rapids, 139 N. W. 903, l. c. 904, 158 A. L. R. 490, the court said:

> "To 'repair' presupposes the existence of the thing to be repaired; thus we say the thing needs repairing; the thing is out of repair, and so, when we speak of repairs, we assume that the thing to be repaired is in existence, and the word 'repair' contemplates an existing structure or thing which has become imperfect by reason of the action of the elements, or otherwise; and, when we repair, we restore to a sound or good state, after decay, waste, injury, or partial destruction, the existing structure or thing which needs to be restored to its original condition, or, in other words, we supply, in the original existing structure, that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be."

See cases cited in 54 C. J., p. 395, par. 4, note 68.

Now turning to the next terms used in the amend-

ment, namely, "remodeling or repairing," it will be noted from a reading of Section 44d, supra, that these words, as used in this section are synonymous because they are coupled with the word "or," and because of the punctuation, as noted, supra. Therefore, in defining these terms, we call attention to the case of Beauchamp v. Consolidated School District, 297 Mo. 64, l. c. 71, wherein the court said:

> "* * * The remodeling of a building is more than repairing it or making minor changes therein. The ordinary significance of the term imports a change in the remodeled building practically equivalent to a new one. * * * * * * * *"

Also, in the case of Nixon v. Gammon, 191 Ky. 175, 229 S. W. 75, l. c. 77, the court said:

> "* * * The word 'repair' does not include the word 'rebuild,' and the courts have never so held.
>
> "If a house be destroyed by fire, to restore it would not be to 'repair' it, but to 'rebuild' it, and this is true even if the walls or some part thereof be standing in substantially the same condition in which they were before the fire. * * * "

Further, as heretofore pointed out, Section 44d, supra, provides for the building of additions to buildings that are already in existence and for additional buildings where necessary. The building of additions contemplates the building of a new structure to be attached to an already existing building, for it was said in the case of Mack v. Eyssell, 59 S. W. (2d) 1049, l. c. 1051, as follows:

> "'The word "addition" implies physical contact; something added to another. 1 C. J. 1190.' Meyering v. Miller (Mo. Sup.) 51 S. W. (2d) 65, 66. The ordinary meaning of the term 'addition to a building' is some structure physically attached to or connected with the building itself. Webster's New International Dictionary defines the word 'addition' when used in reference to a

> building as: 'A part added to a building, either by being built so as to form one architectural whole with it, or by being joined with it in some way, as by a passage, and used so that one is a necessary adjunct or appurtenance of the other, or so that both constitute in use and purpose one and the same building.' * * * * * * * * * * * * * * * * * * * "

The words "additional buildings" of course contemplate the building of a complete new structure.

Now turning to a supplemental question as to the right of the Board to employ architects to ascertain costs and prepare blueprints, specifications, estimates, etc., preparatory to carrying out the powers and directions given to the Board, through the wording, supra, we wish to call attention to a cardinal rule of statutory construction which is equally applicable in construing constitutional amendments giving a statutory grant of power or right which carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete. However, powers specifically conferred cannot be extended by implication. Huggins v. Mooresville Consolidated School District, 278 S. W. 769, l. c. 771; 59 C. J., par. 575, p. 972, 973, and cases cited thereunder.

In the early case of Peterson v. Mayor, etc., of New York, 17 N. Y. Rep. 449, l. c. 453, which case involved a suit to recover for services of plaintiff in preparing certain plans and specifications and work drawings for the erection of a new edifice in the market place of that city, the court said:

> "* * * It was incident to the general power to build a market, to determine upon the form, dimensions and fashion of the edifice; and I suppose no public body or private person would enter upon an important and expansive work of this character without having plans, drawings, specifications and estimates laid before them. I cannot doubt, therefore, but that it was entirely within the province of the council to employ a person of professional skill to perform the services for which the plaintiff claims compensation, unless restrained

by some positive provision of law. * *"

It will be observed, however, that in the above case a more skilled person was employed to draw plans and make specifications for work that is contemplated to be done, and we find no case where a court has interpreted a constitutional provision in the nature of Section 44d, or any statute of similar purpose and intent, which gives the Board the right, by implication, to employ persons to go back and make extensive investigation with the endeavor to lay the blame on certain individuals or corporations for some violation of contract or act of corruption which may, or may not, have existed at the time such structures were built, repaired or remodeled. In answer to the question here presented, therefore, it is our view that Section 44d does not contemplate, directly, indirectly or by implication, the granting of any such powers to the Building Commission. We are further of the view that if the Board should attempt to expend money for any such purpose, they would be clearly doing so without any authority or right. In this connection, we call attention to the case of State v. Smith, 81 S. W. (2d) 613, where this identical amendment was up for review by the court, and wherein payment was sought for items classified as follows:

> "* * * * (1) Furniture and fittings; (2) food service; (3) laundry; (4) clinical; and (5) industrial. The following units are typical of the several classifications mentioned, and will serve the purposes of this opinion without enumerating them all at length: (1) Tubular steel chairs, bedside tables, wheel chairs, hospital chart files; (2) knives, forks, and spoons; (3) electric irons, canvas baskets; (4) colonic irrigation outfit; (5) forge, hand drill."
>
> "* * * * It is elementary that the statute could not authorize an expenditure out of the proceeds of the bond issue not sanctioned by the constitutional amendment itself. In other words, the purposes for which the statute directs expenditures can be no broader than the restrictions placed thereon by the constitutional amendment. * "
>
> "* * * 'But can it be said to be doubtful

as to whether equipment of the character hereinbefore described comes within the purposes of a bond issue to 'repair, remodel or rebuild public buildings devoted to eleemosynary and penal purposes, and for building additions thereto, and additional buildings where necessary?'
* "

CONCLUSION

It is the opinion of this department that the committee appointed, as was provided for in the resolution dated June 17, 1942, shall have the right to obtain information as to the cause of the physical conditions now existing in said cottages. If, in ascertaining the facts that have caused the conditions now existing in said cottages, it is revealed that the conditions are the result of faulty material, bad workmanship, or poor construction, it may follow that the responsibility for said condition may be determined, and the Commission would have the power to pay for such information. It would be the duty of the persons making the investigation in consideration for said payment to state its findings. However, the Commission is not vested with any authority or power, under said resolution, to expend monies from said building fund to secure evidence not necessarily connected with determining the condition of the cottages.

The Commission shall have the right to ascertain what is necessary to be done in order to correct the defects, if any, that exist in the cottages, and, also, may perfect plans and estimates preparatory to remedying such defects, if any.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

GAYLORD WILKINS

ROY McKITTRICK
Attorney General

BRC
GW:DA

GOVERNOR - Writs directing election to fill vacancies in the House of Representative caused by resignation of a Representative from St. Louis City, Missouri, should be directed to the Board of Election Commissioners of the City of St. Louis, Missouri.

July 9, 1942

7-9

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

The Attorney General acknowledges receipt of your letter of July 9, 1942, wherein you request an opinion on the procedure to be followed in filling certain vacancies in the Sixty-first General Assembly due to the resignation of a Representative of the city of St. Louis, Missouri.

Your letter is as follows:

> "The resignation of Honorable J. Glennon McKenna, as a member of the House of Representatives of the Sixty-first General Assembly of the State of Missouri from the fifth representative district, Saint Louis City, Missouri, has been received by me, and a vacancy exists in the membership from which he did by said resignation resign.
>
> "Section 12859 of the Revised Statutes of Missouri of 1939, in reference to a vacancy in either house of the general assembly, provides in part as follows:
>
> "Whenever the governor shall receive any resignation * * * he shall, without delay, issue a writ of election to supply such vacancy.'
>
> "Your opinion, as soon as possible is respectfully requested on the following question:

> "To whom should the writ of election be issued to supply the vacancy from the fifth representative district, Saint Louis City, Missouri?"

Sections 12859 and 12860 R. S. Missouri, 1939, have never received any judicial construction by any of our courts. They appear to be statutes dealing only with a particular object relating to the vacancies in the House of Representatives and the Senate.

Article 24 of Chapter 76 of the Revised Statutes of Missouri, 1939, pertaining to permanent registration and elections in cities of 600,000 or more, provides the manner in which the writs of election shall be served. Under Section 12197 R. S. Missouri, 1939, the Board of Election Commissioners is created in all cities of 600,000 population. In view of the fact that this particular section is voluminous and contains matters which are not pertinent to the question, I will merely cite, and quote, that part of such section which pertains to the matter about which you inquire. The following will be found in the aforesaid Section.

> "The board shall maintain an office, which shall always be kept open during business hours of every day, Sundays and legal holidays (other than election days) excepted. Upon the appointment of the commissioners, the preceding board or other custodians of the property of such board shall turn over to such commissioners all registry books, poll books, tally sheets and ballot boxes, heretofore used, and all other books, forms, blanks, stationery and property of every description in any way relating to registration or election, or the holding of elections, within said city. * * * * * * * * * *"

Section 12283 R. S. Missouri, 1939, refers to the powers of the Board of Election Commissioners in cities of 600,000 or more and provides as follows:

> "The board shall make all necessary rules and regulations, not inconsistent with this article, with reference to the registration of voters and the conduct of elections; and shall have charge of and make provisions for all elections to be held in such city or any part thereof."

In other words, it will be seen that upon the appointment of the Board of Election Commissioner, or upon a new board being appointed, that all of the property held by such former board shall be turned over to the incoming Board of Commissioners.

Further, it will be seen by Section 12283, cited above, that the Board of Commissioners shall make all the necessary rules and regulations and and control the conduct of all elections in such cities, or parts thereof. This Article 24, cited above, is a special provision pertaining to cities of 600,000 or more, and there is only one city of that size in the State of Missouri, and that is the city of St. Louis. It was apparently the intention of the legislature in passing such Article, that the Board of Election Commissioners of the city of St. Louis should have complete control of the elections in such city. Article 24 of Chapter 76, R. S. Missouri, 1939, which deals with the registration and holding of elections in cities of 600,000 or more inhabitants was passed by the legislature in 1937. The Sections referred to, heretofore, Sections 12859 and 12860 have been live statutes in our State for many years. It is apparent that Section 12859 and Section 12860, supra, conflict with the provisions of Article 24, of Chapter 76, and we think that the rule as given in the decision of Young v. Greene County, 119 S. W. (2d) 369, is applicable to the effect that

when two statutes deal with the same subject matter and are inconsistent with each other the later act will be regarded as a substitute for the earlier one, and will operate as a repeal thereof, although it contains no express repeal clause. We deem the two statutes wholly inconsistent with each other, as far as holding an election to fill vacancies in the office of a Representative of St. Louis City in the Sixty-first General Assembly.

This office on October 29, 1941, rendered an opinion addressed to you that in the case of a vacancy in the House of Representatives from Jackson County the writ, or writs, of election should be issued to the Board of Election Commissioners of Kansas City, and, although different statutes govern in Jackson County and the city of St. Louis, these Sections in force and effect are practically the same.

CONCLUSION

Therefore, it is the opinion of this Department that the writ of election to fill a vacancy in the House of Representatives, caused by the resignation of Honorable Glennon McKenna, a member of the House of Representatives from the Fifth Representative District of St. Louis, Missouri, should be issued to the Board of Election Commissioners at St. Louis, Missouri.

Respectfully submitted

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

JSP:RW

ELECTIONS: In re terms of senators elected to fill vacancies caused by resignation of State Senators.

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FILED
24

July 10, 1942

Honorable Forrest C. Donnell
Governor of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

This is in reply to yours of the 8th, wherein you submitted two questions to this department, as follows:

> "(a) What will be the term of office of the person who shall be elected on Tuesday, August 4, 1942, to supply the above mentioned vacancy in the membership in the First Senatorial District of the State of Missouri?
>
> "(b) What will be the term of office of the person who shall be elected on Tuesday, August 4, 1942, to supply the above mentioned vacancy in the membership in the Twenty-sixth Senatorial District of the State of Missouri?"

Under Section 5 of Article IV of the Constitution of Missouri, Senators are elected for a period of four years. This section also provides that the State be divided into convenient senatorial districts.

Section 10 of said Article IV, provides as follows:

> "The first election of Senators and Representatives, under this Constitution, shall be held at the general

> election in the year one thousand eight hundred and seventy-six, when the whole number of Representatives, and the Senators from the districts having odd numbers, who shall compose the first class, shall be chosen; and in one thousand eight hundred and seventy-eight, the Senators from the districts having even numbers, who shall compose the second class, and so on at each succeeding general election, half the Senators provided for by this Constitution shall be chosen."

By this section the odd numbered senatorial districts will elect Senators at the General Election in 1944. Also by this section the even numbered senatorial districts will elect senators in 1942.

As you state in your letter, writs of election have been issued by you to two senatorial districts, numbered 1 and 26. These writs were issued under the provisions of Section 14 of Article IV of the Constitution, which is as follows:

> "Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

We think the answer to your inquiry will depend upon the meaning of the word "vacancies" in said Section 14. In other words, does it mean a vacancy in the office or a vacancy in the term. Our Supreme Court, in State ex Inf. Hadley v. Corcoran, 103 S. W. 1044, 1049, 206 Mo. 1, held that the word "vacancy" at common law means a vacancy in office and not in the term. But it also held in this case that the word "vacancy" when used in written Constitutions with reference to a public office sometimes signifies an unexpired term. Words and Phrases, Permanent Edition, Vol. 43, page 610.

Reviewing the Corcoran case, supra, the court, at l. c. 19 of Missouri Reports, quoted from an Oregon case as follows:

> "'In this country, where written constitutions prevail, the great majority of public officers are elective, having a fixed term, for a prescribed number of years, with varying provisions as to filling vacancies. The term of an office is said to be a fixed period prescribed for holding the office (People ex rel. v. Brundage, 78 N. Y. 407) and is the estate or interest which the incumbent has in it. (a Bla. Com. 144.) When a vacancy happens by death, resignation, or removal, the term is gone, and the office reverts, as at common law, not to the king, but to the people, to be again filled, upon like conditions, for the full term prescribed, unless by express provision or manifest intent the Constitution has limited or restricted the term of the new incumbent. Whether, therefore, the vacancy is in the office as at common law, and reverts to the people to fill for the full term prescribed; or, so to speak, the vacancy is in the term, and limited to filling for the unexpired portion thereof, is made to depend upon the intent of the framers as expressed in the Constitution. But when the Constitution fixes a definite term of office, as for six years, without any limitation or reference whatever to unexpired terms, when a vacancy occurs, the common law acceptation, meaning a vacancy in office, must be received and applied in the construction, and, when filled, the incumbent is vested with a full term of six years.'"

The principles announced in the Oregon case were followed by the court in the Corcoran case, supra, as quoted above. Apply-

ing the principles announced in this case and referring to the aforesaid Constitutional provisions, it will be seen that the framers of the Constitution have fixed a four year term for State Senators and they fixed the time when this term begins and when it ends. We think that by doing so the vacancy referred to in said Section 14 is a vacancy in the term and not in the office.

In the case of State ex rel. Brown v. Spitz, 127 Mo. 248, at l. c. 252, the court said:

> "The distinction to be found in the multitude of cases to be found on the question of filling vacancies seems to be this: Those cases which hold that one elected to fill an office which has become vacant takes for a full term are based either upon constitutional or statutory provisions which provide only for the length or duration which the incumbent may hold the office, whereas in every instance, so far as our research goes, in which the constitution or statute definitely and certainly prescribes not only the duration of the term but a fixed time for its beginning and ending, the holding has been that the incumbent's right to the office, whether he was elected to serve the whole term or to fill a vacancy therein, terminates with the fixed time prescribed for the ending of said term.* * * * * *"

Applying the foregoing rule here the term of the person who is elected at the special election by virtue of the writ of election would end at the time fixed by the Constitution for the expiration of same.

In the case of State ex rel. McHenry v. Jenkins, 43 Mo. 261, an election to fill a vacancy at a time other than that prescribed by statute was considered. At l. c. 265, the court, in speaking of the validity of such an election, said:

> "In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. * * * * * * * * * * *"

Our Constitution makes provision for the election of senators in certain years. It makes no provision for the election of such senators in any other years, except in case of a vacancy. Following the principle announced in the Jenkins case, supra, an election, except a special election, of a senator in any year other than the year prescribed by said Article IV, Section 10 of the Constitution, would be void and of no effect.

Our attention has been called to State ex rel. Asotsky v. Hicks, 346 Mo. 640, and especially to the provisions of Laws of Missouri of 1873, page 43, Section 1, which is as follows:

> "1. In all cases of vacancy in any office, the length of the term of which is over two years, the vacancy shall be filled by the election of some person to the office at the first general election after such office becomes vacant."

The court, in the Asotsky case, held that that section was still in full force and effect even though it had not been carried down by the revisors. However, we do not think this

section is applicable here, because it is in conflict with the special election section of the Constitution providing for special elections to fill vacancies in the office of State Senators; and also because it is in conflict with the provisions of Section 10 of said Article IV of the Constitution, which fixes the time for election of senators. In support of this statement, in the case of Gilkeson v. Mo. Pac. Ry. Co., 121 S. W. 138, 222 Mo. 173, the court, in effect, held that the construction of a statute which brings it in conflict with the Constitution will nullify it as effectually as if it had in the first instance been enacted in conflict therewith.

CONCLUSION

Following the principles hereinbefore announced, it is the opinion of this department that the vacancy in the office of State Senator in the two districts referred to in your request are vacancies in the term. That being the case the vacancy which will be filled by the special election in Senatorial District No. 1 is for the term ending in 1944, and the vacancy which will be filled by the special election in Senatorial District No. 26 is for the term ending in 1942.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

VANE C. THURLO

(Acting) Attorney-General

TWB:CP

NAVAL MILITIA: Interpretation of Section 15093, R. S. Mo. 1939. Method of electing commander, or captain commanding naval militia.

July 17, 1942

FILED
7-17
24

Hon. Forrest C. Donnell
Governor of Missouri
State Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

This is to acknowledge receipt of your letter of July 14, in which you request the opinion of this department. Your letter reads in part as follows:

> "There has arisen in this office the question of what is the manner in which an election of the commander, or captain commanding the naval militia, shall be held. I am not certain whether the elections mentioned in the concluding sentence of Section 15093 Revised Statutes of Missouri of 1939 include the election of the commander, or captain commanding the naval militia, or only the elections of commissioned officers of divisions. I respectfully ask of you your opinion upon the following questions: * * * "

In the remainder of your letter of request you have submitted four questions. We shall answer your questions in the order submitted.

Since your questions pertain particularly to the construction of Section 15093, R. S. Missouri 1939, we quote same in its entirety:

> "The commander, or captain commanding the naval militia, shall be elected by the line officers. The executive officers, navigating and ordnance officers, the signal officers and staff officers shall not be entitled

> to a vote at such elections. Commissioned officers of divisions shall be elected by the members of each division or appointed by the commander-in-chief upon the recommendation of the commanding officer. Such elections shall be held in the manner prescribed by the law for the election of commissioned officers of infantry."

> "Question 1. Do the elections mentioned in the concluding sentence of Section 15093 Revised Statutes of Missouri of 1939 include the election of the commander, or captain commanding the naval militia?

From a reading of the quoted statute, we are of the opinion that the words "such elections" used in the concluding sentence of Section 15093, refer to all of the elections mentioned in said section and not to any particular election referred to therein. It will be noted that the same words "such elections" are used in the sixth line of said section in providing that the executive officers, navagating and ordnance officers, the signal officers and staff officers shall not be entitled to vote at the election of the commander or captain commanding the naval militia, and the term "such elections" must refer to the election of the commander or captain commanding the naval militia for the reason that from its context it is the only election to which the words could possibly apply.

> "Question 2. If the elections mentioned in the concluding sentence of Section 15093 Revised Statutes of Missouri of 1939 include the election of the commander, or captain commanding the naval militia, is it necessary that the election of the commander, or captain commanding the naval militia occur in a meeting?

Since we have answered your first question in the affirmative, you then desire to have our opinion as to how the election of the commander or captain commanding the naval militia shall be held; whether at a meeting or by some other method. We are of the opinion that the election of the commander or captain commanding a naval militia shall be held in a meeting, for the reasons hereinafter stated.

> "Question III. If the elections mentioned in the conluding sentence of Section 15093 Revised Statutes of Missouri of 1939 include the election of the commander, or captain commanding the naval militia, but it is not necessary that the election of the commander, or captain commanding the naval militia occur in a meeting, can said election be held by mail?"

Since we have held that the election of the commander or captain commanding the naval militia must be held in a meeting, said election necessarily could not be held by mail.

> "Question IV. If the elections mentioned in the concluding sentence of Section 15093 Revised Statutes of Missouri of 1939 do not include the election of the comma der, or captain commanding the naval militia, what is the manner in which is held an election of the commander, or captain commanding the naval militia?"

Since it is our opinion that the election of the commander, or captain of the naval militia is governed by the concluding sentence of Section 15093, the election should be held in the manner prescribed by Section 15027, R. S. Mo. 1939, in the same manner prescribed for the election of commissioned officers of the Missouri National Guard. There is no reason to assume that the Legislature, in using the words "such elections" in the concluding sentence of said section, referred only to the election

of commissioned officers of divisions and not to the election of the commanding officer. If such term referred only to commissioned officers, the Legislature has, thereby, provided for no method of electing the commander or captain commanding the naval militia.

The method for the election of officers of the national guard, under Section 15027, provides for a meeting, designates who is to preside at such meeting, and requires that a majority of those entitled to vote at such election shall constitute a quorum, and that a majority of the votes cast shall be necessary to elect. Said section also provides for separate ballots and sets up the necessary machinery for such election. Election by mail is thereby precluded.

CONCLUSION

It is, therefore, our opinion that the method for electing the commander or captain commanding the naval militia is as provided in Section 15027, R. S. Missouri, 1939.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRH:NS

OFFICERS: Common Law powers of statutory officers.

August 13, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This is in response to your oral request as follows:

> "Has the Supervisor of Liquor Control any common law powers to impose requirements for qualification for an applicant for a liquor license, in addition to those prescribed by statute?"

At the outset, in order to determine the extent of the Supervisor's authority, it is necessary to consider the nature of his office and the manner of its creation.

The legislature of this State has authority to create the office of Supervisor of Liquor Control. The general rule is stated as follows in 46 Corpus Juris, p. 933, Section 29:

> "Subject to limitations and restrictions imposed by constitutional provisions, the power to create an office is vested in the legislative department of the government, * * * *"

In State ex rel. v. Smiley, 263 S. W. 825, l. c. 826, 827 (1) 304 Mo. 549, the court said:

> "It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate. State v. Butler, 105 Mo. 91, 73 Atl. 560, 24 L. R. A. (N.S.) 744, 18 Ann.Cas. note, 489.* * * *"

Pursuant to that authority, the legislature created the office of Supervisor, in what is now Section 4875, R. S. Missouri, 1939, Further, the Legislature prescribed the extent of the Supervisor's power in passing upon the qualifications of an applicant for a license to sell intoxicating liquor, in Section 4906, R. S. Missouri, 1939. The question here is: Does the Supervisor

of Liquor Control have common law authority to impose upon an applicant for a liquor license, requirements inaddition to those set out in said Section 4906. This section is as follows:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation, be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid: Provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors, to, by or through a duly licensed wholesaler, within this state."

The General Assembly by Section 645 R. S. Mo. 1939, has provided for the application of the common law in this State in the following language:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First

> and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

In speaking of the application of the common law to public officers and their duties, we find the principle stated in Mechem Public Officers, Sections 501 and 502, which principle, we think, is followed in this state. Said Section 501 provides in part as follows:

> "Under our political system, as has been already stated, the entire source of public governmental authority is found in the people themselves. Either directly or through their chosen representatives, they create such offices and agencies as they deem to be desirable for the administration of the public functions, and declare in what manner and by what persons they shall be exercised. They prescribe the quantum of power to be attached to each department, and the conditions upon which its continuation depends. Their will, in these respects, finds its expression in their constitutions and laws.

> "The right to be a public officer, then, or to exercise the powers and authority of a public office, must find its source in some provision of the public law."

Section 502 provides in part as follows:

> "Where the office is a new one, or one unknown to the common law, the nature and extent of the authority and the terms, manner and conditions of its exercise must be set forth, in some express enactment, with sufficient clearness and fullness to enable it to be interpreted and executed with reasonable certainty."

By the principles here announced, it will be seen that in case of an office unknown to the common law, such as the Liquor Supervisor of this state, the powers and duties of the officer acting in that capacity must be expressed in the statute creating the office.

In the case of State of Missouri ex rel, v. Berryman et al., 142 Mo. App. 373, the court had before it a question similar to the one here. In that case, a city, by ordinance, had attempted to impose requirements on an applicant for a dramshop license, additional to those required by statute. At l. c. 382 the court, quoting from St. Louis v. Kaime, 180 Mo. 322, 79 S. W. 140, stated as follows:

> "'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) Those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable.* * *'"

In that case the court finally held that the city exceeded its authority when it attempted to impose additional requirements upon the applicant for the dramshop license. That is consistent with the general rule stated in 33 Corpus Juris, Intoxicating Liquors, p. 531, Section 85:

> "* * * In any case, however, the officer or board cannot exercise authority in regard to the grant of licenses without a statute or ordinance giving him the right to issue such licenses and prescribing the essential elements of the procedure to be followed, or exceed the terms of the statute or ordinance in respect to the kinds of licenses to be issued, although it is proper and permissible to invest him with a measure of discretion in passing upon applications for license, not amounting to an arbitrary power to grant or refuse."

The same volume, on the same subject, at p. 542, Section 124, states:

> "Except in so far as they may be vested with a measure of discretion, officers charged with the grant of licenses must keep strictly within the limits of their powers and authority as prescribed by the statute.* * * *"

The Supervisor was created by statute. Therefore, the extent of his authority is governed solely by statute. Inasmuch as his office was unknown to the common law, he has no common law authority.

An example of a common law officer, having common law authority and duty, is a sheriff. State on inf. of McKittrick v. Williams, 144 S. W. (2d) 98, 104 (17), 346 Mo. 1003.

CONCLUSION

In view of the above authorities, it is the opinion of

this department that the Supervisor of Liquor Control has no common law power or authority to impose upon an applicant for a liquor license, any requirements for qualification in addition to those prescribed by statute.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

ERNEST HUBBELL
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

TAXATION:
GOVERNMENT INSTRUMENTALITIES:

Buildings, structures, furniture and equipment at Weldon Spring Ordnance Works are exempt from taxation.

August 14, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This is in reply to your request, of recent date, for an opinion in reference to the tax receipt, Form 11A, presented by St. Charles County to the State Board of Equalization, for taxes due on certain personal property which is the equipment owned by the United States Government in the Weldon Spring Ordnance Works, at Weldon Spring, Missouri. Your request specifically states:

> "The State Board of Equalization hereby requests your official opinion on the question whether the property so eliminated is subject to taxation. In this connection your attention is respectfully directed to the fact that the exemption embraced in Section 10937 R. S. Mo. 1939, of furniture and equipments belonging to the United States apparently relates only to the furniture and equipments of 'public buildings and structures'. The question then arises as to whether or not the Ordnance Works comes within the category of 'public buildings and structures'."

In answering your request we are assuming that the land itself is owned by the United States Government, and was lawfully acquired by the Government through an act of Congress, or an administrative officer acting

under an act of Congress, for a public use. The fact that the property was obtained under authority of Congress, or by order of an administrative officer under an act of Congress, declares the property to be for a public use. It was so held in the case of Barnidge v. United States, 101 F. (2d) 295, by the Circuit Court of Appeals of the Eighth District, on an appeal from the District Court of the United States for the Eastern District of Missouri. In that case, the court said, at l. c. 298:

> "It is urged that the purpose for which appellant's property is being taken is not a public purpose, for which land may be taken by eminent domain. If the Federal Government, under the Constitution, has power to embark upon the project for which the land is sought, then the use is a public one. Confessedly, the purpose can not be a private one. Primarily, the right to determine the purpose to be a public one is in Congress. It has been held that the taking of land for commemorative purposes is for a public use. United States v. Gettysburg Electric R. Co., supra; Roe v. Kansas, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259; Old Dominion Land Co. v. United States, 269 U. S. 55, 46 S. Ct. 39, 70 L. Ed. 162. In the last cited case, it is said (page 40): 'Congress has declared the purpose to be a public use, by implication if not by express words. * * * Its decision is entitled to deference until it is shown to involve an impossibility.'"

The general exemption law, as set out in the Constitution of Missouri, is Section 6, of Article X, but this Section does not apply to land owned by the United States Government.

The exemption from taxation of land owned by the United States Government is set out in Section 1 of Article XIV of the Constitution of Missouri, and reads as follows:

> "The General Assembly of this State shall never interfere with the primary disposal of the soil by the United States, nor with any regulation which Congress may find necessary for securing the title in such soil to bona fide purchasers. No tax shall be imposed on lands the property of the United States; nor shall lands belonging to persons residing out of the limits of this State ever be taxed at a higher rate than the lands belonging to persons residing within the State."

Under Section 1 of Article XIV of the Constitution of Missouri the legislature saw fit to enact Section 10937 R. S. Missouri, 1939. That part of this section which you mentioned in your request, and of which you desire our construction, reads as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with

> their furniture and equipments, belonging to the United States; * * ."

It will be specifically noticed that Section 1, of Article XIV, of the Constitution of Missouri, states:

> " * * * No tax shall be imposed on lands the property of the United States; * * * * * * * * * ."

Recently the Supreme Court of this State had a question which was a converse of the facts set out in your request, which was the case of State ex rel Ferguson, Federal Housing Administrator v. Donnell, et al. The question in that case was the authority of the State to tax the Administrator on the personal property used by him in the operation of Manhassatt Village, which had been taken over under foreclosure proceedings, by the Federal Housing Administration Act. The Federal Housing Act permits the states to tax the real estate acquired under that Act, but nothing was said about personal property. This case was before our Supreme Court in May, 1942, and the opinion has recently been handed down, holding that the personal property was taxable by reason of the fact that its ownership was incidental to the ownership of the real estate which was taxable. This case has not been finally adjudicated, for the reason that there is now pending in that case a motion for rehearing.

According to the opinion in the above case the same theory would be held by the court on the converse of the proposition, for the reason that since Section 1, of Article XIV of the Constitution of Missouri provides, "No tax shall be imposed on lands the property of the United States;" , then the personal property, or equipment would be incidental to that land and should also be exempt for taxation purposes.

We are not passing upon the constitutionality of Section 10937, supra, but we find that if the legislature, after setting out in the second exemption of that Section, the words, "lands and lots," had deleted the words "public buildings and structures with their furniture and equipment", and then stated the words, "belonging to the United States", under the recent opinion in State ex rel Ferguson, Federal Housing Administrator v. Donnell, the structures, furniture and equipment would be incidental to the exemption granted lands and lots belonging to the United States, and would also be exempt.

The legislature, in enacting Section 10937, supra, provided for such situations as is now in the Weldon Spring Ordnance Works at Weldon Spring, Missouri. It provided in said section that, in addition to exempting lands and lots, they exempted "public buildings and structures with their furniture and equipment."

Of course, we are assuming, as said before, that the United States Government is owner of the fee of the land. But, if the United States Government is not the owner of the fee in the land, the personal property mentioned in your request would not be exempt from taxation. It was so held in Speed et al. v. St. Louis County Court, 42 Mo. 382, the court, in passing upon that question said:

> "The appellants were seized and possessed of certain real estate in the city of St. Louis which the United States government took possession of in 1861 and continued to hold and occupy till 1865, when it was voluntarily relinquished and returned to its owners, the appellants. It is now claimed that it was illegal to levy and assess a tax on the property for the time the national government so held and occupied it.

> The law exempts from taxation all lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States.
>
> "But we cannot see upon what principle this exemption clause can have any application to the appellants' property, nor has any reason been suggested for giving it such force and direction. The property, to be exempt from taxation, must belong to the national government - - the title and ownership must be vested in it."

Section 10937, supra, specifically exempts "public buildings", which belong to the United States. "Public buildings" as used in this section, and as we believe intended by the legislature, does not mean buildings that are open to the public, at large, but means buildings owned by the United States Government and other Government instrumentalities.

In the case of Maiatico Const. Co., Inc., v. United States, 79 F. (2d) 418, which was a case in which a suit was brought against a contractor who had erected dormitory buildings at Howard University. The action was brought under the Heard Act, 40 U. S. C. A. 270, which Act provided that the bond of the contractor would be liable for material and work upon the dormitories. The court, in arriving at its opinion in the case, defined "public buildings" as follows:

> " * * * Attorney General Griggs in the early stages of the law, was of the opinion that the act had no

relation to contracts for the construction of movable articles and was confined to permanent structures like buildings upon land to which the United States had acquired complete title, etc. (23 Op. Attys. Gen. 174), but in Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 31 S. Ct. 140, 142, 55 L. Ed. 72, it was held that a vessel being built for the United States, the title to which by the contract passed to the government as fast as paid for, was a public work within the provisions of the act. On the other hand, that without such contract provision, the vessel while in the course of construction was not a public work of the United States and was subject to the lien given by the state law to creditors furnishing labor and materials in the construction; the point of difference obviously centering on the question of title.

"But none of the questions decided by the Supreme Court in the Crane Case are particularly helpful in this, except that Mr. Justice Holmes, who wrote the opinion, defines 'public works,' as used in the Heard Act, in these words: 'If it (the work) belongs to the representative of the public, it is public.'

"Read literally, this definition would confine the provisions of the act to those contracts involving public works of which the ownership is in the federal government and this, we think, is the true test. In the title and in the body of the act the words used limit its pro-

> visions to contracts for the construction of public buildings or the prosecution and completion of public works, and these terms, we think, mean buildings or works of the United States."

Under the above holding "public buildings" were considered to mean public buildings or public works which were buildings or works of the United States.

Section 10937, supra, further provided, "and structures with their furniture and equipments." The Weldon Spring Ordnance Works was built under an act of Congress, and is a public building or structure. The fact that Congress ordered it, made it public. (Barnidge v. United States, 101 F. (2d) 295).

In 50 C. J., Sec. 11, page 850, "public buildings" are defined, in a narrow way, as follows:

> "In a narrow sense a 'public building' is a building erected and owned by state, county, or municipal authorities, a building owned or controlled and held by the public authorities for public use; a building belonging to, or used by, the public for the transaction of public or quasi-public business. As so defined the term 'public building' includes a high school building, a hospital, a jail, a town calaboose, or a common schoolhouse."

In the case of Brackett v. James Black Masonry & Contracting Co., 32 S. W. (2d) 288, the Supreme Court of this State in rendering an opinion in a damage suit for personal injuries, passed on the relationship of master and servant and defined "structure" as follows:

> "We think there is no doubt but that the construction of a reservoir was the erection of a building within the purview of the statute. The phrase, 'any kind of building,' is to be interpreted 'structure,' which is defined as that which is constructed, or the arrangement and union of parts in or the manner of construction or organization of a body or object, or construction. It is evident, we think, that the statute covers a structure."

Under the above definition a "structure" need not be a building, but could have been a reservoir.

Under the facts in your request the Weldon Spring Ordnance Works, which is situated on land owned by the United States, is either a public building or structure, and the furniture or equipment in said public buildings is exempt from taxation under Section 10937, supra.

CONCLUSION

It is, therefore, the opinion of this department that the personal property owned by the United States government in Weldon Spring Ordnance Works is not subject to taxation for ad valorem taxes by the State of Missouri or any of its agencies or subdivisions.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney-General

WJB:RW

INSURANCE:
ARROW ROCK TAVERN: Construing an act of the General Assembly and appearing at page 107, Laws of Missouri, 1923, pertaining to Arrow Rock Tavern.

August 18, 1942

8-21

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your request for an official opinion under date of August 8, which reads:

> "Information has been received by me to the effect that certain damage was done by windstorm on April 27, 1942 to the Arrow Rock Tavern, Arrow Rock, Missouri. It is my understanding that the State of Missouri and either the Missouri Society of the D. A. R. or Missouri Society of D. A. R. are insured against loss on account of said damage. It is expected that each of two insurance companies will issue draft for payment of its share of the loss which has been occasioned. I am informed that said damage has been repaired and that certain expense has been incurred for the repairs.
>
> "Enclosed herewith (to be returned by you to the undersigned) is copy of document entitled 'C O N T R A C T' the original of which (whether dated, or not, I do not know) I understand was entered into between the State of Missouri and Missouri Society of Daughters of the American Revolution.
>
> "Your opinion is respectfully requested on the following questions:
>
> I
>
> "Assuming that the drafts expected to be

issued shall be made payable jointly to the order of both the State of Missouri and either the Missouri Society of the D. A. R. or Missouri Society of D. A. R., is it required by law that the money derived from the drafts go into the treasury of the State of Missouri?

II

"If it is not required by law that the money derived from the drafts mentioned in 'I' go into the treasury of the State of Missouri,

"(a) Would it be legal for the money derived from said drafts, in so far as the price of the repairs which are mentioned in the first paragraph of this letter shall consume said money, to be used for the payment of that certain expense incurred for said repairs (or for the payment of so much of said expense as is reasonable), and for the balance, if any, of said money to be paid into the treasury of the State of Missouri?

"(b) If it is legal for the money derived from said drafts, in so far as the price of the repairs which are mentioned in the first paragraph of this letter shall consume said money, to be used for the payment of that certain expense incurred for said repairs (or for the payment of so much of said expense as is reasonable), and for the balance, if any, of said money to be paid into the treasury of the State of Missouri, can any official of the State, and, if so, who, legally bind the State by a consent , in writing, to an agreement that the Missouri Society of the D. A. R. or Missouri Society of D. A. R. shall (1) receive the money derived from said drafts, (2) pay that certain expense incurred for repairs which is mentioned in the first

paragraph of this letter (or pay so much of said expense as is reasonable), and (3) cause the balance, if any, of said money to be paid into the treasury of the State of Missouri?

III

"Assuming that the drafts expected to be issued shall be made payable solely to the order of the Missouri Society of the D. A. R. or Missouri Society of D. A. R., is it required by law that the money derived from the drafts go into the treasury of the State of Missouri?

IV

"If it is not required by law that the money derived from the drafts mentioned in 'III' go into the treasury of the State of Missouri,

"(a) Can any official of the State and, if so, who, legally bind the State by a consent, in writing, to payment being made by the insurance companies to the Missouri Society of the D. A. R. or Missouri Society of D. A. R. of the proceeds of the insurance?

"(b) If an official of the State may legally bind the State by a consent, in writing, to payment being made by the insurance companies to the Missouri Society of the D. A. R. or Missouri Society of D. A. R. of the proceeds of the insurance, would it be legal for the money derived from said drafts to be received by the Missouri Society of the D. A. R. or Missouri Society of D. A. R. in trust to be used, in so far as the price of the repairs which are mentioned in the first paragraph of this letter shall consume said money, to pay that certain expense incurred for said repairs (or to pay so much of said expense as is reasonable) and to pay the balance, if any, of said money into the treasury of the State of Missouri?

The Fifty-second General Assembly enacted a provision authorizing the purchase of said Arrow Rock Tavern and Annex for Five Thousand ($5000.00) dollars. (Laws of Missouri 1923, page 107. See said act in the Contract.)

Thereafter on the 25th day of August, 1923 the fee owners conveyed to the State of Missouri the Arrow Rock Tavern and Annex, hereinafter described in the Contract, in consideration of Five Thousand ($5000.00) dollars. Thereafter on the 4th day of October, 1923, at a State conference, the Missouri Society of the Daughters of the American Revolution duly assembled by their constitution and by-laws adopted a resolution hereafter contained in the Contract.

Thereafter, in 1923 the Contract, which the above act requires the Governor to enter into with the Missouri Society of the Daughters of the American Revolution, was executed by the then Governor of the State of Missouri, the Honorable Arthur M. Hyde and Mrs. Paul D. Kitt, the then State Regent of the Missouri Society of the Daughters of the American Revolution. The Contract reads:

> "THIS AGREEMENT, made and entered into this _____ day of _____, 1923, by and between the State of Missouri, by and through Arthur M. Hyde, Governor of the State of Missouri, pursuant to authority hereinafter set forth, as party of the first part, and Missouri Society of Daughters of the American Revolution, by and through Mrs. Paul D. Kitt, State Regent, pursuant to authority hereinafter set forth, as party of the second part,
>
> "WITNESSETH THAT:
>
> "WHEREAS, by an Act of the General Assembly of the State of Missouri, approved April 2, 1923, appearing at page 107, Laws of Missouri, 1923, it is provided as follows:
>
> "'Section 1. Authorizing purchase of Arrow Rock Tavern and annex, etc.- That the governor be and he is hereby authorized to purchase from the owner thereof, for the

State of Missouri the property known as the Arrow Rock Tavern and annex consisting of a sixteen-room brick building and contents. (Excepting a few personal pictures and two pieces of tapestry reserved by the owner), including the hotel equipment and numerous relics of great historical value, and other buildings all situated on a tract of land and in the village of Arrow Rock in Saline County, Missouri, having a width of 59 feet in front and 105 feet in the rear by a depth of 210 feet; provided that said property can be secured as it now exists free of encumbrance for the sum of five thousand dollars.

"'Section 2. State to require good title to property. It shall be the duty of the governor to see that said owner furnishes the state an abstract of title showing that the state gets good title to the property clear of all encumbrances, and upon delivery by the owner of such abstract and deed making such conveyance and the delivery of such property to the state intact the state auditor shall, at the direction of the governor, draw a warrant on the state treasurer for the said sum of five thousand dollars payable to the owner.

"'Section 3. To be placed in the custody of Missouri Society of Daughters of American Revolution. Upon the acquisition of said property as provided in Sec. 2, it shall be the duty of the governor t o place the same, by contract in the name of the State of Missouri, in the custody of the Missouri Society of Daughters of the American Revolution (D.A.R.) making such restrictions and provisions there-in as in his judgment will be necessary for its preservation and maintenance in its present condition without cost to the State.

"'Section 4, Sum of $5,000 appropriated. There is hereby appropriated out of the general revenue fund of the state the sum of $5,000.00 for the purpose of carrying into effect the provisions of this act.

"'Approved approved April 2, 1923'.

"AND, WHEREAS, by a general warranty deed, executed on the 25th day of August, 1923, Nettie Morris Dickson and Lester N. Dickson, her husband, and Annie W. Hickerson, a single woman, of the County of Saline, State of Missouri conveyed to the State of Missouri, as authorized by the above and foregoing law, in consideration of the sum of Five Thousand ($5,000.00) Dollars therein provided, the following described tracts or parcels of land, situated in the County of Saline, in the State of Missouri, to-wit:

"' Lot No. 60, and the east half (½) of Lot No. 59 in the town of Arrow Rock, Missouri, said east half of Lot No. 59 fronting 39 feet on Main Street, said lots being in Block No. 17 in Arrow Rock Mo. Also: A lot or parcel of ground described as follows: Beginning at the northwest corner of the lot known as the Hotel Lot, and running thence south on line of the Arrow Rock Hotel lot, 71 feet & four inches, thence west 20 feet & 3 inches, thence North 71 feet & 4 inches, thence East 20 feet and 3 inches to the place of beginning all being in Lot No. 59 Block 17, in Arrow Rock, Mo., and including all buildings and improvements on said lot, together with the hotel equipment and numerous relics as specified in House Bill No. 511 in Section No. 1 of said Bill, as passed by the General Assembly of Missouri of 1923.

"' The above description as to metes and bounds and dimensions conforms to the description of said property as outlined in said section of said bill authorizing the purchase.'

"AND, WHEREAS, the Missouri Society of Daughters of the American Revolution in State conference duly assembled, as provided by their Constitution and By-laws on the 4th day of October, 1923, adopted the following resolutions, to-wit:

"'WHEREAS, by act of the General Assembly of the State of Missouri in the Year 1923, the Governor of the State was authorized to purchase the Arrow Rock Tavern at Arrow Rock, Missouri, for the State of Missouri, and to contract with the Missouri Society of Daughters of the American Revolution (D.A.R.) for its maintenance and up-keep: And,

"'WHEREAS, such property has been purchased and turned over to our Society under the terms of said Act of the General Assembly; Now, Therefore,

"'BE IT RESOLVED by the Missouri Society of Daughters of the American Revolution, in State Conference duly assembled:

I

"'That we accept the obligations of the provisions of the law aforesaid, and ratify the contract by our officers with the Governor in taking over such property of the State.

II

"'That for the management of said property we hereby create a body to be known as the Board of Managers of the Arrow Rock Tavern, the members of which shall be members of our Society. The membership of said Board of Managers, the method of selection, term of office, and powers and duties being fixed in the following paragraphs of this resolution.

III

"'The Board of Managers of the Arrow Rock Tavern, shall consist of eight members, seven of whom shall be appointed by the State Regent of the Missouri Society of Daughters of the American Revolution. Of

the first Board, three shall be appointed for three years, two for two years, and two for one year. The Regent of the Arrow Rock Chapter of said Society (whoever she shall be) shall be the eighth member of said Board, and the Vice-Chairman thereof, The State Regent shall designate who shall be chairman of said Board of Managers, but the Board shall select its Secretary and Treasurer. As the terms of office of the members of the first Board of Managers expire, the then State Regent shall appoint members to serve for the term of three years, so that there shall be three members to be Appointed one year, and two each the succeeding two years.

IV

"'Said Board of Managers shall meet at Arrow Rock, at least twice per year, and at such other times and places as may be designated by a call of the Chairman of the said Board. The Board shall have full control of the property for the Society and can fix its own rules and regulations, subject always to change and modifications by the State Conference of the Society.

V

"'Said Board shall have power to lease or rent the property, and receive the rents and profits thereof. It shall also make and pay for the necessary repairs upon the property, in order to preserve the same in good condition, but extensive improvements shall be first ordered by the State Conference. It shall also keep the property insured and pay the premiums on the policies, and this expense, and the expense of repairs aforesaid, shall be paid from such funds as the Board has from rents or other sources.

VI

"'Said Board shall make accurate report of its management to each annual State Conference, and a copy of such report shall be

sent to the Governor of the State. It shall also furnish to the State Regent a report of each meeting of the Board.

VII

"'If said Board is unable to rent or lease the property it shall have power to so run and conduct the same as to make it as nearly self sustaining as possible, and to this end may employ a caretaker or other necessary help. In the management of the property the said Board shall also consult with the Governor, as the representative of the State, under the law providing for the purchase of the property by the State.'

"NOW, THEREFORE, in consideration of the premises aforesaid, and of the mutual covenants herein contained, it is hereby agreed by and between the parties hereto that the party of the first part does hereby place in the custody of the party of the second part, the property hereinabove described, subject to the terms to the terms and conditions, first, of the Act of the Legislature, hereinabove set forth, and second, of the resolution of the State Conference, Missouri Society of Daughters of the American Revolution, hereinabove set forth; and the second part hereby accepts said property and assents to said conditions and all the conditions herein contained.

"IT IS EXPRESSLY UNDERSTOOD AND agreed that the essence of this contract is the preservation and maintenance in its present condition as a historic edifice and repository for historic relics of the property herein mentioned and the preservation and maintenance for their historic value of the contents thereof; and the compliance with said essential requirement shall be a question of fact for determination by the Governor of the State of Missouri at any time such

question may arise.

"IT IS, THEREFORE, understood and agreed that the then Governor of the State of Missouri may at any time terminate the tenancy of said property by the party of the second part under this contract, upon sixty (60) days' written notice, duly served upon the then State Regent or chief executive officer of the Missouri Society of Daughters of the American Revolution, for any violation of the terms of this contract, to be specified in such notice.

"IT IS FURTHER PROVIDED and agreed that whenever it shall appear to the then Governor of the State of Missouri that said property is not being preserved and maintained without cost to the State, he may thereupon terminate this contract immediately. The power of the General Assembly of the State of Missouri, to dispose of the property herein described, by sale or other disposition, is expressly recognized and reserved.

"WITNESS our hands to duplicate parts hereof the day and year last above written

STATE OF MISSOURI

By /s/ Arthur M. Hyde
Governor

Attest:

/s/ Charles U. Becker
Secretary of State

MISSOURI SOCIETY OF DAUGHTERS OF THE AMERICAN REVOLUTION.

By /s/ Mrs. Paul D. Kitt
State Regent.

Attest:

/s/ Mrs. W. Ernest Glenn
State Recording Secretary."

Under this act and Contract the State of Missouri owns said property and the Missouri Society of the Daughters of the American Revolution merely have custody of said property. The Society is obligated to maintain and preserve said property in its present condition without any cost whatsoever to the State of Missouri. The Society may rent or lease said property and is authorized under Section V of the Resolutions and Contract to receive said rental. It further provides that said Society shall keep the property insured and pay the premium on the policies and such expense and the expense of the repairs shall be paid from such funds as the Board may have from rents and other sources.

It is apparent that it was the intention that said insurance should be taken out for the protection of said property from any destruction. However, there is no provision in the contract whatsoever that specifically requires this insurance, if paid, be expended for the repairs or destruction occasioned by windstorm, etc. It would have been an easy matter to have inserted a provision following the request to keep the property insured and pay the premiums, any payments resulting from damage to said property to be used to repair or restore the property to its former status or that it shall be payable to the State of Missouri for such purpose, but this was not done.

In State ex rel Thompson vs. Board of Regents, 305 Mo.,57, a writ of mandamus by the State Treasurer was denied by the court. The writ required the Board of Regents of the Northeast Missouri State Teachers College to turn over to the State Treasurer money received from a fire insurance company on an insurance policy on buildings belonging to the State and destroyed by fire. Under the law the Board of Regents was vested with entire management of the college. The law also required the Superintendent of Public Schools to report all receipts of money from appropriations, incidental fees and all other sources, and the disbursements thereof and for what purposes, and the condition of said College. The Board of Regents from incidental fees paid premiums on fire insurance policies on said buildings. The court held that to pay the money in to the State would merely delay the rebuilding of said structures for the reason it would require another appropriation; that it was apparent the legislature intended such fees were not to be paid into the State Treasurer, also, that such money did not constitute revenue as used in the State Constitution and therefore the money was not required to be paid into the State Treasurer and be appropriated in order for the buildings to be reconstructed. In so holding the court said:

"I. The constitutional provision invoked by relator as the underlying authority for the issuance of this writ is but one of the many restrictions to be found in the Constitution of 1875 concerning the custody and expenditure of the revenue. The moving cause for the incorporation of these restrictions in the Constitution was to put an end to an era of extravagance and waste in the use of the revenue which had prevailed for more than a decade prior thereto- the Constitution of 1865 containing no such limitation as is found in the provision under consideration. This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the State from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the State from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources as our numerous statutes attest, but no matter from what source derived, if required to be paid into the Treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment or, as aptly put by the respondent, state money means money the State, in its sovereign capacity, is authorized to receive- the source of its authority being the Legislature. * * *

the Superintendent of Public Schools of all receipts of money from appropriations, incidental fees and all other sources and the disbursements thereof and for what purpose, and the condition of said college. The terms of this section indicate by reasonable implication the power of the board to hold and disburse without covering into the State Treasury the funds here in question. If, as is contended by relator, all moneys received by the board were required to be paid into the State Treasury the only money that could be disbursed by the board and for which it would have to render an account would be that which had been appropriated for the college by the Legislature. The authorized disbursements of the board are not thus limited by the section which includes 'appropriations, incidental fees and moneys received from all other sources.' In addition, the board is required to state the purposes for which these disbursements were made. Certainly it cannot, under any rule of construction, be held that a payment into the State Treasury of incidental fees received by the college is in any sense a disbursement. Even the tyro in the use of our mother tongue, attributes no other meaning to the word than to pay out or expend. A payment into the Treasury, therefore, cannot be so classified, as it simply effects a change in the custodian and the place of deposit of the fund. The correctness of our construction of Section 11505 is further attested by Section 11506 which requires the treasurer of the board to make an itemized statement to the Legislature of the receipts and expenditures of the board showing all disbursements of money received from the State and from other sources. In harmony with the construction given to the foregoing sections in Section 11508, which requires the board at its annual meeting to set apart 'all money derived from incidental or other fees paid by students,' etc., thus clearly recognizing that the college has funds within its control which were never in the State Treasury nor appropriated by the Legislature.

> "III.* Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the State Treasury and appropriated therefrom by the Legislature. In the absence of a mandatory requirement to that effect no duty is devolved upon such boards to thus dispose of these funds. Their duty in the premises in the presence of that discretion with which the law has clothed them is to expend such funds for the college, and account for same in the manner required by the plain provisions of the governing statutes.
>
> "No reason existing for the exercise of this court's mandatory power under the facts in this case, the writ is denied. * * * * * * "

Therefore, in answering your first query, in view of the foregoing authority, and that such moneys received from said insurance company for destruction does not constitute revenue as provided in our Constitution, that such money shall not be required to go into the treasury of the State of Missouri but same shall go to the Missouri Society of the Daughters of the American Revolution, of course we are assuming that said insurance policy did not provide to the contrary and further that the Society did pay all premiums upon said policy.

Your second query is practically answered by our conclusion to your first query. It would be legal to use said money to repair and restore said property to its former status. However, any surplus is not, under the law and Constitution hereinabove referred to, required to be placed in the State treasury. In reply to your third query, we have already answered same.

Our opinion relative to your fourth query is that no State official is authorized to bind the State as proposed. Furthermore, we are of the opinion that any necessary repairs to restore said property to its former status should be paid out of the insurance payment which is forthcoming as a result of said damage. We know of no way to force such expenditure from such payment. However, under the Act authorizing the purchase of said Arrow Rock Tavern and Annex and the Contract entered into it leaves no doubt that the Missouri Society of the Daughters of the American Revolution are obligated to pay for such damages.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARH:EAW

GOVERNOR: APPROPRIATIONS: LEGISLATURE - Neither regular general assembly or specially called general assembly can pass deficiency appropriation.

September 11, 1942

9-15

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your request for an opinion of recent date, which partially reads as follows:

> "Your opinion is respectfully requested on the following questions:
>
> (a) May the governor, during the period of time remaining in the present biennium, on his certificate legally certify for allowance and payment out of the state treasury, as other demands against the state, the expenses of some messenger to whom the governor has issued his warrant, under the seal of the state, and who has received the fugitive named in the warrant and conveyed such fugitive to the county in which an offense was committed, or is by law cognizable, in an amount which exceeds the sum remaining in the appropriation for the present biennium for the Apprehension of Criminals?
>
> (b) May the payment of the expenses referred to in question (a) be legally made from an appropria-

> tion by a session of the General Assembly which shall hereafter convene?"

Section 48 of Article IV of the Constitution of Missouri, reads as follows:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."(Underscoring ours.)

This section was adopted October 30, 1875, and went into operation November 30, 1875, and no similar section was in the Constitution of 1865. Under this section, any contract or agreement, made without express authority of law, shall be null and void.

Section 19, of Article X of the Constitution of Missouri, reads as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its manage-

> ment, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Under the facts set out in your request the appropriation for the present biennium for the apprehension of criminals is practically exhausted, there being only Seven Dollars and Nineteen Cents ($7.19) remaining.

Under Section 19, Article X of the Constitution of Missouri, supra, no money can be paid out of the treasury of this State, or any funds under its management, except where the money has been appropriated by law. Since there is no money in the treasury to pay more than Seven Dollars and Nineteen Cents ($7.19) out of the appropriation for the apprehension of criminals, any order made by the Governor, or contract which binds the State, would be null and void, if there was not sufficient money in the appropriation to pay the claim or demand against the State.

In 1933, the legislature saw fit to enact Article 1, Chapter 3, which is known as the "State Budget Law." Under Section 10907 R. S. Missouri, 1939, which is part of the State Budget Law, the legislature prohibited expenditures, where there was not sufficient money in the appropriation, to any department to pay the same.

In that section it is specifically stated:

> "The auditor shall keep accounts showing the appropriations and allotments. Such accounts shall show all charges and obligations incurred against such appropriations and allotments. No expenditure shall be made and no obligation incurred by any department without the certification of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same. The auditor shall be liable personally and on his bond for any certification in excess of any allotment or in excess of the cash balance available. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation. For any department maintaining its principal office outside of Jefferson City, the auditor shall be authorized to establish a system for certification of obligations and expenditures so as to prevent inconvenience and delay."

Under the above section it will be specifically noticed that the word "obligation" is used, meaning, the incurring of a debt. This section also provided

that the auditor would be liable personally, and on his bond, for any certification in excess of any allotment, or in excess of the cash balance available. Also, in this section, it will be noticed that the following sentence is included, "Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation." In other words, any officer who enters into a contract attempting to bind the State, where there is not sufficient money in the appropriation to pay the obligation, is liable personally and on his bond.

That part of Section 10907, supra, which provides that the cash balance should be available seems to be very impractical, but it is not for this department to say whether or not that part of the section is constitutional. The Supreme Court of this State has held that the balance of a statute is constitutional although certain parts of the section of the statute is unconstitutional.

In any event, under Section 19, Article X, of the Constitution of Missouri, Section 48, Article IV of the Constitution of Missouri, and Section 10907 R. S. Missouri, 1939, which are a part of the State Budget Law, no contract can be made binding the State where there is no appropriation for the demand against the State, or where the appropriation has been exhausted. We base this reasoning on the fact that since Section 48, Article IV of the Constitution of Missouri prohibits the payment or authorization of the payment of any claim against the state, county, or municipality, under any agreement or contract made without express authority of law and Section 10907, supra, prohibits the incurring of any obligation without first securing a certification from the auditor that there is sufficient money in the appropriation to pay the obligation.

The sections of the Constitution and the section of the Statutes hereinbefore set out clearly express that it was the intention of the framers of the Constitution and the legislature to keep the expenditures of any biennium within the appropriation made for that biennium. The intention of the framers of the Constitution may be construed by the action of the legislature in enacting laws to carry out certain parts of the Constitution. The legislature in enacting Section 10907, supra, construed Section 19, Article X and Section 48, Article IV of the Constitution of Missouri to mean that the expenditures of any biennium should not be more than the appropriation made for the same biennium. That the intention of the framers of the Constitution could be construed by the legislature in the enactment of a statute was held in the case of State ex rel. O'Connor v. Riedel et al., 46 S. W. (2d) 131, Par. 5, where the court said:

> "In determining the constitutionality of statutes, great weight has always been given to the contemporaneous construction placed upon the several provisions of the fundamental law. This is particularly true with regard to the construction given by the Legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is entitled to great weight and should not be departed from unless manifestly erroneous. 6 R. C. L., pp. 63, 64. * * * * * * "

The Missouri Constitution is a limitation on, and not a grant of, power to the legislature. (Gaines v. Canada, 59 Sup. Ct. 65, 305 U. S. 580, Mandate 131 S. W. (2d) 217.) The intent and purpose of lawmakers is of primary importance in determining the true meaning and scope of constitutional provisions. (Graves v. Purcell, 85 S. W. (2d) 543.)

Section 3977 R. S. Missouri, 1939, reads as follows:

> "The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

This section is to the effect that where the Governor agrees to pay the expenses of a return of a fugitive, the expenses should be paid out of the State Treasury the same as other demands against the State. Under this section the Governor is not restricted as to the amount of the expenses, and it does not set out any statutory fees or costs that can be allowed by the Governor, and he, alone, must determine the amount he should allow the messenger who returns the fugitive, as set out under Section 3976 R. S. Missouri, 1939. That it is in his discretion as to the amount of allowance was held in the case of State ex rel. See, Marshal, v. Allen, Auditor, 180 Mo. 27, l. c. 31, 32 where the court said:

> "Under the statute quoted (sec. 2744, R. S. 1899) the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, and all his acts as such are in that capacity, and hence he can not be interfered with in the discharge of his duties by the courts. * *

> "* * * The Governor alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor can not lawfully issue a warrant therefor. * *"

There is no question but that the allowance of expenses in the apprehension of criminals is a contract for the reason that the Governor enters into an agreement with the messenger as to the amount of expenses allowed for the return of the fugitive. Since the appropriation for the apprehension of criminals is practically exhausted, and the Governor allows a messenger the amount of his expenses, which is in excess of the present balance in the appropriation, he is contracting to bind the State to pay the expenses of a messenger, in violation of Section 19, Article X of the Constitution of Missouri, and Section 10907, supra, and the contract of the Governor with the messenger would be null and void, as set out in Section 48, Article IV of the Constitution of Missouri. The reason that the contract would not be binding on the State, is the fact that there is not sufficient money, or no money, in the appropriation to pay the claim. It was held that such contract, where no money was appropriated for the payment of a claim, would be null and void, in the case of State ex rel McKinley Pub. Co. v. Hackmann, State Auditor, 282 S. W. 1007, Par. 10, where the court said:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid

> pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose. And it might be said in passing that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law, and section 48 of article 4 of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law, and that all such authorized contracts shall be null and void." (Underscoring ours.)

In the above quotation, the court specifically held that the legislature could not now pass a valid act appropriating money for the payment of an illegal claim, because the claim was based upon a contract entered into without authority of law, and was in violation of Section 48, of Article IV of the Constitution of Missouri, which prohibits the appropriation of money for the payment of such a claim. This case is the last and ruling case on this particular point.

A further reason is the fact that under Section 10907, supra, which is part of the State Budget Law, the auditor is prohibited from certifying such a claim, and under Section 10895 R. S. Missouri, 1939, which is also part of the State Budget Law, the Governor is responsible for the preparation of the Budget and its presentation to the legislature, and shall enforce observance of the appropriation made by the legislature under the State Budget Law.

We are aware of the case of State ex rel. Kelly et al. v. Hackmann, 205 S. W. 161, which opinion was to the effect that architects by the name of Kelly & Kelly were entitled to money for services rendered in the building of the new State Capitol, although their claim was not demanded before the end of the biennium in which they performed their services, but in that case it was not a question of appropriation, for the reason that there was sufficient money in the fund earmarked for the building of the State Capitol.

Section 43, Article IV of the Constitution of Missouri, reads as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:
>
> "First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.
>
> "Second, For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.
>
> "Third, For free public school purposes.
>
> "Fourth, For the payment of the cost of assessing and collecting the revenue.

> "Fifth, For the payment of the civil list.
>
> "Sixth, For the support of the eleemosynary institutions of the State.
>
> "Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

Here This section is designated as a limitation on legislative power and specifically prohibits the appropriation of money by successive general assemblies in any other manner except as set out in this section. In reading this section we find no order of appropriation for the payment of claims arising in a former biennium, or at a former time, for which no appropriation had been made. In fact, it specifically states that no money shall be diverted from the treasury except in pursuance of regular appropriations made by law.

Another limitation on the legislative power is Section 44, Article IV of the Constitution which partially reads as follows:

> "The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, except in the following cases: * * * * * * * * *."

This section specifically prohibits the contracting or authorization of the contracting of any debt or liability on behalf of the State, except in certain instances which are set out in four separate paragraphs which are too lengthy for this opinion. The first exception being a renewal of certain bonds, the second exception which allows the creation of the debt in the case of an unseen emergency which may arise by reason of the fact that the revenue is not sufficient for the appropriation made. This exception does not mean that a debt can be created when the appropriation is exhausted, but means a deficiency of the revenue and shall not exceed the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars for any one year. The third exception provides for the general assembly to submit an act providing for the loan of $250,000.00 for any one year, this submission must be made to the voters of the State. The fourth exception is for the relief of members of the military service in World War Number One.

In reading both Sections 43 and 44 of Article IV of the Constitution of Missouri, we do not find any provision allowing the general assembly to appropriate money for expenditures created in the previous biennium.

Section 43, Article IV of the Constitution of Missouri, supra, prohibits the payment of money out of the state treasury on any claim where no appropriation has been made. It was so held in the case of State ex rel Gordon, 236 Mo. 142, l. c. 158, where the court said:

> "The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have

> no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would relator be entitled to the audit and allowance of his accounts for salary and expenses. * * * * * "

Section 48 of Article IV of the Constitution of Missouri, supra, became effective on November 30, 1875, and in the Laws of 1877, page 17 a general deficiency appropriation was made by the general assembly, which was the first general assembly after Section 48, of Article IV became effective. The legislatures from that time on have enacted deficiency appropriations under that name, and under the name of "Relief", but if the relief or deficiency appropriation is made for the payment of a contract or obligation that is null and void, then the appropriation would be a violation of Section 46, of Article IV of the Constitution of Missouri, which reads as follows:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The legislature on many occasions since 1877 has made deficiency and relief appropriations to most of the departments, but that fact cannot be taken advantage of by reason of laches, for the reason that the sections of the Constitution hereinbefore set out

are still in full force and effect. It was so held in the case of Alfred Harfst et al, Appellant, v. A. J. Hoegen, et al, Respondent, No. 37264, in the Supreme Court of Missouri, unreported. In that case Judge James Douglas, who wrote the opinion said:

> "It is of no purpose to discuss or decide other questions raised except to point out that long acquiescence of appellants in the management of the school cannot make such management proper. [18] No one may waive the public interest [19]; the constitutional provisions are mandatory and cannot be waived."

([18] Knoulten v. Baumhover, 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841; [19] De May v. Liberty Foundary Co., 372 Mo. 495, 37 S. W. (2) 640, 16 C. J. Const. Law, Sec. 89; [20] State ex rel United Railways Co., v. Public Service Commission, 270 Mo. 429, 192 S. W. 958.)

In Paragraph (b) of your request you ask the following question:

> "May the payment of the expenses referred to in question (a) be legally made from an appropriation by a session of the General Assembly which shall hereafter convene?"

We are assuming that when you say, and refer to the, "General Assembly which shall hereafter convene", you mean either the "Regular General Assembly", or a "Specially called General Assembly." Under the authorities hereinbefore set out, we believe that the contract with the messenger, where no money is in the appropriation, is null and void, and for that reason the next general, or specially called assembly, if one is called, is prohibited from appropriating any money on any demand against the State under any contract which is null and void.

We are enclosing a copy of an opinion rendered by this department on February 19, 1942, to you, in reference to a deficiency appropriation for the relief of the Grain and Warehouse Commission. In that opinion we held that a deficiency appropriation would be unconstitutional.

CONCLUSION

It is, therefore, the opinion of this department that the Governor during the period of time remaining in the present biennium, cannot, on his certificate, legally certify for allowance and payment by the State Treasurer, as other demands, against the State, the expense of some messenger to whom the Governor has issued his warrant, under the seal of this State, and who has received the fugitive named in the warrant and conveyed the fugitive to the county in which the offense was committed, or is by law cognizable or in an amount which exceeds the sum remaining in the appropriation for the present biennium for the apprehension of criminals.

It is further the opinion of this department that the payment of such expenses cannot be legally made from a later appropriation by a session of the regular general assembly, or by the session of a specially called session of the general assembly.

In view of the fact that legislatures, beginning in the first general assembly after the adoption of Section 48, Article IV of the Constitution of Missouri, have passed deficiency appropriations and appropriations for the relief of most of the departments of the State, and the last legislature of 1941 made a deficiency appropriation to many of the departments, including the Judiciary Department, we suggest that this matter should be tested in the Supreme Court by proper procedure so that there will be no doubt as to the legality of appropriations made by future legislatures.

We say this, not for the reason that we are in doubt about this opinion, but for the reason that such a decision would be final and leave no doubt as to the purposes of the framers of the Constitution in adopting Section 48 of Article IV and Section 19 of Article X, and the legislature, in enacting Section 10907, R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW
ENC (1)

FEDERAL SOLDIERS' HOME
AT ST. JAMES, MISSOURI:

It is not necessary for a soldier or sailor to have actually served in a war to be entitled to admission to the Federal Soldiers' Home at St. James, Missouri.

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September 15, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

This is to acknowledge receipt of your letter of recent date received by this department September 14th, 1942. Your letter is as follows:

> "Your opinion is respectfully requested on the following question:
>
> "Is a soldier or sailor entitled to admission into the State Federal Soldiers' Home at St. James, Missouri, who is a citizen of the state of Missouri, who was honorably discharged from the service of the United States, and who is in indigent circumstances, and from a disability, not received in any illegal act, is unable to support himself by manual labor, but who has not served in the United States army, navy or marine corps in any war and been honorably discharged from such service?
>
> "In connection with the question above propounded your attention is respectfully directed to Section 15136 and Section 15140 of the Revised Statutes of Missouri of 1939, and also to Article I, Section 1 of the By-Laws for the Government of the State Federal Soldiers' Home.
>
> "There is enclosed a copy of By-Laws and Rules and Regulations for the Government of the State Federal Soldiers' Home. With your opinion, hereby requested, kindly re-

> turn said copy of By-Laws and Rules and Regulations for the Government of the State Federal Soldiers' Home."

If we understand your question correctly, it is: if a person possesses all the other qualifications required by law to entitle him to admission into the Federal Soldiers' Home at St. James, Missouri, is it necessary for him to have served in the United States army, navy or marine corps in any war.

You have called our particular attention to Sections 15136 and 15140 of Article 2, Chapter 124, R. S. Mo. 1939, and to certain portions of Section 1, Article I of the By-Laws and Rules and Regulations for the government of the State Federal Soldiers' Home, St. James, Missouri, adopted November 3rd, 1939, by the Board of Managers of said Home.

It will be necessary to trace very briefly the history of the Federal Soldiers Home. We find that this home was created by the act of the General Assembly in 1897 (Acts 1897, page 28), which empowered the Board of Trustees created by the act "to receive for a nominal consideration from the corporation known as the 'Woman's relief corps soldiers' home' a good and sufficient conveyance of the property, comprising fifty-nine acres, more or less, in or near St. James, in the county of Phelps, known as the soldiers' home of said place, vesting the title to said property in the state of Missouri." The home was purchased in accordance with the above law and proceeded to function accordingly.

We call your attention to that part of Section 15136, R. S. Mo. 1939, which may have some bearing on your question, as follows:

> "The governor, by and with the advice and consent of the senate, shall appoint a board of trustees of the federal soldiers' home, to be composed of five members. Each of said members shall be a citizen of the state of Missouri, and more than thirty years of age, and it shall be the duty of the members of said board of trustees to maintain the home now established at

> St. James in the state of Missouri for disabled and indigent soldiers and sailors and army nurses who enlisted, served and participated in the Mexican war and the war of the rebellion for the preservation of the union of the United States; and also for the aged wives of such soldiers and sailors. * * * * * * * *"

It will be noted that this section merely describes the home then established and the people who were maintained or kept at the home at the time it was taken over by the State, and does not undertake to describe those who are now eligible to be admitted therein for the reason that Section 15140, R. S. Mo. 1939, provides what qualifications one must have to be admitted to said home, and Section 15136, supra, in no way sets forth the qualifications for admittance.

Section 5, Session Acts of 1897, the original act, has been amended in several particulars by adding different groups of persons who are entitled to admission since its original enactment.

By the Acts of 1911, page 119, the following words were added: "or widow or such ex-member of the enrolled Missouri militia, who served 90 days or more in the field during the civil war," and, by the Acts of 1939, at page 746, the word "mother" was inserted, referring to the mother of such soldier or sailor who was eligible to be admitted to the home. So that, Section 15140, R. S. Mo. 1939, reads as follows:

> "The soldiers and sailors who shall be entitled to admission into said home shall be citizens of the state of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances, and from any disability, not received in any illegal act, are unable to support

> themselves by manual labor, and that the aged mother, wife or widow of such soldier or sailor, and army nurses, who served with the armies of the United States or such ex-members of the enrolled Missouri militia, who served ninety days or more in the field during the civil war, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

By the amendment of Section 5, Session Acts of 1897, throughout the years down to the present Section 15140, R. S. Mo. 1939, the legislature has shown an intent to determine who was eligible to be admitted to the home and has not granted that power to the board of trustees to determine who shall be admitted.

Section 1, Article I, of the By-Laws referred to above, provides in part as follows:

> "The soldiers and sailors who shall be entitled to admission in the State Federal Soldiers' Home shall be citizens of the State of Missouri, who shall have served in the United States army, navy or marine corps in any war, and have been honorably discharged from such service, * * * * * * * * * * *"

Said section provides certain other qualifications for admission to the home not pertinent to the question here involved and which we therefore deem unnecessary to quote.

The authority for the Board of Trustees of the Home to make the rules and Regulations is found in the latter part of Section 15139, R. S. Mo. 1939, as follows:

> "* * * That the said board shall have the power to make all needful rules and regulations for the management and government of said home, to employ the necessary officers and employees, to fix their compensation and to formulate rules for the admission of the state's beneficiaries not inconsistent with the following section."

It will be noted by the By-Laws and Rules and Regulations of the Home that one of the qualifications for the admission of soldiers and sailors to the home is that they shall have served in the United States army, navy or marine corps in any war and have been honorably discharged from such service. Upon a reading of Section 15140, supra, we find no such qualification required for admission to the home by soldiers and sailors. In other words, it is not essential for the soldier or sailor to have actually served in any war to be admitted to the home, because Section 15140 makes no such requirement and the By-Law adopted above making such requirement would be inconsistent with Section 15140, supra.

CONCLUSION

It is, therefore, the opinion of this department that if the soldier or sailor mentioned in your request possesses all the other qualifications for admission to the Home at St. James as provided by Section 15140, supra, it is not necessary for him to have actually served in any war.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri

CRH:CP

CANNONS: State of Missouri has title to German cannons on Capitol grounds captured in first World War.

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September 21, 1942

9-22

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

Several days ago you requested this office to furnish you with an opinion regarding the title and ownership of the artillery pieces used for ornamental purposes on the Capitol grounds. These artillery pieces are from different wars. From the war with Germany there are five pieces, as follows: one 150 mm. long field rifle gun, one 135 mm. long field gun, one 210 mm. howitzer, one 75 mm. gun, converting to 75 A.A., one 77 mm. gun standard. These five pieces were distributed by the Secretary of War under authority of Section 203, Chapter 3, Title 5, U.S.C.A., which is as follows:

> "The Secretary of War is authorized and directed to apportion and distribute pro rata among the several States and Territories, and possessions of the United States and the District of Columbia in corresponding ratio as the total number of men serving in the armed forces of the United States, as hereinafter provided, from each State, Territory, or possession of the United States and the District of Columbia bears to the total number of men so serving from all States, Territories, possessions, and the District of Columbia, all guns and howitzers with their respective carriages, machine guns, and other war devices and trophies suitable for distribution and captured by or surrendered to the armed forces of the United States from the armed forces of Germany

> and allied nations, with the exception of such guns, howitzers, carriages, machine guns, and other war devices and trophies as may be required for experimental purposes, or for actual use by the armed forces of the United States; and the further exception of such of the devices aforementioned as may be required for display in national museums, at national homes for disabled volunteer soldiers, or for monumental purposes in Arlington National Cemetery and in other national cemeteries, national parks, and national monuments wheresoever situated."

Section 204 of the same Chapter and Title provides the basis of distribution and Section 205 of that Chapter and Title directs how shipments shall be made, and further provides as follows:

> "* * * If the chief executive or the commissioners of any State, Territory, possession, or District, shall not, within one year after notification of the character and quantity of the apportionment, file with the Secretary of War such acceptance and agreement, such apportionment, or any part thereof, shall be sold as surplus property as it then is and where it then is, or shall be destroyed - all as the Secretary of War, in his discretion, shall determine; and like action shall be taken in respect of the rejected portion of any apportionment accepted in part only, and war devices and trophies considered by the Secretary of War as unsuitable for distribution."

This law was enacted in 1924. Section 207 of the same Chapter and Title authorized the Secretary of War to make rules and regulations to carry the Act into effect.

A search of the records in the Adjutant General's office has failed to reveal any formal acceptance by the Governor of these pieces. In all probability if a copy of such acceptance exists it would be in the correspondence files of the Hon. Arthur M. Hyde, who was Governor of the State of Missouri at the time of the enactment of the law. There is, however, a copy of a letter written by F. M. Rumbold, the Adjutant General of Missouri, under date of May 5, 1925, to the Chief of Ordnance, requesting information in regard to the above mentioned pieces of artillery, in which letter it is stated by General Rumbold that he has been designated agent for the Governor and that the pieces have been received and are on the Capitol grounds.

None of the sections of the Federal statutes above referred to has ever been construed by any court.

The word "apportion" is defined by Webster's New International Dictionary as follows:

> "To divide and assign in just proportion; to divide and distribute proportionally; to make an apportionment of; portion out; to allot."

The word "distribute" is defined by Webster's New International Dictionary as follows:

> "To divide among several or many; to deal out; apportion; allot."

Further, in numerous cases the word "apportion" has been held to mean merely "to divide" and the word "distribute" while having no technical meaning in conveyancing, has also in numerous cases been held to mean "to divide among several", "to deal out." It is a word which is ordinarily used when referring to the dividing and giving out of personal property.

From the foregoing it appears to the writer that the above mentioned pieces of artillery were a gift from the Federal government to the State of Missouri to be accepted by the Governor; that they were properly accepted, although there

is no copy of formal acceptance, and that title to the same is in the State of Missouri and, further, that these pieces of artillery used for ornamental purposes may be dealt with in the same manner and by the same means as other pieces of ornamental personal property on the Capitol grounds are dealt with by the State.

This conclusion is strengthened by the administrative interpretation of the Chief of Ordnance in the letter dated November 11, 1926 and directed to Hon. F. M. Rumbold, Adjutant General of Missouri, treating with other articles which had been sent out under authority of the above mentioned Acts. This letter was a reply to a letter of General Rumbold asking directions about some material which had been shipped to the State of Missouri, which had not been formally ordered or accepted, or, about the Federal government helping to pay freight charges on the same. In the letter C. C. Williams, Major General United States Army, Chief of Ordnance, said:

> "I do not like to suggest that German shells be sold as scrap due to their value as souvenirs, but under the law they have passed to the Governors of the various States and if they cannot be distributed under conditions which will pay for their freight, I do not believe there is any bar from the United States government's viewpoint to the States selling them for reimbursement for the freight charges."

As you know, in the absence of construction by courts an administrative construction by the officer authorized to administer an Act is entitled to great weight. And, in further support of the conclusion is the above quoted portion of Section 205, Chapter 3, Title 5, U. S. C. A., supra.

There is also an old brass, or bronze piece which is a souvenir of the Spanish-American War. No record of any kind has so far been found dealing with this piece of artillery. However, in this connection it is desired to call your attention to Section 68, Chapter 5, Title 50, U. S. C. A., which is as follows:

> "The Chief of Ordnance is hereby authorized to sell without advertisement for public parks, public buildings, and soldiers' monuments purposes surplus obsolete brass or bronze cannon, carriages, and cannon balls at such prices as he may deem reasonable and just: Provided, That obsolete brass or bronze cannon and their accessories shall not be disposed of for such purposes except as provided for in this section."

As to the Civil War piece and the piece which is said to have been with the Doniphan Expedition in the Mexican War, we have not as yet been able to find any record dealing with its accession.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri.

TAXATION: DATE TAX LIEN BECOMES EFFECTIVE: Lien for taxes is created on assessment date. Such lien is not extinguished by passing title to tax exempt body.

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October 12, 1942

0-114

FILED
24

Hon. Herbert H. Douglas
Prosecuting Attorney
Neosho, Missouri

Dear Mr. Douglas:

This is in reply to yours of recent date wherein you submit the following set of facts and request:

> "In the fall of 1941 several thousands of acres of land were condemned in Newton County for the site of Camp Crowder. The government at the time of the appraisement took the position that the 1942 State and County Taxes would have to be paid, but since that time I have been informed that they are willing to release the 1942 State and County Taxes to the land owners if the State will give them the permission to do so. Are these taxes, both County and State, payable for the year 1942?"

In searching through the opinion files of this department I find that this department on June 19, 1935, by an opinion to Hon. William H. Tandy, Attorney for the United States Department of Agriculture, Rolla, Missouri, held that the tax lien for state and county taxes is fixed on June first and that a subsequent purchase in the name of the United States does not exempt the land from that lien; also opinion dated February 14, 1939, to A. W. Landes, legal title attorney, St. Louis, Missouri,

holding the same. From an examination of these two opinions, however, I find that the case of McAnnally v. Little River Drainage District, 28 S. W. (2d) 650, which is an opinion of the Supreme Court of Missouri en banc, dated May 15, 1930, was not considered.

In January, 1942, this department wrote another opinion on this question in which opinion the ruling of the Court in the Little River Drainage District case, supra, and the ruling of the Federal Court for the Western District of Missouri entitled U. S. v. Certain Lands in the City of St. Louis, Missouri, 29 F. 92, dated September 7, 1939, was considered. In that opinion this department held that the lien was not established until the levy was made. Since the Supreme Court of the United States in the case of United States v. Alabama by an opinion dated May 26, 1941, 313 U. S. 275, 61 S. Ct. 1011, has ruled on this question and has adopted like views expressed in the first two decisions referred to herein we deem it necessary to give this question further consideration.

In considering this question the following statutes and constitutional provisions are applicable:

Section 1, Article 14 of the Constitution of Missouri, provides in part as follows:

" * * * * * * * No tax shall be imposed on lands the property of the United States; * * * * * * "

Section 10937 R. S. Mo., 1939, provides in

part as follows:

> "The following subjects are exempt from taxation: * * * * * second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; * * * * * "

Section 10940 R. S. Mo., 1939, provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

As stated in your letter the government through condemnation proceedings came into possession of this land after the assessment but before the levy for the taxes was made. On June 30, 1941, the Supreme Court of Missouri en banc, in the case of State ex rel City of St. Louis v. Baumann, 153 S. W. (2d) 31, 34, held:

> "Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected. Bannon v. Burnes, C. C. W. D. Mo., 39 F. 892. And see cases cited in the notes in 30 A. L. R. 413 and 2 A. L. R. 1535. Since the City is seeking to purchase the land in its public governmental capacity and not as a mere fiduciary, the land becomes immune from taxation as

> soon as the City becomes the owner of it and such immunity would extend to taxes previously assessed and levied."

This was a case in which the City of St. Louis had bought in certain lots at a delinquent tax sale and refused to pay other taxes than the delinquent taxes for which the lots were sold. Under the law as it existed at that time the collector was not authorized to execute a deed on a tax certificate until the holder of the certificate had paid all outstanding taxes on the property described in the certificate. The Court in the Baumann case, in speaking of the liability of the city for these taxes held that the city was not liable because it was a tax exempt body. In that case the assessment and levy had been made. However, the Court did not say that the purchase by a tax exempt body would destroy the tax lien which existed at the time of the purchase. The lien-holder may not have a right to proceed to enforce his lien, yet his lien is not extinguished because of that fact. This principle is announced in U. S. v. Pierce County et al, 193 F. 529, l. c. 531, wherein the Court said:

> "In the case of lands acquired by the United States for needful public buildings, with the consent of the state Legislature, as is the situation here, the national Constitution withdraws such 'places' entirely from the jurisdiction of the state immediately upon their purchase by the general government. The determinative question in the present controversy, therefore, is whether the taxes in question were imposed before or after the acquisition of the property by the United

> States. If they were imposed before, they would continue to constitute a valid lien on the premises, though even in such case the acquisition of the property by the general government would withdraw it from the jurisdiction of all state officers, and resort for the enforcement of any lien thereon would have to be had to the tribunals of the United States. A subsequent tax sale by state officers, even for a valid tax, would be void."

This case is in the annotations of Volume 2 A. L. R. 1538, which is cited by the Supreme Court in the Baumann case as authority for the above statement that property is exempt when purchased by a tax exempt body.

In the case which you submit it seems that the assessment had been made but the levy had not been made. In our opinion dated January 16, 1942, we followed the statement of the Supreme Court en banc in the McAnnally v. Little River Drainage District, 28 S. W. (2d) 650, 651, wherein the Court said:

> "The lien of the state for taxes is established by an assessment of all land for that purpose. Section 12757. However, said lien does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax. Likewise, the lien of a drainage district annually accrues and becomes a fixed incumbrance at the time the board of super-

> visors 'determine, order and levy the amount of the annual installment of the total taxes levied under' section 4395. The intention of the Legislature could not have been otherwise, for, as argued by respondents: 'Can a lien exist until the amount of the charge has been determined? Can a charge be cancelled until it has been created? Can a sale of land in 1926 destroy a tax not to be determined and levied until in 1928? Can anything be destroyed prior to its creation? A landowner cannot pay the annual tax until after it has been determined, ordered and levied and certified to the Collector. How can it be contended that it is a lien until the owner of the property charged had an opportunity to discharge the so-called lien?'"

Judge Collet in the Federal District Court of Missouri in the case of U. S. v. Certain Lands in City of St. Louis, Missouri, 29 F. 92, also followed this opinion and held that the tax lien did not come into being until the levy was made.

However, in an opinion by the Supreme Court of Missouri in State ex rel Hayes v. Snyder, 139 Mo. 549, dated June 8, 1897, Division 2 of the Supreme Court had before it the question of the tax on property which had been sold to the United States. This land was sold after the assessment but before the levy. The tax was assessed June 1, 1891. The government acquired title on July 1, 1891. The tax was levied on April 1, 1892, and was not payable until September 1, 1892. In speaking of the liability for these taxes by the owner of the land on assessment date, the Court said at l.c. 552:

> "The first question presented by this record for our consideration is as to whether or not the assessment of taxes against the real estate owned by defendants at that time, created a personal liability against them for the taxes? It is insisted by plaintiff that it did, both by reason of section 7569, Revised Statutes 1889, which provides that 'every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year,' and irrespective of the statute. We quite agree with plaintiff with respect to the meaning of the statute and that by its provisions a personal liability exists against defendants for the amount of the taxes levied upon the land which they owned on the first day of June, 1891. * * * * * "

By this opinion the Court has held that the state has an inchoate lien upon the lands as of the date of assessment.

Section 10941 R. S. Mo., 1939, provides as follows:

> "Government lands entered or located on prior to the first day of June shall be taxable for that year and every year thereafter; school and swamp lands and lots shall become taxable whenever the county sells, conveys or agrees to con-

> vey its title; real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the state in all real property for all taxes thereon, which lien shall be enforced as hereinafter provided in this chapter; said lien shall continue and be in force until all taxes, forfeitures, back taxes and costs shall be fully paid or the land sold or released, as provided in this chapter."

This Section clearly indicates that the lien is created on assessment date. We think that the Supreme Court of the United States in the case of U. S. v. State of Ala., 61 S. Ct. 1011, 313 U. S. 275, has adopted the same views. In that case the Court ruled that the lien for taxes existing at the time the property comes into possession of a tax exempt body is not extinguished by such acquisition, but that the holder of the lien cannot proceed to enforce it while the property is so held. However, such a lien is a cloud on the title which, with the consent of the governmental owner for the enforcement of the same, could be prosecuted.

The Alabama case, supra, was decided May 26, 1941. In that case the evidence showed that the assessment date was October 1. The government acquired some of the land in question after the assessment date, some of it before the date of the levy and other parts of it after the date of the levy. These lands were sold by the State of Alabama for delinquent taxes and that suit was brought to clear the title for the lands. The government took the position that since it acquired the lands before the levy then the taxes were not imposed, therefore, no lien upon which a sale could be pre-

dicated existed; and therefore, the sale for delinquent taxes was void. The Alabama Statute (Section 372, Act 194 General Acts of Alabama, 1935, page 566) provides in part as follows:

> "From and after the first day of October of each year, when property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; * * * * * * * "

The Supreme Court of the United States in construing that statute at l.c. 1013 said:

> " * * * * * There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. * * * * * * * We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax

> liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified. * * * * * "

The language of the Alabama statute with reference to the creation of the lien is quite similar to the language of the Missouri statute, Section 10941, with reference to the creation of this lien and we think the same construction of the Missouri section would be adopted by the Supreme Court of the United States that was adopted on the Alabama statute.

While the Supreme Court in the St. Louis v. Baumann case, supra, held that the City was not liable for outstanding taxes which had been levied and assessed before it came into possession of such lands, and even though it would apply to such lands purchased by a tax exempt body, still we have the question of whether or not tax liens existing at the time of such purchase are extinguished. If the lien is not extinguished then, of course, it is a cloud on the title regardless of whether the owner of the land may be proceeded against in the enforcement of such lien. U. S. v. Pierce County, 193 Fed. 529, supra. This was the view taken by the Supreme Court in the Alabama case. The government in that case took the position that even though it could not be sued without its consent still it was entitled to have a marketable title so that if it desired to dispose of the property there would be no cloud on the title by reason of the tax lien. At. l.c. 1014 (61 S. Ct.) the Court in discussing this question said:

> " * * * * * The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title in such circumstances to see that provision is made for the payment of taxes and the Government could easily have protected itself in like manner. * * * * * * * "

In our opinion dated January, 1942, we quoted Judge Collet in the case of U. S. v. Certain Lands in City of St. Louis, Missouri, 29 F. 92, dated September, 1939. As stated above that opinion followed the opinion of the Supreme Court in the Little River Drainage District case. In the federal opinion, Judge Collet referred to two Missouri cases, namely, Blossom v. Van Court, 34 Mo. 390, and McLean v. Shelbe, 45 Mo. 130, which, under an old statute, the Court held that the lien for taxes was created on assessment date. Judge Collet held that since the present statute is different from the statutes in force when those opinions where written, then they would not apply now. Of course, that is the rule. From an examination of the federal opin-

ion and the Little River Drainage District opinion, we find that the case of State ex rel v. Snyder, supra, was not considered. The Snyder opinion was written under the statutes, namely, 7569 and 7570 R. S., 1889. These statutes are precisely like our present statutes, Sections 10940 and 10941, supra.

Therefore, we think the rule of the Court in the Snyder case would be controlling. In State ex rel Waddell v. Johnson, 316 Mo. 21, 296 S. W. 806, Judge Gantt, author of the opinion for the Court en banc, held that the taxes became a lien on June first, the assessment date; but Judge Collet in the St. Louis opinion, supra, said that was dictum.

Again referring to the statement of the Court in the Little River Drainage District case, it will be seen that by the first two sentences of the opinion the Court said:

> "The lien of the state for taxes is established by an assessment of all land for that purpose. Section 12757. However, said lien does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax. * * * * * * "

The remainder of the statement quoted above to some degree contradicts these two sentences. It will be noted, however, that the case under consideration there pertained to drainage district taxes and

for that reason such a statement might have been appropriate, but under the previous rulings of the Supreme Court this department takes the view that the lien for the tax was established by the assessment.

We also call your attention to the statement of the Court in the case of State ex rel v. Snyder at l.c. 555 wherein the Court said:

> "There are therefore two different methods provided by statute for the collection of taxes against real estate, viz., one by suit to enforce the State's lien against the land, the other to distrain personal property for 'all taxes.' In re Life Association of America, 12 Mo. App. 40, it was said: 'The right thus given to distrain personal property for "all taxes," as well before as after they have become delinquent, shows that all taxes are personal charges against the owner of the property in respect of which they are levied. * * * * * * "

So if a person owns lands upon which the inchoate lien for taxes exists, then even though such lands pass to a tax exempt body before the taxes are paid, the taxing authorities may proceed by distress warrant to collect the taxes.

CONCLUSION

From the foregoing it is the opinion of this department that the inchoate lien for taxes exists on the date of assessment and that the transfer of the property tax to a tax exempt body does not extinguish the lien and it remains a cloud on the title regardless of the ownership thereafter. Following these rules the taxes, both county and state, on the lands referred to in your letter are payable for the year of 1942.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:FS

ELECTIONS:
SPECIAL, FOR STATE REPRESENTATIVES AND SENATOR:

Governor can set election dates in election writs and cannot amend or supplement them. If sheriffs change dates set, an irregularity is created, but House of Representatives and Senate respectively may affirm results of elections.

October 17, 1942

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

Your request of October 16, 1942, for an opinion upon the following is acknowledged:

"The Governor has issued writs of election to fill the following vacancies:

(a) 13th Senatorial District
(b) Representative from Ralls County
(c) Representative from Third Representative District of Jasper County

"The writ of election for (a) and the writ of election for (b) each directs that the election be held on October 28, 1942, and the writ of election for (c) directs that the election be held on October 27, 1942.

"QUESTIONS:

"1. May the election in (a), (b) and (c) be legally held on November 3, 1942, instead of on the dates designated in the writs, provided the sheriff in (a), (b) and (c) changes the date for the election in (a), (b) and (c)?

"2. May the Governor legally by an amendment of each of the above mentioned writs, or by withdrawing the original writs and the issuance of new writs, direct that each of the abovementioned elections be held on November 3, 1942?"

Inasmuch as the system of elections in the United States is not of common law origin but is entirely statutory, and the exercise of the right of suffrage is controlled solely by constitutional and legislative provisions, the questions submitted depend upon certain statutes and constitutional provisions of Missouri. 18 American Jurisprudence, Sec. 2, p. 179; Taylor v. Buckham, 178 U. S. 548, 44 L. Ed. 1187; State ex rel. Ellis v. Brown, 33 S. W. (2d) 204, l. c. 107; State ex rel. Edwards v. Ellison, 196 S. W. 751, 271 Mo. 123.

"The system of elections in the United States is not of common law origin. The subject is entirely statutory, and the exercise of the right of suffrage is in all states regulated by constitutional and statutory provisions. These provisions vary widely in the different states, and it has been a common occurrence that as a result of statutory changes, different systems and rules have at different times prevailed within the same state. * * * * *"

18 American Jurisprudence,
Sec. 2, page 179.

In State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, l. c. 107, 326 Mo. 627, the following is stated:

> " * * * It is true that the right of suffrage is not a natural or inherent right, if there be any such, but is purely conventional. It is not, however, conferred by the Legislature but by the organic law. As no privilege is granted by the statute in question, the rule of construction invoked is without application."

Section 14 of Article IV of the Constitution of Missouri provides:

> "Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

Section 17 of Article IV of the Constitution of Missouri is, in part, as follows:

> "Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; * * * *."

Section 12859, R. S. Missouri, 1939, is as follows:

> "Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

Section 12860, R. S. Missouri, 1939, is as follows:

> "When any vacancy shall happen in the senate, for a district composed of more than one county, the writ of election shall be directed to the sheriff of the county first named in the law establishing the district; and when such vacancy shall happen in a senatorial district, which shall have been divided or altered after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the county first named in such old district; and when any vacancy shall happen in either house, for any county which shall have been divided after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the old county."

Section 12861, R. S. Missouri, 1939, is as follows:

> "The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies

> of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

It appears that each of the writs of election heretofore issued to fill the designated vacancies set the election day, while the statute, Section 11492, supra, clearly provides that the Governor shall mention in the writ how many days' notice the sheriff shall give of the special election, not less than ten. Section 12861, supra, provides that the sheriff, upon receipt of a writ of election, shall call the election to supply such vacancy, and shall issue his proclamation or notice for holding the election accordingly, and that notices shall be posted. These provisions are upon the same subject-matter, to-wit, special elections to fill vacancies in the General Assembly, and should be read together and harmonized. In re Rosing's Estate, 85 S. W. (2d) 495, 337 Mo. 544; State v. Mangiaracina, 125 S. W. (2d) 58, 344 Mo. 99; State ex rel. Henning v. Williams, 131 S. W. (2d) 561, 345 Mo. 22; State v. Gomer, 101 S. W. (2d) 57, 340 Mo. 107; State ex rel. Central Surety Ins. Co. v. Commission, 155 S. W. (2d) 43.

No statutory or constitutional provision, in express terms, authorizes the Governor to set the day of the elections.

Section 14 of Article IV of the Missouri Constitution is similar, in effect, to Article I, Section 2, Clause 4, of the United States Constitution, and decisions arrived at under the Federal constitutional provision are persuasive here. It will be noticed, by a comparison of the State and Federal constitutional provisions, that the phrase "writs of election to fill such vacancies" appears in each of the constitutions.

In 20 C. J., Sec. 86, page 101, the following is stated:

> "Under another provision that, when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies, the power carries with it the power to fix the time and place of holding such elections, where they have not been fixed by law. The time of such an election is a matter of executive discretion with which the courts will not interfere."

In the case of John Hoge, Clarke & Hall Contested Election Cases, H. of R., page 135, the Governor of the State of Pennsylvania issued a writ of election on October 22, 1804, to supply a vacancy in the House of Representatives. The election was directed to be held on November 2, 1804, and the sheriff did not proclaim the election until October 31. Mr. Hoge received the most votes at the election, and when his seat was contested, the following was ruled:

> "Where the Legislature of a State have failed to 'prescribe the times, places, and manner' of holding elections, as required by the constitution, the Governor may, in case of a vacancy, in his writ of election give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice. In this case the notice was short, (in effect only two days,) yet as the time prescribed was a day fixed for a general election, to wit, of electors for President and Vice President, it was held to be sufficient."

Watson's treatise on "Constitution of the United States", page 199-200, states:

> "Where the legislature of a State fails to prescribe by law the time of an election to fill a vacancy in Congress, the Governor may fix the time in his writ of election. * * * * "

Thus, it appears that the Governor, having been given the right to issue the writs of election, has the implied authority to fix the date of the elections in the writs.

The contention may be advanced that, inasmuch as the Governor is directed to issue writs of election, and may fix the date of such elections therein, he may later change the election dates by additional or supplemental writs of election, and on the theory that he has control of the writs. This contention in all probability would be supported by an argument that the writs are similar to a judicial writ, which is always under the control of the court that issued it until the writ is completely executed.

Such an argument would apparently be unsound, by virtue of the decision of the Supreme Court of Missouri in the case of State ex rel. Attorney General v. Seay, 64 Mo. 89, l. c. 98, in which it was ruled:

> " * * * that provision of the constitution that 'the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.,' confers no judicial authority, but merely for convenience, authorizes him to determine that question, because the public service might suffer if a vacancy could not be filled until after a judicial investigation be had. * * *"

The Supreme Court of Illinois in the case of People ex rel. Dever v. Sweitzer, 314 Ill. 330, 145 N. E. 648, had before it an action in mandamus to compel a county clerk to print notices of the election in conformity with a writ of election issued by the Governor to fill a vacancy in the office of Judge of the Superior Court. The vacancy was occasioned by the resignation of a judge as of December 5, 1923. The writ recited the vacancy by reason of the resignation of the judge on December 5, 1924, and called a special election for November 4, 1924. The clerk refused to take cognizance of the writ upon the ground that it was void because an election could not be held to fill a vacancy where the vacancy did not exist. The Governor then issued a second writ, which was endorsed "Writ of election to correct typewriter error in date of resignation in original". The court held, l. c. 650:

> "* * * The issuance of the second writ was but a correction of the first, and does not constitute the issuance of a new writ. That it merely corrected the first writ to speak the truth is not controverted, as it nowhere appears that Judge McDonald did not, in fact, resign on December 5, 1923."

It is to be noted, however, that two judges dissented upon the ground that the first writ was ineffective and the second writ was wholly void.

It is apparent that, inasmuch as the decision is based upon the theory that the second writ was not in reality a writ of election but a correction of the first as to a mistake of fact, that court would not have held good a second writ which would have amounted to a change in substance. Undoubtedly the change of the day of election by a second writ would be a change in substance. It is to be borne in mind that the statute of Illinois required the Governor to set the election day in his writ, and that there is no statutory or constitutional provision in Missouri that authorizes the Governor to issue a second or amended writ of election.

A review of the history of the various enactments in this State with reference to special elections discloses that under the Territorial Laws of 1814, in issuing writs of election to fill vacancies in the Territory's representation in Congress, the Governor fixed a day certain for the election in the writ of election, and directed the sheriff of the county to order an election, which was to be conducted as general elections were conducted. The language of the Constitution of 1820 was the same as that which now appears in Section 14 of Article IV, quoted above.

In 1822, by "An Act regulating elections", the General Assembly provided:

> "5. The governor of this state when he issues a writ of election, to fill any vacancy that may happen, which vacancy is to be filled by an election of the people, shall mention in said writ how many days notice the sheriff of the county or district shall give of said election."

The General Assembly in 1822 did not carry forward provisions similar to those in the Territorial Act of 1814, and subsequent legislation has not supplied like provisions. In 1855 the language had been changed to that now contained in Section 11492, R. S. Missouri, 1939, except that the number of days was five. In 1879 this had been changed to ten days, as it is now.

When the Governor issues a writ of election to fill a vacancy, as he does not act judicially, he apparently is in an analogous position with a trustee who exercises his powers and cannot later exercise further authority in the matter. Once the writ of election is issued, the Governor's authority evidently ceases and his duties are completed. This being true, the Governor may not issue a supplemental or amended writ of election for the same

vacancy. He is but perhaps a conduit conveying an authorization to the sheriff to proclaim an election, and his authority ceases when the sheriff receives the writ.

Since we have ruled that the Governor has the authority to fix the date of the special elections in the writs of election, and since the writs of election have been issued for dates other than November 3, 1942, it is the opinion of this department that the sheriffs would not be authorized to change the dates for holding those elections.

Our research of the authorities would indicate that the sheriffs should follow the writs of election as to the date upon which the elections are to be held. It is to be noted, however, that no punishment is provided in the event the sheriffs do not do so; neither is there any statutory or constitutional provision which would tend to destroy the effect of the elections if they were held on dates other than specified in the writs.

We are dealing here with special elections for members of the House of Representatives and State Senate. By virtue of Section 17 of Article IV of our Constitution, those bodies are the sole judges of the qualifications, election and returns of their own members. Those respective bodies, namely, the House of Representatives and the Senate, might affirm, as is their right, the results of the elections even though they were held on different dates than named in the writs, and based upon the following rule:

> "The authorities sustain the proposition that where an election held by a municipal corporation 'Clearly expresses the will of the voters, the courts are disinclined to set it aside because of a departure from a statutory provision as to the time of holding it even if this be regarded as mandatory; and so if it does not appear that the holding of an election on a day different from

> the day fixed by law was induced by any corrupt or fraudulent motives, that it was the result purely of mistake and no one was prevented from voting thereby, the court may in the exercise of its discretion refuse to consider an attack upon its validity.' 9 R. C. L. p. 998, sec. 19; 20 C. J. 101, 102, sec. 87; State ex rel. v. Tolan, 33 N. J. Law 195."
>
> Rainwater v. State, 187 So. 484, 121 A.L.R. 981, l.c. 985.

See, also, People ex rel. Comerford v. Miller, 314 Ill. 474, 145 N. E. 685.

CONCLUSION

It is, therefore, concluded that if the sheriffs to whom the writs of election are directed would change the dates of the elections specified in such writs to November 3, 1942, after giving the required days' notice prior to said November 3rd, an irregularity would result, but if the elections were regular in all other respects, then the House of Representatives and Senate respectively might properly affirm the results of such elections, as those bodies, by the Constitution of Missouri, are made the sole judges of the qualifications, election and returns of their respective members.

It is further the conclusion of this department that the Governor, having issued writs of election for special elections to fill vacancies in the House of Representatives and the Senate, may not amend such writs

or issue new writs and thereby change the date of the election designated in each of such writs.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

VCT:HR

APPROPRIATIONS:
STATE BUILDING COMMISSION: Appropriations may be made to this Commission.

October 31, 1942

11-4

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated October 26, 1942, which is as follows:

> "Paragraph Twenty of proclamation, dated today, by which is convened the Sixty-First General Assembly of the State of Missouri in extra session, reads as follows:
>
> > 'To make appropriation, out of the State Treasury, chargeable to the General Revenue Fund, of a sum for repair, remodeling and reconstruction of Penal and Eleemosynary buildings which were constructed, under the supervision of the State Building Commission, in accordance with Senate Bill No. 1 enacted by the Fifty-Seventh General Assembly (Extra Session) and set forth at page 107 and following, Laws of Missouri (Extra Session) 1933-1934.'
>
> "Your opinion, as soon as possible, is respectfully requested on the following question:

"May an appropriation be legally made to the State Building Commission of a sum for repair, remodeling and reconstruction of Penal and Eleemosynary buildings which were constructed under the supervision of said State Building Commission, in accordance with Senate Bill No. 1 enacted by the Fifty-Seventh General Assembly (Extra Session) and set forth at page 107 and following, Laws of Missouri (Extra Session) 1933-1934?"

In November, 1934, pursuant to a Joint and Concurrent Resolution of the General Assembly, the people added Section 44d to Article IV of the Constitution of Missouri. The Resolution appears at page 174 of the Laws of Missouri, Extra Session, 1933-1934. The amendment is one of the exceptions to the general law with reference to the powers of the General Assembly to contract for and authorize a debt.

Under this section bonds in the aggregate of $10,000,000 were authorized for the purpose of repairing, remodeling and rebuilding state buildings and properties at all or any of the eleemosynary and penal institutions of the state, and constructing additions thereto and additional buildings wherever necessary. It was further provided that the General Assembly should enact such laws as might be necessary to carry the amendment into effect. It was provided that funds arising from the sale of the bonds and funds received from the Federal Government in aid of the purpose of the amendment should be paid into the state treasury and into a fund designated "The State Building Fund," which should stand appropriated without legislative action, and for the payment of all expenses incidental to the purposes therein specified, including the payment of the principal and interest of said bonds.

After the passage of such Joint and Concurrent Resolution, but prior to its adoption by the people, the General Assembly passed Senate Bill No. 1, which appears at

page 107, Laws of Missouri, Extra Session, 1933-1934. This Act was approved January 9, 1934, and carried an emergency clause, which is as follows:

> "Whereas, the state eleemosynary and penal institutions are overcrowded, and by reason thereof, the health and safety of the inmates thereof are impaired; and, whereas said institutions are in need of repairs and additions thereto; and, whereas there has been submitted to the people of this state, by the Fifty-seventh General Assembly of Missouri, in extra session, a proposed amendment to Article IV of the Constitution of this state, providing for a new section in said Article IV, to be known as Section 44a authorizing a bond issue of Ten Million Dollars ($10,000,000.00) for the purpose of improving said institutions; this act is declared to be necessary for the immediate preservation of the public peace, health and safety, and an emergency within the meaning of the Constitution is hereby declared to exist. Wherefore, this act shall take effect and be in force when and after said proposed Constitutional amendment is adopted by the people of this state."

By this emergency clause it was specifically provided that this Act should be in effect when and after the proposed constitutional amendment was adopted.

Section 1 of the Act is as follows (page 107):

> "That for the purpose of repairing, remodeling or rebuilding, or repairing, remodeling and rebuilding all or any of the eleemosynary or penal institutions of this State, for building additions

> thereto and additional buildings wherever necessary, there is hereby created a Board of Commissioners, to be styled, 'The State Building Commission,' which shall consist of the Governor, Attorney General, Secretary of State, State Auditor, State Treasurer, and State Superintendent of Schools. The Governor shall be ex-officio chairman of said commission, and the commission shall elect one of its members as vice-chairman. The Chairman shall preside at all meetings of the Commission, sign its minutes and records and perform the usual and customary duties of such position. In the absence of the chairman, the vice-chairman shall perform the duties of the chairman. The commission shall maintain its office and hold its sessions at the Seat of Government, and meet as often as the business of the commission may require. A majority of the commission shall constitute a quorum for the transaction of business. The members shall receive no compensation for services on the commission, but shall be allowed reimbursement for all traveling and other expenses actually incurred in carrying out the purposes of this act."

While Sections 3 and 4 of the Act deal directly with the funds to be derived from the $10,000,000 bond issue contemplated by the proposed constitutional amendment, Section 44a, the remainder of the Act is apparently general in its scope. The repairing, remodeling or construction of buildings mentioned in Section 1 is not limited to those financed by the funds from such proposed bond issue. In addition, the membership of The State Building Commission is comprised of permanent officers of the state. A comprehensive scheme of the activities of such Commission is embraced within the Act which is general in character. For instance, provisions

with reference to contracts for the construction and improvement of buildings are not limited to work to be paid for by the bond issue.

Section 10 of the Act provides (page 115):

> " * * * On presentation of said certificate to the State Auditor, he shall draw his warrant on the State Treasurer for payment of the same out of money in the state treasury appropriated for its payment. All other accounts or demands may be allowed by the commission on proper vouchers therefor, and when the same shall have been certified to the State Auditor with a duplicate of said voucher attached, the Auditor shall draw his warrant therefor in favor of the proper person or persons on the State Treasury, payable out of the monies therein applicable to the payment of said accounts."

While the moneys to be derived from the bond issue and funds contributed by the Federal Government were by the constitutional amendment automatically appropriated, yet here the Legislature refers to moneys appropriated for the payment of bills and expenses. This would indicate that the Legislature had in mind moneys that might be appropriated to the Commission by subsequent Legislatures.

The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used, if possible, and to put on the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its manifest purpose. (Artophone Corp. v. Doale, 135 S. W. (2d) 345, 345 Mo. 344; State ex rel. McKittrick v. Carolene Products Co., 144 S. W. (2d) 153, 346 Mo. 1049.)

The meaning of the language of the statute is narrowed or broadened to conform with the legislative intent,

as gathered from its entirety, history and purpose. (Rust v. Missouri Dental Board, 155 S. W. (2d) 80.)

There can be no doubt but that the State Building Commission is now in existence. It has never been destroyed by legislative action, and we are informed that there is in The State Building Fund at the present time the sum of $16,087.53.

While Senate Bill No. 1 was not carried forward in the 1939 Revision, such omission does not repeal it.

> " * * * They do not appear in the revisions of 1879 and succeeding revisions. Even so, the omission from the revisions does not operate to repeal said sections. Meriweather v. Overly, 228 Mo. 218, 129 S. W. 1; Bird v. Sellers, 122 Mo. 23, 26 S. W. 668."
>
> (State ex rel. Asotsky v. Hicks, 142 S. W. (2d) 742, l. c. 743, 346 Mo. 640.)

While the Legislature evidently was primarily concerned with the expenditure of the bond issue funds and Federal matching funds, yet it saw fit to create a board with a permanent membership and specifically gave to it powers and duties that apply to the construction, alteration and repair of buildings other than those of necessity financed from the funds provided for in said Section 44d of the Constitution. The Act does not limit the duties of the Commission by express terms to the handling of the bond issue money. The portion of Section 10 above quoted mentions appropriations. If the Commission was created for the sole purpose of handling the bond money, such words would be meaningless, as that money was automatically appropriated by the constitutional provision.

Taking into account the emergency clause on said Senate Bill No. 1, the Legislature apparently intended that The State Building Commission should be a permanent body; that it should first use the funds provided for by said Section 44d of the Constitution as rapidly as possible after

its adoption; and that it could expend such funds as might later be appropriated to it by future Legislatures to carry out the purposes of the Act.

CONCLUSION

It is, therefore, the opinion of this department that an appropriation may be legally made by the General Assembly to the State Building Commission for the purpose of repairing, remodeling and constructing penal and eleemosynary buildings which were constructed under the supervision of said State Building Commission in accordance with Senate Bill No. 1 as enacted by the Fifty-Seventh General Assembly, Extra Session, and as set forth at pages 107, et seq., Laws of Missouri, Extra Session, 1933-1934.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HR

GOVERNOR:
OFFICERS:
RECESS APPOINTMENTS: The governor must submit recess appointments for confirmation to the senate of the 61st General Assembly in special session.

November 10, 1942

FILED NO. 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your letter of October 28, 1942 as follows:

> "There is attached hereto a list, with certain data, of appointments to office made in vacation of the Sixty-First General Assembly, subject to the approval of the Senate.
>
> "Your opinion is respectfully requested on the following question:
>
> "Which, if any, of said appointments should be transmitted to the Senate of the Sixty-First General Assembly in extra session?"

The attached list sets forth appointments requiring us to review twenty-seven different statutory requirements on confirmation by the Senate, and therefore, in order that each may be dealt with separately, we will first set forth the general rules on this subject.

Directing our attention first to the question of whether at a special session of the General Assembly, the Senate may confirm or reject appointments, we find the following:

In 46 C. J. p. 953 Section 68, it is stated:

> "* * * In the absence of Constitutional restriction a confirmation by the legislature of an executive appointment may be at a special session, * * *."

In 42 Am. Jur. p. 963 Section 111, it is stated:

> "* * * The act of confirming an appointment to office is * * * the exercise of an executive function, and since it is not legislative in character, it need not be performed at a regular session. * * *"

In 42 Am. Jur. p. 964 Section 113, it is stated:

> "* * * confirmation by the senate of appointments made by the governor is not a legislative act. Consequently, such conformation may be made as well at a special as at a regular session, and it is immaterial for what purpose the legislative body may have been called in session for whenever that body is lawfully convened for legislative purposes, it has the right to act for administrative purposes, even without mention of such purposes in the call for a special session"

So far as Missouri is concerned, this question has been set at rest in State ex inf. Major ex rel. Sikes v. Williams 222 Mo. 268, 121 S. W. 64, 17 Ann. Cas. 1006. In this case it was contended that the Senate had no authority to confirm an appointment of the Governor at a special session. In answer to this contention, the court stated in 222 Mo., l.c. 275:

> "* * * We are unwilling to give our assent to this insistence. The confirmation by the Senate of appointments made by the Governor are not legislative acts, and in our opinion can be made as well at a special session as a regular session. Such acts by the Governor concerning appointments are merely administrative and can be confirmed by the Senate whenever that body is in session, and it is immaterial for what purpose the legislative body may have been called in session. In other words, whenever the body is lawfully convened for legislative purposes it has the right to act for

> administrative purposes, even without mention of such purpose in the call for a special session. * * *"

The next question which presents itself is: The Senate having authority to confirm appointments at special sessions of the General Assembly, must the Governor submit such appointment for confirmation at such time?

In 46 C. J. p. 953 Section 68, it is stated:

> "Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had; * * * * *."

This rule was applied in this state in the case of Schulte v. City of Jefferson, 273 S.W. 170 (Mo. App.) as respects city officers appointed by the Mayor and to be confirmed by the council. There the court stated, l. c. 172:

> "It is well settled --
> 'Where the appointment is made as the result of a nomination by one authority and confirmed by another, the appointment is not complete until the action of all bodies concerned has been had, * * * *.'"

Of course, these rules do not mean that the Governor cannot make recess appointments, but simply mean that the appointees' titles are not complete until confirmation. State ex inf. Major ex rel. Sikes v. Williams, supra, l. c. 283, 284 of 222 Mo. The general rule is stated in 17 Ann. Cas. 1012 as follows:

> "A vacancy, caused by death, resignation, removal, or other cause, so that there is no one to perform the duties of the office, may be filled by appointment during a recess of the confirming body."

While there is some authority contra to the above rule (42 Am. Jur. p. 962 Sec. 111; 17 Ann. Cas. 1012) we think the general rule as above stated has been adopted in Missouri by the Williams case and especially should this be true when consideration is given to Section 11, Article V of the Missouri Constitution, providing:

> "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, * * * * *."

Returning now to our question, we find it stated in 46 C. J. p. 954 Sec. 68:

> "Where there is a failure to confirm on the part of the confirming body, it is the duty of the nominating power to make a new appointment. * * * *"

In the Williams case, supra, (222 Mo. l. c. 284) the court in speaking of the recess appointment had this to say:

> "* * * In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. * * * *"

The above statements have dealt with the question from the standpoint of what must transpire if, when an appointment is submitted for confirmation, it is rejected or there is a failure to confirm. It seems that our problem is, what must transpire if the Governor fails to submit the appointment for confirmation? We think the rule is that failure to obtain confirmation constitutes a revocation of the appointment even though that failure results from failure to submit the appointment for confirmation. Reason would seem to indicate that this is the correct view, for otherwise a Governor could defeat the right of the Senate to confirm by simply refusing to submit a list of his

appointments for confirmation. Such reasoning was employed in People v. Sohmer, 143 N.Y.S. 216, in a similar case. The court held there, that where a vacancy occurred during a session of the Senate, the Governor must fill the same before adjournment rather than wait until after adjournment of the Senate and then make a recess appointment. The court, at l. c. 219, said:

> "If this conclusion is not correct, the lawful power of the Senate to give its advice and consent upon executive appointments could be defeated in many, if not most cases, and the executive would exercise the power of appointment independent of the Senate in many cases where the law provides that such appointments can be made only by the Governor by and with the advice and consent of that body."

In State v. Williams, 20 S.C. 12, the statute provided that the Governor was to make the appointment by and with the consent of the Senate, if in session, and if not in session, subject to the approval of the Senate at its next session. The court, in speaking of a recess appointment, stated at l. c. 15:

> "That is, the (recess) appointment made by the governor is provisional merely, and, unless approved by the senate at its next session, terminates with such session."

For present purposes, it is sufficient to state that the statutes pertaining to confirmations of all the listed appointments, state in effect that the Governor, by and with the advice and consent of the Senate, shall appoint a person or persons to fill the named positions. Recess appointments, under the case law, may be acted upon by a special session of the Senate. Thus, it appears the Governor is under a statutory duty to have his recess appointments approved and failure of the Senate to approve, constitutes a revocation of the appointment. Under the general rule, it appears that where a duty is imposed and results or consequences are prescribed for failure to perform that duty, then it is held that the duty to act is mandatory. As was said in Ousley v. Powell, 12 S. W. (2d) 102, 103 (Mo. App.):

> "* * * When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."

As stated in Sutherland Statutory Construction (2d Ed.) page 1114:

> "The consequential destinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results."

In further support of our view, we call attention to the fact that at the four special sessions of the Senate that we have checked, we find that recess appointments were submitted for confirmation. See: First Extra Session, 51st General Assembly 1921, Senate Journal page 1208; Second Extra Session 51st General Assembly 1921, Senate Journal page 1568; Extra Session 57th General Assembly 1933-1934, Senate Journal page 26; Extra Session 60th General Assembly 1940, Senate Journal pages 12 to 18 inclusive, 22, 23, 24 and 30. The foregoing reflects an executive construction of long standing to the effect that it is necessary that recess appointments be submitted to a special session of the Senate. Such action and practice is strong evidence of the true meaning to be given the law. Barber Asphalt Paving Co. v. Merservey, 103 Mo. App. 186, l. c. 194; Venable v. Wabash Western Ry. Co., 112 Mo. 103, 125.

Thus our view is that, (1) a special session of the Senate has power to pass upon and confirm or reject recess appointments of the Governor; (2) the Governor must submit such appointments for confirmation at such special session, otherwise the appointment is revoked at the close of such session.

Of course, this conclusion must be tentative until the statutes relating to the appointment and confirmation of these officers are reviewed. It must be kept in mind in connection with the following, that the appointments dealt with were all made after the adjournment of the 61st General Assembly on July 12, 1941.

We next take up the appointments and statutes involved.

1. State Administrator of the Social Security Commission appointed to fill a vacancy caused by resignation. Section 9400 R. S. Mo., 1939, provides:

> "The Governor, by and with the advice and consent of the Senate, shall appoint * * *."

While the statute is silent as to the power of the Governor to fill a vacancy in this office, nevertheless, Section 11 Article V of the Constitution supplies this deficiency. However, the statute requires the appointment to be made with the advice and consent of the Senate. That, as yet, has not been done and we see nothing that indicates this appointment should not be submitted at this time. As indicated at the close of our resume of the general rules on this subject, we think the appointment must be submitted to the Senate in special session. If it is not submitted, the Senate will adjourn without approval of the same and that will constitute a revocation of the appointment.

2. Member of the State Social Security Commission appointed to a place created by the expiration of a term. Section 9398 R.S. Mo., 1939, provides:

> "The State Commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of the Senate * * *."

Our conclusion on this is the same as that indicated at the close of our resume of the general rules on this subject and as stated on the State Administrator of the Commission, which we shall hereinafter refer to as (1) supra.

3. Three members of the Board of Election Commissioners of the County of St. Louis, one to fill a place created by the expiration of a term, one to fill a vacancy created by death, and one to fill a vacancy created by resignation. Section 11928 R.S. Mo., 1939, provides:

> "* * * the governor, by and with the advice and consent of the senate shall appoint * * *. In case of a vacancy in said board from any cause whatsoever, it shall be filled in the same manner and subject to the confirmation by the Senate as is the case of the original appointment, * * * * *."

Our conclusion on this appointment is the same as that reached on (1) supra.

4. Six members of the Board of Managers of the Eleemosynary Institution, three to fill places created by expiration of terms and three to fill vacancies created by resignations. Section 9259 R.S. Mo., 1939, provides:

> "The * * * institutions * * * shall hereafter be under the * * * management * * * of one board of managers consisting of six persons to be appointed by the governor, by and with the consent of the senate, * * * * *."

Section 9262 R. S. Mo., 1939, also provides:

> "* * * All members appointed when the senate is not in session shall hold their offices for the unexpired term, subject to the approval of the senate at its first session after such appointment."

These statutes make it clear that these appointments must be submitted at the present special session of the Senate.

5. Member of the Board of Managers of the Missouri School for the Blind, appointed to fill a place created by the expiration of a term. Section 10846 R. S. Mo., 1939, provides:

> "The government of each of these schools shall be vested in a board of managers, composed of five members, appointed by the governor with the consent of the senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

6. Two members of the Board of Pharmacy, one appointed to fill a vacancy created by resignation and one to fill a place created by the expiration of a term. Section 10010 R.S.Mo., 1939 provides:

> "The board of pharmacy * * * shall be appointed by the governor, with the approval of the senate, * * *."

Our conclusion on this is the same as that reached on (1) supra.

7. Member of the Board of Police Commissioners of St. Joseph appointed to fill a vacancy created by resignation. Section 6486 R.S. Mo., 1939, provides:

> "The governor of the state of Missouri shall, * * * * appoint three commissioners, the senate concurring therein, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

8. Five members of the Board of Examiners and Registrars of Nurses, all appointed to fill places created by the expiration of terms. Section 10025 R.S.Mo., 1939, provides:

> "* * * Upon the expiration of the term of office of any member in office the succeeding member or members to be appointed, in any year, shall be chosen by the Governor, with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

9. Two members of the Board of Police Commissioners of Kansas City, one appointed to fill a vacancy created by resignation and one to fill a place created by expiration of a term. Section 7646 R.S.Mo., 1939, provides:

> "The governor of the state of Missouri, by and with the consent of the Senate, shall appoint the four commissioners * * *. In

> case of vacancy in said board from any cause whatever, it shall be filled by appointment for the unexpired term, in the same manner as in the case of original appointments. * * *"

Our conclusion on this is the same as that reached on (1) supra.

10. Two members of the Board of Probation and Parole, each appointed to fill places created by the expiration of terms. Section 9158 R. S. Mo., 1939, provides:

> "* * * Immediately after the taking effect of this article it shall be the duty of the Governor by and with the approval and consent of the Senate to appoint two members of said Board, each of whom shall hold office for a term of four years and thereafter until his success or is appointed and qualified. * * * *"

Our conclusion on this is the same as that reached on (1) supra.

11. Three members of the State Highway Commission, two appointed to fill places created by the expiration of terms and one to fill a place created by resignation. Section 8743 R. S. Mo., 1939, provides:

> "The state highway commission shall consist of four members, who shall be appointed by the governor, by and with the advice and consent of the Senate, * * *."

Our conclusion on this is the same as that reached on (1) supra.

12. Two commissioners of the Department of Penal Institutions, each appointed to fill places created by the expiration of terms. Section 8973 R. S. Mo., 1939, provides:

> "Immediately after the taking effect of this law it shall be the duty of the governor, by and with the consent and approval of the senate, to appoint three commissioners, * * * * each of whom, * * * shall hold office for a term of four years, and thereafter until his successor is appointed and qualified.* * *"

Our conclusion on this is the same as that reached on (1) supra.

13. Seven members of the State Board of Registration for Architects and Professional Engineers, each appointed to fill places created by the creation of the offices. Section 4 Laws of Missouri 1941 page 656, provides:

> "The State Board of Registration shall consist of seven members who shall be appointed by the Governor with the advice and consent of the Senate, * * *. All vacancies occurring in said Board shall be filled by appointments by the Governor with the advice and consent of the Senate, and any such appointments so made while the Senate is not in session shall be submitted for confirmation at its next ensuing session. * * * *"

The language of this section makes it clear that these appointments are to be submitted for confirmation at the present special session of the Senate.

14. Three members of the Missouri Real Estate Commission, each appointed to fill places created by the creation of the offices. Section 4 Laws of Missouri 1941, page 426, provides:

> "* * * Such commission shall be appointed by the Governor with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

15. Member of the Missouri Dental Board appointed to fill a place created by the expiration of a term. Section 10062 R. S. Mo., 1939, provides:

> "* * *the Governor shall appoint by and with the advice and consent of the Senate * * * * * *."

Our conclusion on this is the same as that reached on (1) supra.

16. Four members of the Board of Election Commissioners of Jackson County, three appointed to fill places created by the

expiration of terms and one appointed to fill a vacancy created by resignation. Section 11884 R. S. Mo., 1939, provides:

> "* * * the governor, by and with the advice and consent of the senate shall appoint * * *. In case of a vacancy in said board from any cause whatsoever it shall be filled in the same manner and subject to the confirmation by the senate as in the case of original appointment, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

17. The Grain Warehouse Commissioner, appointed to fill a vacancy created by resignation. Section 4 Laws of Missouri 1941 page 375, provides:

> "It shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, * * *. Any vacancy occurring by removal, resignation or death shall by and with the consent of the Senate be filled by the Governor * * *."

Our conclusion on this is the same as that reached on (1) supra.

18. Adjutant-General of the State, appointed to fill a vacancy created by resignation. Section 15016 R. S. Mo., 1939 provides:

> "There shall be an adjutant-general of the state, to be appointed by the governor by and with the advice and consent of the senate, * * * *."

Our conclusion on this is the same as that reached on (1) supra.

19. Six members of the State Board of Health, all appointed to fill places created by the expiration of terms. Section 9733 R. S. Mo., 1939, provides:

> "The governor, by and with the advice and consent of the senate, shall appoint seven

> persons, * * *. All vacancies occurring in the board shall be filled by the governor of the state, and when made, when the senate is not in session, will be subject to confirmation at the next ensuing session of the senate."

This statute makes it clear that such appointments must be submitted for confirmation to the present special session of the senate.

20. Superintendent of the Missouri State Highway Patrol, appointed to fill a place created by resignation. Section 8348 R.S. Mo., 1939, provides:

> "The superintendent of the Missouri state highway patrol shall be appointed by the governor by and with the advice and consent of the senate * * * *."

Our conclusion on this is the same as reached on (1) supra.

21. Five members of the Boards of Regents of the State Teachers Colleges, one to fill a vacancy created by resignation, two to fill vacancies created by death, and two to fill places created by the expiration of terms. Section 10755 R. S. Mo., 1939, provides:

> "In the year 1919 and every two years thereafter, and during a regular session of the general assembly, the governor shall, by and with the advice and consent of the senate, appoint two regents for each state teachers college; and whenever a vacancy occurs in either of said boards by death, resignation, removal from the district or by operation of law or otherwise, the governor shall, in a like manner immediately appoint some competent person to fill such vacancy, and communicate his action thereon to the senate at the next

> session of the general assembly thereafter. The person so appointed shall hold his office subject to the confirmation of the senate, for the unexpired term:* * * *."

This statute makes it clear that these appointments are subject to confirmation by the present special session of the Senate.

22. Superintendent of the Insurance Department, appointed to fill a place created by the expiration of a term. Section 5781 R. S. Mo., 1939, provides that he shall:

> "* * * be appointed by the governor, by and with the advice and consent of the senate, * * *. If a vacancy shall at any time occur, the same shall be filled by the governor, by appointment, subject to the confirmation of the senate, if in session; if not, then at its next session. * * * *"

This statute would seem to clearly require that this appointment must be submitted at the present special session of the Senate.

23. Member of the State Board of Optometry, appointed to fill a place created by the expiration of a term. Section 10110 R. S. Mo., 1939, provides:

> "The governor, with the advice and consent of the senate, shall appoint five persons * * * who shall constitute the state board of optometry. * * *. All vacancies, however occurring, shall be filled by appointment by the governor, with the advice and consent of the senate, and appointments made when the senate is not in session shall be confirmed at its next ensuing session. * * *"

This statute clearly requires the appointment to be submitted to the present special session of the Senate.

24. Three members of the Board of Trustees of the Confederate Soldiers Home at Higginsville, each appointed to fill places created by the expiration of terms. Section 15129 R. S. Mo., 1939 provides that said persons:

> "* * * shall be appointed by the governor, by and with the advice and consent of the senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

25. Three members of the Board of Curators of Lincoln University, each appointed to fill places created by the expiration of terms. Section 10775 R.S. Mo., 1939, provides:

> "The Board of Curators of Lincoln University of Missouri, * * * shall be appointed by the Governor, by and with the advice and consent of the Senate. * * *"

Our conclusion on this is the same as that reached on (1) supra.

26. An assistant to the Commanding General of the First Infantry Brigade of the Reserve Military Force of Missouri with the rank of Brigadier General, appointed to fill an original vacancy. Section 15027 R. S. Mo., 1939, provides:

> "* * * the commanding general of the national guard and all general officers shall be appointed by the governor, by and with the advice and consent of the senate, * * * *."

By force of Section 15021 R. S. Mo., 1939, this statute applies to the Reserve Force and our conclusion on this appointment is the same as that reached on (1) supra.

27. Member of the Public Service Commission of Missouri, appointed to fill a vacancy created by resignation. Section 5580 R. S. Mo., 1939, provides:

> "The Commission shall consist of five members who shall be appointed by the governor, with the advice and consent of the senate, * * *."

Our conclusion on this appointment is the same as that reached on (1) supra.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:AW

PROBATE JUDGE: Governor should issue commission to person elected to fill unexpired term.

November 18, 1942

11-18

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your letter of this date, which reads as follows:

"Under date of October 10, 1942, Mrs. Alice Hyde, Keytesville, Missouri, was appointed by myself as Judge of the Probate Court in Chariton County, Missouri, for a term ending when her successor is duly elected and qualified; vice, A. C. Drace, deceased.

"There was received by me a document which reads as follows:

'CERTIFICATE OF ELECTION

'STATE OF MISSOURI,)
) ss.
County of Chariton,)

'THIS IS TO CERTIFY, That at an General Election, held in the County aforesaid, on the 3rd day of November 1942 Mrs A. C. Drace having received a higher number of votes for the office hereinafter named than were cast for any other persons for said office at said election, was

'DULY ELECTED TO THE OFFICE
of JUDGE OF THE PROBATE COURT
(Unexpired term ending December
31, 1942)
within and for the County and state
aforesaid.

'In Testimony Whereof, I, T. H.
Hubbard
'Clerk of the County Court of
said County and State, have hereunto
subscribed my name and affixed the
seal of said Court.

'Done in office at Keytesville, this
9th day of November, A. D. 1942

(Seal) T. H. Hubbard Clerk
Marvin G. Wilson D. C.'

"Your opinion, as soon as possible, is respectfully requested on the following question:

Should the Governor commission Mrs. A. C. Drace as Judge of the Probate Court in Chariton County, Missouri, for an unexpired term ending December 31, 1942?"

Section 2438, R. S. Missouri, 1939, reads as follows:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters in every county. Said judge shall be commissioned by the governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January en-

> suing his election and continue in office for four years and until his successor shall be duly elected and qualified: Provided, that in all cases where the death of the judge-elect shall take place after his election and before he qualifies, the same shall constitute a vacancy in such office from and after the date which said judge-elect is required to qualify."

The foregoing section provides that a person elected for a full term shall be commissioned by the governor.

Section 2439, R. S. Missouri, 1939, provides for the election of a probate judge to fill out the unexpired term caused by a vacancy in that office, and reads as follows:

> "When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

It will be observed that in Section 2439 there is nothing said about the governor issuing a commission to the person elected as probate judge to fill out an unexpired term. However, Section 23 of Article V of the Constitution of Missouri provides as follows:

> "The Governor shall commission all officers not otherwise provided for by law. All commissions shall run in the name and by the authority of the

State of Missouri, be signed by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In view of the fact that the Constitution provides that the governor shall commission all officers not otherwise provided for by law, and in view of the fact that said Section 2438, relating to the election of a probate judge in a county, provides that such judge shall be commissioned by the governor, it seems to us that the law contemplates that anyone elected to the office of probate judge should receive a commission from the governor.

It might be suggested that since Section 11463, R. S. Missouri, 1939, does not require that the vote for probate judge in a county be certified to the secretary of state, and that Section 11466 of the statutes does not require the secretary of state to certify to the governor the name of the candidate who received the highest number of votes for the office of probate judge in a county, that the law does not contemplate that the governor should issue a commission to such candidate so elected. However, Sections 11463 and 11466 are general statutes relating to the duties of the county clerk and secretary of state with respect to certifying the results of elections, while Section 2438 is a special statute relating to the office of probate judge alone.

It is a general rule of statutory construction that where general statutes and a special statute relate to the same subject matter, the special statute will prevail as far as the particular subject matter comes within its provisions. (State ex rel. v. Smith, 334 Mo. 653, 67 S. W. (2d) 50.)

Following this rule of construction, we think the statute relating to the office of probate judge would prevail over the statutes relating to numerous officers in so far as the office of probate judge is concerned. In addition to this deduction, we have the constitutional provision above quoted which requires the governor to commission all officers not otherwise provided for.

Furthermore, Section 1988, R. S. Missouri, 1939, provides in part as follows:

> " * * * and every judge of any court of record shall be commissioned by the governor, and, whether elected or appointed, shall hold his office until his successor is elected and qualified."

The latter section may likewise be considered as a special statute relating to judges of courts of record, and since a probate court is a court of record, said statute would control as to that office as against the general statutes above referred to.

CONCLUSION

It is, therefore, the opinion of this office that the governor should issue a commission to Mrs. A. C. Drace as Judge of the Probate Court of Chariton County, Missouri, for the unexpired term ending December 31, 1942.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

FROBATE JUDGE: Supplement to opinion of November 18, 1942.

November 19, 1942

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Since writing the opinion to you on November 18, 1942, with reference to the commissioning of Mrs. A. C. Drace as Probate Judge of Chariton County for the unexpired term ending December 31, 1942, it has been called to our attention that there was a further question in your mind which was not covered by the opinion. That question was as to whether Section 11509, R. S. Missouri, 1939, applied to the Chariton County situation, or whether Section 2439 applied. We, therefore, offer the following as a supplement to the opinion rendered on the 18th.

Section 11509, R. S. Missouri, 1939, reads as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall

> be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

By its terms the foregoing section is a general statute dealing with vacancies in state and county offices generally, with certain specified exceptions.

Section 2439, R. S. Missouri, 1939, which was set forth in the opinion of the 18th, is by its terms a special statute dealing specifically and solely with a vacancy in the office of judge of the probate court.

Under the well known rule of statutory construction pointed out in the opinion of the 18th, where a general statute and a special statute relate to the same subject matter, the special statute prevails over the general statute in so far as the particular subject matter comes within its provisions. Therefore, we must conclude that Section 2439 prevails over Section 11509 in so far as a vacancy in the office of probate judge is concerned.

CONCLUSION

For the above reasons, in addition to the reasons assigned in the original opinion of the 18th, it is the opinion of this office that the governor should issue a

commission to Mrs. A. C. Drace as Judge of the Probate Court of Chariton County, Missouri, for the unexpired term ending December 31, 1942.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:HR

APPROPRIATIONS: Governor's appropriation to enforce the laws may be used to pay expense of
EXTRADITION OF FUGITIVES: extraditing criminals.

December 14, 1942

12-15

FILED
24

Honorable Forrest C. Donnell
Governor
Jefferson City, Missouri

Dear Governor Donnell:

On December 9, 1942, you requested the opinion of this office upon the following:

> "May the expenses, incurred in the present biennium at a time when there were not sufficient funds to pay said expenses remaining in the appropriation for the present biennium for the apprehension of criminals, of some messenger to whom the governor has issued his warrant, under the seal of the state, and who has received the fugitive named in the warrant and conveyed such fugitive to the county in which an offense was committed, or is by law cognizable, be paid out of the appropriation found on page 125 of the Laws of Missouri 1941, which appropriation reads in part as follows:
>
> 'D. Operation:
>
> General expense consisting of communication, printing and binding, engraving, lithographing, travel within and without the State, of the Governor, his secretary, and such other employees as the Governor may deem necessary to make

> investigations and procure information, to enforce the laws and for any other proper expense, * * *."

Section 6 of Article V of the Constitution of Missouri provides as follows:

> "The Governor shall take care that the laws are distributed and faithfully executed; and he shall be a conservator of the peace throughout the State."

Article 9 of Chapter 30, R. S. Missouri, 1939, requires the governor to issue his warrant for the extradition of a fugitive, directed to some messenger, and commanding him to deliver such fugitive to the sheriff of the county in which the crime was committed. It is further provided that the governor shall ascertain the expenses which may accrue, and certify to the same, which shall be paid out of the state treasury, as other demands against the state.

Section 19 of Article X of the Constitution of Missouri, in part, provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. * * * * "

This provision has been held to be self-enforcing. State ex rel. v. Holladay, 66 Mo. 585.

The pertinent portions of the Appropriation Act of 1941 bearing upon the question asked are fully set out in your request. It is noted that the act provides for "General expense consisting of * * * travel within and without the State, of the Governor, his secretary, and such other employees as the Governor may deem necessary to make investigations and procure information, to enforce the laws and for any other proper expense, * * *"

Appropriation acts are strictly construed, and if any doubt arises out of the use of the words therein, such doubt is resolved in favor of the public by limiting the expenditures of the appropriation to the express terms to which it is made. State ex inf. Harvey v. Missouri Athletic Club, 261 Mo. 576, l. c. 598, 170 S. W. 904; Meyer v. Kansas City, 18 S. W. (2d) 900, 325 Mo. 200, l. c. 203. In other respects, the usual rules of statutory construction apparently govern. State ex rel. v. Dierkes, 214 Mo. 578, 113 S. W. 1081; State ex rel. v. Weatherby, 344 Mo. l. c. 854, 129 S. W. (2d) 887.

The term "and for any other proper expense" adds little to the act. These words refer to the items set out above them and do not include an item differing in character from the specific items the term follows. In State ex rel. v. Dierkes, 214 Mo. 578, l. c. 591-592, 113 S. W. 1081, the Supreme Court ruled:

> " * * * Relator contends that the words 'other expenses of House of Delegates,' are sufficient to authorize the payment of this money out of the unexpended balance in that fund. The whole clause of the ordinance reads:
>
> 'Publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses of House of Delegates....$8,000.00.'
>
> "To our mind the rule of ejusdem generis fully applies here. The term 'other

> expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act and does not include an appropriation for work of the character performed by relator. To hold that it did include such would be to nullify the provisions of section 14, article 5, of the city charter, supra." (Underscoring ours.)

One of the cardinal guides in statutory construction is the ascertainment of the legislative intent from the words employed in the act, and placing upon such words their plain and rational meaning, and the promotion of the manifest purpose of the statute, considered historically. Artophone Corporation v. Coale, 135 S. W. (2d) 345, l. c. 347. This doctrine of legislative intent applies to appropriation acts. State ex rel. v. Weatherby, 344 Mo. l. c. 854, 129 S. W. (2d) 887.

The general assembly undoubtedly took cognizance of the governor's duty to enforce the criminal statutes, and to secure the return of fugitives for trial in the criminal courts, by providing funds for the enforcement of the laws. The legislative intent, we believe, is that such portion of the funds set aside and adjudged necessary by the governor be used to enforce the criminal laws by securing the return for trial of fugitives, thus making it possible for the chief executive to properly discharge the obligations placed upon him by the Constitution and statutes of our state. After making provision for traveling expenses of the governor and certain of his employees to make investigations and procure information, the writers of the act inserted a comma before the words "to enforce the laws." The use of the comma indicates to the writer that the latter term is not restricted by the words used immediately before the comma, but that the two word groups are independent of each other. Thus, the act authorizes the expenditure of state funds by the governor to enforce the criminal laws, of which the extradition of fugitives is a part.

CONCLUSION

It is, therefore, the opinion of this department that extradition expenses incurred in the present biennium at a time when there were not sufficient funds to pay said expenses remaining in the present appropriation for the apprehension of criminals, may be paid out of the appropriation set out at page 125 of the Laws of Missouri, 1941.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HR

APPROPRIATIONS:

GRAIN AND WAREHOUSE DEPARTMENT:
EXECUTIVE DEPARTMENT:

Funds appropriated in 1941 to the Executive Department may not be used to pay operating expenses of Grain and Warehouse Department.

December 15, 1942

12-16

FILED
24

Honorable Forrest C. Donnell
Governor
Jefferson City, Missouri

Dear Governor Donnell:

We acknowledge your request of December 9, 1942, for an opinion. It is as follows:

> "An appropriation found on page 203 of the Laws of Missouri 1941 reads in part as follows:
>
> 'D. Operation:
>
> General Expense: including communication, printing and binding, transportation of things, travel within and without the State, other general expense (office rent and premium on bonds) and material and supplies: consisting of light, heat, water and power supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies and special material and supplies...$45,000.00'
>
> "May certain operation expenses, incurred in the present biennium at a time when there were not sufficient funds to pay said expenses remaining in the above mentioned appropriation for the present biennium, of the Grain Warehouse Department be paid out of the appropriation found on page 125 of

the Laws of Missouri 1941, which appropriation reads in part as follows:

> 'D. Operation:
>
> General expense consisting of communication, printing and binding, engraving, lithographing, travel within and without the State, of the Governor, his secretary, and such other employees as the Governor may deem necessary to make investigations and procure information, to enforce the laws and for any other proper expense, * * *.'"

Appropriation acts, as to the purpose for which the funds therein provided may be expended, are strictly construed, (State ex inf. Harvey v. Mo. Ath. Club, 261 Mo. 576, l. c. 598, 170 S. W. 904; Meyer v. Kansas City, 323 Mo. 200, l. c. 203, 18 S. W. (2d) 900), "and if any doubt arises out of the use of the words employed it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made." (Meyer v. Kansas City, supra.) In addition, funds appropriated for one purpose may not be used for a disconnected and unrelated purpose. State v. Thompson, 85 S. W. (2d) 594, 337 Mo. l. c. 340. In other respects, appropriation acts are apparently subject to the usual rules of statutory construction. State ex rel. v. Dierkes, 214 Mo. 578, l. c. 591, 113 S. W. 1081; State v. Weatherby, 344 Mo. 848, 129 S. W. (2d) 887.

Section 6 of Article V of the Constitution of Missouri provides:

> "The Governor shall take care that the laws are distributed and faithfully executed; and he shall be a conservator of the peace throughout the State."

This duty pertains more to the criminal statutes and laws involving the peace and welfare of the State. The succeeding section of the Constitution authorizes the Governor to call out the militia to execute the laws, suppress insurrection and repel invasion.

It is difficult to visualize a direct connection between the constitutional provisions and the Grain and Warehouse Department, which now exists by virtue of the Laws of 1941 (pp. 373-396). The only provision of the Executive Appropriation Act (Laws of 1941, p. 125) that bears upon the question is found in the words, "General expense * * * to enforce the laws and for any other proper expense, * * *." The term "and for any other proper expense" adds little to the act. These words refer to items of the same character before mentioned and do not broaden the terms preceding them. The rule of ejusdem generis applies to appropriation bills. State ex rel. v. Dierkes, 214 Mo. 578, l. c. 591, 113 S. W. (2d) 1081.

It should be noted that the Grain and Warehouse Department Appropriation is from the Weighing and Inspection of Grain Fund in the State Treasury (pp. 202-203, Laws of 1941), in keeping with Section 8 of the Grain and Warehouse Department Act (pp. 376-377, Laws of 1941.) On the other hand, the Executive Appropriation mentioned is from the General Revenue Fund (pp. 124-125, Laws of 1941).

The question resembles the one decided in State v. Weatherby, 129 S. W. (2d) 887, 344 Mo. 848. The facts in that case were that an attorney was employed by the then Superintendent of Insurance and the then Attorney General as Special Counsel to represent them in certain actions involving the Insurance Laws. It was agreed that the attorney was to be paid out of appropriations made by the Legislature. He was paid partially from Insurance Department funds and partially from the Legal Department appropriation. The action was one to recover the amount paid from the Legal Department funds. The Legal Department appropriation, out of which the attorney was paid, came from "The State Revenue Fund," while the money paid him from the Insurance Department appropriation was chargeable "to the Insurance Department Fund," in keeping with the Insurance Code.

In holding that the funds sued for were recoverable, the Supreme Court said (344 Mo. l. c. 854):

> "These appropriation acts evidence a clear legislative intent that the salaries, fees and expenses arising out of appointments issuing from the Insurance Department were to be chargeable against the Insurance Department fund in so far as therein provided; whereas those arising out of appointments under the Legal Department were to be paid out of the State revenues. While the General Assembly was vested with authority to change the fund chargeable with the payment of the controverted items, it did not see fit so to do. It follows that payments to one holding an appointive position under Section 5678, supra, as 'counsel' out of State revenue appropriated for the support of the Legal Department were without legislative sanction and unlawful. This is in conformity with the constitutional mandate found in Section 19 of Article 10."

We believe the above holding is decisive of the question submitted.

CONCLUSION

It is, therefore, concluded that certain operation expenses of the Grain and Warehouse Department incurred in the present biennium at a time when there were not sufficient funds to pay such expenses from the appropriation to the Grain and Warehouse Department may not be paid out of the appropriation to the Executive Department as set out on pages 124 and 125 of the Laws of Missouri for the year 1941.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

VCT:HB

APPROPRIATION
GOVERNOR:
JUDICIAL COMMISSION:

Governor cannot [illegible] funds appropriated in H. B. 571 Laws of Mo. 1941, page 125 D. Operation, for payment of Judicial Commission's expenses.

- -

December 19, 1942

26 [illegible]

12-22

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Your letter of December 10, 1942 is as follows:

"Section 5 of Amendment No 3, which Section is found on page 725 of the Laws of Missouri 1941, reads as follows:

> "'Section 5. Expenses -- how paid.-- All expenses incurred in administering this amendment, when approved by the Supreme Court of Missouri, shall be paid out of the state treasury. The Supreme Court shall certify such expenses to the State Auditor, who shall draw his warrants therefor payable out of funds not otherwise appropriated.'

"It is my understanding that no appropriation has been made for the present biennium for administering said Amendment No. 3.

"Your opinion, as soon as possible, is respectfully requested on the following question:

"May certain expenses incurred in the present biennium in administering said Amendment No. 3 be paid out of the appropriation found on page 125 of the Laws of Missouri 1941, which appropriation reads in part as follows:

"'D. Operation:

General expense consisting of communication, printing and binding, engraving, lithographing, travel within and without the State, of the Governor, his secretary, and such other employees as the Governor may deem necessary to make investigations and procure information, to enforce the laws and for any other proper expense, * * * *?'"

In Section 5 of the Constitutional Amendment appearing in Laws of Missouri 1941, page 725, there is a clear statement as to the source from which the expenses of the Judicial Commission shall be paid. That is, "All expenses incurred in the administering of this amendment, when approved by the Supreme Court of Missouri, shall be paid out of the state treasury."

However, the provisions of Section 5, supra, are not so clear as to the method by which payment of these expenses is to be effected. Said section provides:

"* * * The Supreme Court shall certify such expenses to the State Auditor, who shall draw his warrants therefor payable out of funds not otherwise appropriated."

As we see it, to answer your question we do not need to undertake to determine what method is contemplated by this provision. All we need to consider is whether the appropriations made to the Governor in Laws of Missouri 1941, page 125, set out in your letter, may be used for this purpose when Section 5, supra, states that the warrant in payment of such expense shall be drawn by the Auditor (1) on the certification of the Supreme Court (2) on funds in the treasury not otherwise appropriated.

Clearly, if these expenses are to be paid out of the Governor's appropriation, the warrant must of necessity be drawn on the Governor's certification -- not the Supreme Court's and

said warrant must also, of necessity, be drawn on funds in the treasury otherwise appropriated.

In construing laws "words in common use are to be construed in their natural, plain and ordinary significance and acceptation." Bellerive Inv. Co. v. Kansas City 13 S. W. (2d) 628, 638 (Mo. Sup.). The natural meaning of the word "otherwise" is: "In a different manner; in another way or in other ways; contrarily." Webster's New International Dictionary, Second Edition.

Thus we think the words "not otherwise appropriated" do not permit the use of funds appropriated, as set forth in H.B. 571, Section 1, D. Operation (Laws of Mo. 1941, page 125) to be used to pay these expenses. The items for which this appropriation may be spent are enumerated to a certain extent and then follows the classification "and for any other proper expense." In State ex rel. Cavigan v. Dierkes 214 Mo. 578, an appropriation act, under consideration, enumerated certain items for which it could be spent and concluded with "and other expenses." In passing on the meaning of this quoted language, the court said, l.c. 592:

> "To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act * * * * * * *."

We see no difference in substance between the words "and for any other proper expense" used in the appropriation act which we have under consideration, and the language under consideration in the Dierks case. Applying said rule, we do not think it can be said that the expenses of the Judicial Commission are of the character for which the appropriation can be spent under the clause "and for any other proper expense." That refers to expenses incurred by the Governor in performance of his duties to be paid on his certification. The Governor has no duties to perform in connection with the functions of the Judicial Commission until that body has completed its deliberations and submits its nominees. It is not the Governor's duty "to enforce" the Constitutional Amendment on selection of judges. This expense is not that incurred for travel by "the Governor, his

secretary, and such other employees as the Governor may deem necessary to make investigations and procure information." It is not expense of "Communication, printing and binding, engraving, (or) lithographing" incurred by the Governor, nor is it an expense similar to any of the above, incurred by the Governor. It therefore appears that these funds are otherwise appropriated and cannot be used due to the restrictive language of Section 5 of the Constitutional Amendment. Even were this not so, the funds authorized by said appropriation, could not be so used because payment of said expense is not one of the objects specified in the appropriation act. Section 19, Article X of the Missouri Constitution prohibits the payment of funds out of the treasury "except in pursuance of an appropriation made by law;" and "it cannot be said that a claim is paid pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose." State ex rel. McKinley Pub. Co. v. Hackmann 282 S. W. 1007, 1013 (Mo. Sup.).

CONCLUSION

It, therefore, is our opinion that funds available to the Governor, under H. B. 571 Sec. 1, D. Operation (Laws of Mo. 1941 page 125) cannot be used to pay the expenses incurred by the Judicial Commission in performing its functions under the Constitutional Amendment appearing in Laws of Mo. 1941, page 722.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:AW

COUNTY ASSESSOR: Induction into the army under Selective Service Act does not create a vacancy.

- -

December 19, 1942

17-22

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
State Capitol Building
Jefferson City, Missouri

Dear Governor Donnell:

Under date of November 23, 1942, you wrote this office requesting an opinion as follows:

> "Information has been received by me to the effect that the County Assessor of Ripley County, Missouri, has been drafted into the armed forces of the United States. It is my understanding that the work of the County Assessor is now being performed by a deputy assessor or by deputy assessors. Your opinion is respectfully requested on the following question:
>
> "Should the Governor appoint a person as County Assessor of Ripley County, Missouri?"

At the time this request was received, attention was called to the case of State ex inf. McKittrick vs. Wade Wilson, which had been filed as a test case for the purpose of securing a decision from the Supreme Court upon the question of whether induction into the army under the Selective Service Act creats a vacancy in office. It was suggested that during the pendency of that case it was felt it would be improper for this office to express an opinion upon the question. The Supreme Court rendered its decision on Monday, December seventh. No motion for rehearing has been filed and the time in which

motion for rehearing could have been filed has expired so the decision is now final.

The Wilson case, supra, is a case involving the office of Clerk of the Circuit Court and statutes relating to that office. The statutes relating to the office of county assessor are not the same ones that are applicable to the Clerk of the Circuit Court but it is believed the principle announced in the Wilson case would be applicable in considering the statutes pertaining to the office of county assessor, which case holds that induction into the army did not create a vacancy or cause an automatic forfeiture of the office. The following brief quotation is from the Wilson case:

> "The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.
>
> "It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

By the provisions of Section 10946, Article 2, Chapter 74, Revised Statutes of Missouri, 1939, a county assessor has authority to appoint as many deputies as he may find necessary:

> " * * * * * And every assessor may appoint as many deputies as he may find necessary, to be paid for out of the fees allowed to such assessor, for whose official acts he shall be responsible, and who shall take the same oath and have the same power and authority as the assessor himself, while employed as such deputy or deputies."

By reason of this statutory authority for the appointment of deputies the duties of the office can be performed by someone lawfully authorized to do so, and business of the county and the public will not suffer.

CONCLUSION

It is, therefore our conclusion the Governor should not appoint a person as county assessor of Ripley County.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

SCHOOLS:)
APPROPRIATIONS:) Free public school fund cannot be appropriated to pay the cost of paving tax bills.

December 23, 1942.

12-30

FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 2, 1942, as follows:

> "I respectfully request your opinion upon the following question:
>
> "Would an appropriation to either the Missouri School for the Deaf or the Missouri School for the Blind, payable out of that part of the State revenue set apart for the support of the free public schools of Missouri, for repairs and replacements or for additions or for the payment of a tax bill for street paving be permissible under the Constitution of Missouri?"

On August 6, 1942, we rendered an opinion to Dr. C. C. Chesterson, President of the Board of Managers for the Missouri School for the Blind, in which we approved the appropriation of part of the money known as free public school fund for operations, additions, repairs and replacements of said school. The provisions of law relating to both the Blind and Deaf Schools are contained in the same article, where the statutes deal with them together (See: Article 25, Chapter 72, R. S. Mo. 1939). It would therefore appear that the conclusion reached in the opinion to Dr. Chesterson applies with equal force to the School for the Deaf. We enclose a copy of that opinion.

This leaves open but one question, and that is: May the General Assembly appropriate out of the free public

school fund, money to pay street paving tax bills assessed against said schools?

Section 6, Article XI of the Missouri Constitution creates the free public school fund and provides that the money constituting that fund "shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatever." Thus, the point is: Are street paving tax bills a part of the cost of "establishing and maintaining" the schools for the Blind and Deaf? Certainly this is not cost of "establishing" either of these schools, nor do we think it can be said that said paving tax bills constitute part of the cost of "maintaining" such schools. The word "maintain" has many meanings. In Lucas v. St. Louis & Suburban Ry. Co., 174 Mo., l. c. 276, the court defined the word to mean:

> "' 1. To hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; not to suffer to fail or decline. 2. To keep possession of; to hold and defend; not to surrender or relinquish. 3. To continue; not to suffer to cease or fail. 4. To bear the expense of; to support; to keep up; to supply with what is needed.'"

Clearly it is the last meaning set forth that applies here, because Section 6 of Article XI has to do with financial support of the free public schools. We cannot see how the cost of street paving tax bills bears any relation to the "expense" of the school; the "support" of the school; the "keeping up" of the school; or supply the school "with what is needed." Particularly is this true when we consider that the apparent purpose of Section 6 of Article XI is to restrict the purpose for which these funds may be spent, to those having to do with the "diffusion of knowledge and intelligence" by the "gratuitous instruction of all person in this State between the ages of six and twenty years." (Sec. 1, Art. XI, Mo. Const.). We are unable to see how a paving a street can diffuse knowledge and intelligence to a student or even be considered as a part of the equipment used by schools for that purpose.

Another factor to be considered in determining the meaning to be attributed to the restrictive language of Section 6 of Article XI, is as follows: In Normandy Consol. School District v. Wellston Sewer Dist., 77 S. W. (2d) 477 (Mo. App.), the sewer district sought to compel the school district to pay a special benefit assessment. The court held the school district not to be liable, saying (l. c. 478):

> "It has been consistently held that neither the Constitution (article 10, Sec. 6, Const. Mo.) nor the statute (section 9743, R. S. 1929 (Mo. St. Ann. Sec. 9743, p. 7863)), both of which provide for the exemption of certain kinds of property, including public property, from taxation, purport to refer to or include an exemption from special assessments for local improvements, and that it is therefore within the legislative power and will, in the passage of legislation providing for the making of local, public improvements, to require public property benefited by the improvement to pay its proportionate share of the expense thereof. City of Clinton v. Henry County, 115 Mo. 557, 22 S. W. 494, 495, 37 Am. St. Rep. 415; Thogmartin v. Nevada School Dist., 189 Mo. App. 10, 176 S. W. 473.
>
> "But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property

> shall be subject to the assessment. This doctrine traces its ancestry back to the ancient common-law principle that the crown was not to be bound by any statute, the words of which restrained or diminished any of his rights or interests, unless he was specially named therein; and the theory of the modernized restatement of the principle is that to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. And of course, if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication. City of Clinton v. Henry County, supra; City of Edina, etc. v. School Dist. etc., supra; City of St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; State ex rel. v. School Dist. of Kansas City, supra; Thogmartin v. Nevada School Dist. supra."

Such was the rule in 1875 when the present Section 6 of Article XI was adopted and such is the rule today, for, so far as we can find, there has never been a statute enacted which subjects state maintained educational institutions to these special benefit taxes. Therefore, it could hardly be contended that a void tax bill is expense of "maintaining" the free public schools. The least restriction that could be implied from Section 6 of Article XI is that the funds be spent on valid and legal obligations.

Conclusion

It is therefore our opinion that the free public school fund cannot be appropriated to pay street paving tax

bills assessed against the property of the state that is being used by the schools for the Blind and Deaf.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:EG
Enc.

SCHOOLS: County court cannot invest school funds in United States securities.

January 14, 1942

FILE
25

Honorable David A. Dyer
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this office under date of January 7, 1942, which is as follows:

> "I am requesting the opinion of your office on the question of the power, if any, of a County Court to invest county school fund moneys in securities of the United States of America or of the State of Missouri, such investments to be made by the Court not on the theory that they are to be permanent investments but only a temporary means of securely investing large sums of school moneys so that such sums may be slowly and conservatively loaned out on real estate owned by residents of the county.
>
> "It happens that at the present time the school funds of this county are not all loaned up. There is considerably over $100,000.00 of such moneys in the office of the Treasurer. In these times it is not only difficult to obtain first class real estate loans coming to only one-half of the value of the property on which the loan is taken but also the burden on the Prosecutin Attorney of reading the abstracts for the number of loans necessary to place such sum at work is extremely burdensome. Accordingly, the Court has asked me if they have the power to invest some money in securities of the type

> mentioned, always keeping enough money available to make the local real estate loans that meet the requirements.
>
> "I am not aware of any express statute that does give the County Court such right of investment but it is certainly true that they are the conservators of these funds and it strikes me they might have the implied power in the situation I have endeavored to sketch out above to make such investments for the ultimate safe-guarding of the funds available.
>
> "In requesting this opinion I am not forgetting that the County administers two different funds, the one being the township capital funds dealt with in Section 10383 and the following sections of the Revised Statutes of Missouri, 1939, and the other being the County school funds dealt with at Section 10376. An opinion as to the Court's powers with reference to one of the funds would, as I read the statutes, control their powers as to the other.
>
> "Will you kindly furnish me with your opinion on this question?"

Section 10, Article XI of the Constitution of Missouri provides as follows:

> "All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

Sections of the Constitution are limitations on the powers of the Legislature and under Section 10, the Legislature is not empowered to enact any laws which would allow the school funds to be invested in anything but in loans upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto.

Section 10, supra, is unambiguous and needs no con-

struction and we do not find any construction of this section by the appellate courts of this state. This section is also not only a limitation upon the acts of the Legislature but is also a limitation on the county courts and must be followed specifically. In the case of Saline County v. Thorp, 88 S. W. (2d) 183, paragraphs 5-7, the Supreme Court, in holding that the county court could not waive any of the limitations upon a loan of school funds, said:

> "The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest due (Veal v. Chariton County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. Lafayette County v. Hixon, 69 Mo. 581. Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school fund bond and mortgage, a note which does not conform to the statutory requirements. Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626. * * * * * * * * * "

In your letter you say that this will only be a temporary arrangement for the protection of the money but in the above case the court also said:

> "* * * The county court should not be permitted to accomplish by indirection something which it is prohibited from doing directly. * * * * * * * * * * * "

By reason of Section 10, Article XI, the Legislature enacted Sections 10376, 10383 and 10384, R. S. Missouri 1939, which specifically set out the manner of the loan of county or township school funds.

We have not overlooked Sections 6 and 9 of Article XI of the Constitution by reason of which the Legislature enacted Section 10871, R. S. Missouri 1939, which permitted the state school funds but not the county school funds to be invested by the State Board of Education in United States Bonds.

CONCLUSION

In view of the above authorities it is the opinion of this department that the County Court of St. Charles County cannot invest the school funds even for a short time in securities of the United States.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

AGRICULTURE:
DAIRY REGULATIONS: Dairy regulations promulgated by Commissioner of Agriculture

February 19, 1942

FILE 25

Mr. C. E. Driver
Assistant Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you request this department to pass upon the legality of the following regulations prescribed and promulgated.

"SUGGESTED REGULATIONS COVERING
MILK OR MILK PRODUCTS TO BE USED FOR MANUFACTURING
PURPOSES

* * * * * * * * *

"COWS, TUBERCULOSIS AND OTHER DISEASES.---Except as provided hereinafter, a tuberculin test of all herds and additions thereto shall be made before any milk therefrom is sold, and at least once every 12 months thereafter, by a licensed veterinarian approved by the State livestock sanitary authority. Said tests shall be made and reactors disposed of in accordance with the requirements approved by the United States Department of Agriculture, Bureau of Animal Industry, for accredited herds. A certificate signed by the veterinarian or attested to by the health officer and filed with the health officer shall be evidence of the above test: Provided, That in modified accredited counties in which the modified accredited area plan is applied to the dairy herds the modified accredited area system approved by the United States Bureau of Animal Industry shall be accepted in lieu of annual testing.

"All milk and milk products offered for sale for manufacturing purposes shall be from herds, or additions thereto, which have been found free from Bang's disease as shown by blood serum tests for

agglutinins against Brucella Abortus made in a laboratory approved by the Health Officer. All such herds shall be retested every 12 months and all reactors removed from the herd. A certificate identifying each animal by number and signed by the laboratory making the test shall be evidence of the above test.

"DAIRY BARN, LIGHTING.---A dairy or milking barn shall be required, and in such sections thereof where cows are milked, windows shall be provided and kept clean and so arranged as to insure adequate light properly distributed, and when necessary shall be provided with adequate supplementary artificial light.

"DAIRY BARN, AIR SPACE AND VENTILATION.---Such sections of all dairy barns where cows are kept or milked shall be well ventilated and shall be so arranged as to avoid overcrowding.

"DAIRY BARN, FLOORS.---The floors and gutters of such parts of all dairy barns in which cows are milked shall be constructed of concrete or other approved impervious and easily cleaned material, provided that if the milk is to be pasteurized tight wood may be used, shall be graded to drain properly, and shall be kept clean and in good repair. No horses, pigs, fowl, calves, etc., shall be permitted in parts of the barn used for milking.

"DAIRY BARN, WALLS AND CEILINGS.---The walls and ceilings of all dairy barns shall be kept clean and in good repair.

"DAIRY BARN, COWYARD.---Shall contain no pools or manure and shall be well drained and no swine shall be permitted in the cowyard.

"MANURE DISPOSAL.---All manure shall be removed daily from barn and properly disposed of, stored inaccessible to cows or piled outside until weather permits scattering on fields.

"MILK HOUSE OR ROOM, CONSTRUCTION.---There should be provided a milk house or milk room in which the cooling, handling, and storing of milk and milk products, and

storing of milk containers and utensils shall be done. The milk house or room shall be provided with a tight floor constructed of concrete or other impervious material, in good repair, and graded to provide proper drainage. It shall be well lighted and ventilated. It shall be effectively screened.

"MILK HOUSE OR ROOM, CLEANLINESS AND FLIES.--The floors, walls, ceilings, and equipment of the milk house or room shall be kept clean at all times. All means necessary for the elimination of flies shall be used.

"TOILET.--Every dairy farm shall be provided with one or more sanitary toilets conveniently located and properly constructed, operated, and maintained, so that the waste is inaccessible to flies and does not pollute the surface soil or contaminate any water supply.

"WATER SUPPLY.--The water supply for the milk room and dairy barn shall be properly located, constructed, and operated, and shall be easily accessible, adequate, and of a safe sanitary quality, no cistern or surface water unless approved.

"UTENSILS, CONSTRUCTION.---All multi-use containers or other utensils used in the handling, storage, or transportation of milk or milk products must be made of smooth nonabsorbent material and of such construction as to be easily cleaned, and must be in good repair. Regulation covered milk pail should be used. Joints and seams shall be soldered flush. Woven wire or cloths of any kind shall not be used for straining milk. Approved single service milk strainers with cotton disc must be used.

"UTENSILS, CLEANING.---All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage, using brush and dairy washing powder. No washcloth, soap or soap powders shall be used on any dairy equipment.

"UTENSILS, STORAGE.---All containers, and other utensils used in the handling, storage, or trans-

portation of milk or milk products shall be stored in a special definite place, preferably a rack, utensils to be inverted and not nested or stacked together.

"UTENSILS, HANDLING.---After bactericidal treatment no container or other milk or milk product utensil shall be handled in such manner as to permit any part of any person or his clothing to come in contact with any surface with which milk or milk products come in contact. Milk containers or utensils shall not be used for any other purpose.

MILKING, UDDERS AND TEATS, ABNORMAL MILK.---The udders and teats of all milking cows shall be clean at the time of the milking. Udders and teats should be wiped with a cloth which has been dipped in chlorinated water. Abnormal milk shall be kept out of the milk supply and shall be so handled and disposed of as to preclude the infection of the cows and the contamination of milk utensils.

"MILKING, FLANKS.---The flanks, bellies, and tails of all milking cows shall be brushed free from visible dirt at the time of milking.

"ODORS AND DUST.---No dry, dusty or strong odor feeds should be fed to cows during milking.

"MILKER'S HANDS.---Milkers' hands shall be washed clean. Wet-hand milking is prohibited.

"MILK HANDLING.---All milk must be removed from barn before pouring or filtering.

"MILK STOOLS.---All milk stools shall be kept clean and hung in a clean place.

"COOLING.---Milk is to be cooled in fresh, cold water deep enough to reach the neck of the can. The smallest container to be used is one-half of a fifty gallon wooden barrel. This cooling of milk with water must be continued throughout the year. Milk must be maintained at that water temperature until delivery unless delivered to a milk plant or receiving station for pasteurization or separation within two hours after completion of milking. Cans of milk set along

side of highway shall be protected from dust, sun and freezing.

"SEDIMENT TESTS.---It shall be the duty of the factory operator to make sediment tests on milk of each producer once each month. If this test shows No. 4 such milk shall be rejected and sale of all milk discontinued until improvement is made.

"REDUCTAS TEST.---Reductas tests may be used as a basis for quality grading by plants if desired, and unsatisfactory reductas tests shall be basis of forced discontinuance of sale of milk until improvement is made.

"MILKING MACHINE.---Milking machine pails should be handled in the same manner as other utensils. Satisfactory treatment of rubber parts consists of thoroughlrinsing following each milking and filling with one-half per cent lye solution (one 12 oz. can of lye to 18 gals. of water) until the next milking. Racks serve this purpose more satisfactorily than the practice of immersing rubber parts in the solution.

RETURNED MILK PRODUCTS.---When whey, skimmed milk, buttermilk, or other milk products intended for animal feed is returned to the producer, it shall be immediately removed from the can upon arrival, the can thoroughly washed and rinsed with a chloride solution and placed on a can rack.

"MISCELLANEOUS.---All vehicles used for the transportation of milk or milk products shall be so constructed an operated as to protect their contents from freezing, direct rays of sun, and contamination. No stock, poultry, or other contaminating elements shall be hauled in the same truck with the milk or milk products.

PERIODIC INSPECTION.---All milk product manufacturing plants are subject to rigid periodic inspection by the Department of Agriculture."

Article 6 of Chapter 102 R.S. Mo., 1939 containing sections 14097 to 14132 inclusive, contains the Missouri dairy laws.

This article makes numerous provisions for the protection and supervision of the dairy industry and provides penalties for violations thereof. It contains the following provisions with reference to the Commissioner of Agriculture administering the law and particularly prescribing and promulgating the regulations. Section 14104 R. S. Mo., 1939, is as follows:

> "The commissioner is hereby authorized to prescribe and promulgate such reasonable regulations (not contrary to the purpose of this law) as are necessary to properly enforce this law."

This section is a standard by which the proposed regulations are to be judged if they are reasonably within the purpose and spirit of the act, not arbitrary not in violation of the Constitution, and are necessary to properly enforce the law, then they are authorized by the Act.

The rule to determine the legality of a regulation promulgated by an administrative officer or board is stated as follows in the case of State ex rel. Wabash Railway Company v. Public Service Commission 306 Mo. 149, 167:

> "* * *The findings of the commission are by statute made prima-facie lawful, and we will ascribe to them the strength due to a judgment of a tribunal created by the Legislature and informed by experience. While the conclusion reached is subject to review, nevertheless, if the power of the commission has not been arbitrarily exercised * * * * * * and if the order made is not violative of the Constitution, or wanting in conformity to statutory authority, and is supported by substantial evidence, we accept it as final."

The Public Service Commission Act is broader than the Act concerning the Commissioner of Agriculture in respect to the making and promulgating of rules and regulations, but we think the same principles of law apply to both.

CONCLUSION

Applying the foregoing principle of law to these regulations, it is the opinion of this department, that they are reasonable regulations, that they are not contrary to the purposes of the law and that they are necessary to properly enforce the dairy law.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

ELECTIONS: In re residence of persons employed in service - civil or military.

- -

June 25, 1942

FILED
25

Mr. Frank L. DuBoise
Assistant, Board of ElectionCommissioners
County Court House
Kansas City, Missouri

Dear Sir:

This is in reply to your letter of June 23rd, wherein you request an opinion from this department on the following statement of facts:

> "A legal question has arisen in our office regarding certain individuals' voting rights, that I should like to have clarified.
>
> "Article VIII, Sec. 7 of the Constitution of Missouri says in part:
>
> > "'For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lose it by reason of his absence, while employed in the service, either civil or military, of this state, or of the United States; * * *'
>
> "It is generally agreed here that an individual's residence is not lost through governmental employment either in or out of the state, but many think that a voting right is gained through one year of residence within the state, whether that residence is because of governmental employment or not. I think that the second position is entirely inconsistent with the first."

It will be noted from said Section 7, supra, that a person does not gain or lose his residence by reason of his absence from county or voting precinct because he is employed in the service either civil or military of this State or of the United States. This provision, according to the views that the courts have taken, does not deprive the voter of making his choice of voting at the place where he is working in civil or military service providing such person has been there long enough to establish a voting residence. This section was before the St. Louis Court of Appeals in 1934, in the case of Chomeau v. Roth, 72 S. W. (2d) 997. In that case, the question before the court was, the right of a student to vote. In discussing this provision of the Constitution, the court said at l. c. 999:

> "* * * Our Missouri Constitution provides in article 8, sec. 7 (Const. art. 8 sec. 7, p. 677, Mo. St. Ann.), that for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or to have lost it by reason of his absence, while a student of any institution of learning. So the Constitution leaves the student much as it finds him, permitting him either to retain his original residence for voting purposes, or to take upa residence wherever his school is located if he so elects. In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home; the whole question, as in all similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in the light of all the facts and circumstances of the case. Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97; Goben v. Murrell, 195 Mo. App. 104, 190 S. W. 986, 197 S. W. 432.

> "The two cited cases, and particularly the former, control this case in all essential respects. As they announce the law, it is entirely possible for a student to gain a residence at the place where he is attending school, although he may have gone there for no other purpose than to attend school; the question of whether a change of residence is effected depending upon the intention with which the removal from the former residence was made. A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. Nolker v. Nolker (Mo. Sup.) 257 S. W. 789; Finley v. Finley (Mo. App.) 6 S.W. (2d) 1006."

It will be noted, that the court in expressing its views indicated that it was a matter of the intention of the voter; that is if the voter is at a certain place and has resided there long enough to establish residence and he shows an intention to establish a residence, then the foregoing provisions of the Constitution would not deprive him of the right to do that.

In the case of Hall v. Schoenecke, 128 Mo. 661, at l. c. 666, in speaking of the right of a student to vote, the court said:

> "Each case must, then, depend upon the facts. There is no doubt that a student may become a resident of the place where

> the college is located, though he only went there for the purpose of attending school. Whether he has done so or not, depends upon all the facts and circumstances. The fact that he is supported and maintained by his parents, and spends his vacation with them, are strong, but not necessarily conclusive, circumstances to prove that he has not changed his residence. See cases cited in note 6 Am. & Eng. Encyclopedia of Law, p. 278. The question is, as in other cases, largely one of intention, * * * * * * * *."

CONCLUSION

It is therefore, the opinion of this department, that a voting right may be gained through one year of residence within this state whether that residence is because of governmental employment or not. In other words, if the voter is in this state, engaged in civil or military service, if he so desires and shows an intention to do so, he may establish a voting residence in this state.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

DEPARTMENT OF AGRICULTURE:
STATE VETERINARIAN APPROPRIATIONS: The State Veterinarian may expend available funds out of the appropriation to his department for the purpose of enforcing the provisions of the law relating to the disposal of diseased animals and carcasses of same.

January 16, 1942

FILE
26

Hon. John W. Ellis
Commissioner of Agriculture
State Office Building
Jefferson City, Missouri

Dear Mr. Ellis:

This is in reply to your letter of recent date wherein you inquire of this department whether or not the State Veterinarian may use funds appropriated to his department for the purpose of administering the Dead Animal Disposal Act passed by the 61st General Assembly, Laws of Missouri 1941, page 290. You further state that the General Assembly failed to make an appropriation specifically for the purpose of carrying out the provisions of said Dead Animal Disposal Act.

Referring to the Dead Animal Disposal Act, it will be seen that the lawmakers intended to enact a law, the purpose of which was to protect the health and safety of livestock in this state. Section 14493-ee, page 293, Laws of Missouri 1941, of the Act provides for the collection of fees for licenses to operate under the Act. These fees are deposited with the State Treasurer to the credit of the "Disposal Plant Fees Fund", subject to the appropriation by the General Assembly.

Evidently there was an oversight on the part of the General Assembly, in that no appropriation was made under this Act. The lawmakers clearly indicated by this Bill, however, that they intended for the State Veterinarian to proceed with the enforcement of the Act when it became effective, which was ninety days after General Assembly adjourned. The State Veterinarian is placed in a peculiar position here because the lawmakers have directed him to do certain things and, by oversight, have failed to appropriate funds to pay for doing such things.

To institute the administration of this Act, expenditures for printing, blanks, licenses, inspections, etc. will be necessary. In the absence of a specific appropriation to carry out the provisions of this Act, and to avoid charging the legislature with doing a useless thing, we look to other statutes pertaining to the duties of the State Veterinarian for the purpose of obtaining some light on this question. Section 14190, R. S. Mo. 1939, provides that the Commissioner of Agriculture shall appoint a Veterinary-Surgeon to aid and assist in developing and protecting the livestock interests of the state.

The said Dead Animal Disposal Act of 1941, pertaining to the dispostion of dead animals, is for the same purpose, namely the protection of livestock against contagious diseases, the ultimate result of which is to protect livestock interest of the state. Therefore, if the appropriation to the State Veterinarian is broad enough, we think you would be authorized to expend funds out of the appropriation under that Act for the purpose of carrying out the provisions of said Dead Animal Disposal Act.

Section (d) of Section 19, page 188, Laws of Missouri, 1941, which is a part of the appropriation to the State Veterinarian, reads as follows:

"D. Operation:

General expense: including communication, transportation of things, travel within and without the State, printing and binding, supplies, stationery, office supplies, premiums on bonds, and other necessary expenses -- ----------$12,500.00 "

Out of the funds appropriated to the State Veterinarian under said Section 19, we think he would be authorized to expend any moneys necessary for the protection of the live stock interests of the state. By said subsection (d), supra, it will be seen that moneys may be expended for printing, binding, supplies, stationery, etc.

In the case of Bowers v. Missouri Mut. Ass'n., 62 S. W. (2d) 1058, a rule of construction of the statutes is announced which might be applied here. At l. c. 1063 the court said:

> "Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect.
> * * * *"

Applying this rule to the Dead Animal Disposal Act and to the Veterinarian (State), we think the ends of public welfare would be furthered by giving an instruction that a part of said appropriation to the State Veterinarian may be used for the purpose of administering the Dead Animal Disposal Act, because the ultimate purpose of the Dead Animal Disposal Act is the same as the purpose for which the State Veterinarian is appointed and for which the appropriation to his department is made, that is "for the protection of the livestock interests of the state."

CONCLUSION

It is, therefore, the opinion of this department that the expenses of administering the Dead Animal Disposal Act of 1941 may be paid out of the appropriation to the State Veterinarian, because such funds have been appropriated for the purpose of protecting the livestock interests of the state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

NOTICE OF ADMINISTRATOR OF FINAL SETTLEMENT IN PROBATE COURT:

In a county of under 600,000 population a notice of final settlement published in a weekly newspaper for four consecutive weeks prior to time of making final settlement is sufficient.

April 18, 1942

H-17

FILE 26

Hon. Walter A. Eggers
Judge of Probate
Perry County
Perryville, Missouri

Dear Sir:

We have for answer your opinion request of April 13, 1942, which is as follows:

> "The writer qualified as Judge of Probate of Perry County, Missouri on April 10, 1942, after the office had been vacant for several weeks.
>
> "The first day of the Regular May Term of this court is to be held on Monday, May 11, 1942. Final notices are being published in the weekly newspapers of the county on the following dates;-
>
> April 16, 1942.
> April 23, 1942.
> April 30, 1942.
> May 7, 1942.
>
> "Will you kindly advise whether this is considered as sufficient notice as called for in Sec. 229 of the Revised Statutes of Missouri 1939."

Section 229, R. S. Mo., 1939 sets out the proper manner of giving notice of final settlement by an administrator of an estate in the Probate Courts of this State. That section is as follows:

"At the first regular term of the court after the expiration of one year from the date of granting of the first letters on the estate, as required by this chapter, unless further time has been given by the court by an order entered of record, every executor and administrator shall make final settlement, having first published once a week for two consecutive weeks in cities or counties having a population of over six hundred thousand as shown by the last preceding federal census and in all other counties once a week for four consecutive weeks prior thereto in some newspaper published and circulated in the county where such settlement is to be made, if there be one, and if there be none published in such county, then by ten printed handbills put up in ten public places in said county, a notice to all creditors and others interested in the estate that he intends to make such final settlement at the next term of the court. If any executor or administrator fail to so advertise and make such final settlement at such term or when required by the court at any time thereafter, he shall be proceeded against as for his failure to make annual settlements, unless for good cause shown the court shall continue same. If the first insertion of the publication required by section 75 is not published within ten days from the date of the granting of the letters, then the one year above mentioned shall begin to run

> from the date of the first publication of such notice: Provided, that where publication is made in a daily newspaper, publication for each week after the first shall fall on the corresponding day of the week as did the first publication." (Underscoring ours).

In 36 Cyc. 1106, it is said as follows:

> " * * * * * * The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. * * * * * * * "

The law is well settled in this state that where a statute is plain and unambiguous it is not necessary to place a construction upon it. It is only necessary to take the obvious intent of the Legislature and act in accordance therewith. In State v. Keller, reported in 137 S. W. 2d 989, l.c. 990, the court said:

> " * * * * * * In construing this statute the following well established rule should be kept in mind: Where the language of a statute is plain and unambiguous nothing contrary to the evident intent can be implied. State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 682, 92 S. W. 2d 640. A statute should be so construed as to give effect to the legislative intent. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 106 S. W. 2d 898. A statute that is clear in its terms and leaves no

> room for construction must be enforced as written. Dahlin v. Missouri Commission for Blind, Mo. App., 262 S. W. 420. * * * * * * "

In the case of Fichtner v. Mohr, reported in 16 S. W. 2d 739 l.c. 741, the court said as follows:

> " * * * * * * We are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the language used is plain, it must be given effect by the courts. * * * * * * * "

In the case of Cummins v. Kansas City Public Service Co. 66 S. W. 2d 921 l.c. 925, the court said as follows:

> " * * * * * * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically', is properly given consideration. See Grier and Meyering Cases; 2 Lewis, Sutherland on Stat. Const. (2d Ed.) section 383; Endlich on Interpretation of Statutes, section 329; and Maxwell on Statutes (5th Ed.) 425. * * * * * * * "

CONCLUSION

Perry County is a county of under six hundred thousand (600,000) inhabitants. It is, therefore, the conclusion of this office that if an administrator has complied with all the other provisions of Section 229, supra, and makes his publication as set out in your request, the last insertion being four (4) days before the term opened, that is sufficient notice as required in Section 229, supra.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

ELECTIONS:
ABSENTEE BALLOTS, APPLICATION FOR: Officers authorized to administer affidavit for absentee ballot.

- -

June 17, 1942

Mr. A. G. Eberle, Secretary
Board of Election Commissioners
For the City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri

FILE
26

Dear Sir:

This department is in receipt of your request for an official opinion upon the following question:

> "* * * if the affidavit called for either by Section 11518 or Section 11521 R. S. Mo. 1939, is administered by a military or naval officer as specified in Section 1948, will it be necessary to have the affidavit accompanied by a certificate showing the authority of such military or naval officer, administering the oath, to take affidavits. * * * * * * * * * * *"

Section 3411, R. S. Mo. 1939, provides in part as follows:

> "* * * * The certificates of the officers referred to in sections 1948 and 3410 of their rank shall be <u>prima facie</u> evidence thereof."

Under the section quoted above, we believe that no certificate of authority is required but a certification of the officers that they hold a certain rank must be taken as prima facie evidence of such rank.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

AO'K:CP

APPROVED:

ROY McKITTRICK
Attorney-General

PENAL INSTITUTIONS: Period provided by 3/4ths law runs only while convict in prison. Where power reserved parole may be revoked for any reason deemed sufficient by Governor. Where convict deprived of 3/4ths benefits, and paroled, his parole may be revoked, and convict required to serve full terms.

PAROLES:

June 24, 1942.

6-26

FILED
26

Mr. Robert C. Edson
Director of Probation and Parole
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Edson:

This is in reply to your request for our opinion by your recent letter which is in the following terms:

"The above named subject was received at the Missouri State Penitentiary March 7, 1929, to serve a term of fifteen years having pled guilty to the charge of Robbery 1st in the Circuit Court of Jackson County.

"On September 21, 1935, the subject escaped from the East Church Farm. He was returned from Reding, California, October 19, 1938. Due to this escape, which is a violation of prison rules, the subject's time was flattened so that had he remained in prison his full sentence without the benefit of three-fouths law, would have expired December 27, 1946.

"On February 25, 1941, the subject was paroled by Governor Lloyd C. Stark.

"The subject violated his parole by virtue of the fact that he committed an offense in California and he is now serving from one to ten years in Folsom Prison for Grand Larceny. By reason of this new felony

> conviction the subject's parole was revoked by Governor Forrest C. Donnell on April 18, 1942.
>
> "Now the question has been raised and we would appreciate your opinion as to whether the three-fourths law became operative when the subject was granted a parole. In other words, whether the subject was restored to a status of good behavior. In view of the above facts we would appreciate further knowing whether the Board had the power or right to recommend the revocation of the subject's parole and whether the Governor had the right to revoke the subject's parole and whether we can again take the subject into custody and cause him to serve the remaining portion of his sentence as a parole violator."

In a subsequent conversation you informed us that the conviction in California for another offense there, was on February 26, 1942.

From your letter and our conversation, we understand the first question is, was the revocation of parole valid? Our ultimate answer is in the affirmative.

Rogers was sentenced to imprisonment in the penitentiary for a term of fifteen (15) years. Assuming good behavior, he could be held to serve three-fourths of that period, under Section 9086, R. S. Missouri, 1939, which in part provides:

> "Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any

> infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; * * * * *."

Three-fourths of fifteen (15) years is eleven years and three months. After Rogers had served in the penitentiary for six years, six months and fourteen days, and on September 21, 1935, he escaped from a prison farm. At that time he still owed on three-fourths of his sentence, a balance of four years, eight months and sixteen days. Thereafter, he was recaptured and returned to the penitentiary on October 19, 1938. Thereafter, he remained in the penitentiary for two years, four months and six days, until February 25, 1941, when he was paroled. At that time he still owed on three-fourths of his sentence, a balance of two years, four months and ten days.

The three-fourths period runs only while a convict is in the penitentiary. The statute establishing the three-fourths rule, Section 9086, supra, applies only to a convict, "who shall serve three-fourths of the time for which he or she may have been sentenced * * *." This statute was construed in Ex parte Carney, 122 S. W. (2d) 888, l. c. 889, 890, 343 Mo. 558, and it was held that the benefits and burdens provided by this statute, attach only "while undergoing punishment" in the penitentiary. This State adheres to, "the majority rule that parole suspends the running of the sentence * * *." 39 American Jurisprudence, p. 578, section 94. It follows that the extent of the term of a parole is governed solely by the parole itself. As far as the time element is concerned, the revocation is valid.

The parole provided that its term should extend "up to August 23, 1945." That is a proper condition, under Article V, Section 8 of the Constitution of Missouri, which authorizes the Governor to act in this connection, and in part provides that, "The Governor shall have power to grant . . . commutations and pardons, after conviction . . . upon such condition

and with such restrictions and limitations as he may think proper * * *."

That power to pardon includes the power to issue a conditional pardon (46 C. J., page 1182, Section 3), or a parole which is the same thing. It was so ruled in State v. Asher, (Mo. Sup.) 246 S. W. 911, l. c. 913, and the following definition of a parole was quoted with approval:

> "'A form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on the violation of the condition of the parole.'" See 46 C. J., page 1183, 1184, Section 6.

Also, for the purposes of this case, conditional pardons and paroles are the same as documents sometimes called conditional commutations. A commutation of sentence is "the substitution of a less for a greater punishment by authority of law." (Lime v. Blagg, (Mo. Sup.) 131 S. W. (2d) 583; 46 C. J., page 1182, Section 4). That commutations may be conditional under said Article V, Section 8, of the Constitution of Missouri was pointed out in Ex parte Strauss, (Mo. Sup.) 7 S. W. 2d 1000 (1-4), 320 Mo. 349; 46 C. J., page 1199, 1200, Section 54.

When Rogers left the penitentiary under the parole, he accepted and was bound by its terms. It was so ruled in Ex Parte Strauss, 7 S. W. (2d) 1000, 1001, 320 Mo. 349, and the court said:

> "The Governor may therefore attach to a commutation granted by him any condition he chooses, provided it is not illegal, immoral, or impossible of fulfill-

> ment. Ex parte Mounce, 307 Mo. 40, 269 S. W. 385. * * * * * * * * * * * A commutation of sentence is a matter of grace or favor. It is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out the sentence originally imposed upon him to a suspension of it under the conditions imposed, he has the clear right to do so; but, if he elects to accept the commutation and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. Ex parte Alvarez, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102 7 Ann. Cas. 88."

Respecting the method of establishing the conditions of a parole (or conditional pardon), the Court, in Ex Parte Reno, 66 Mo. 266, l. c. 273, 27 Am. Rep. 337, ruled:

> "* * * While the Governor may grant a pardon on conditions, such conditions to be operative should appear on the face of the paper. * * * * *."

To the same effect are numerous decisions from other states, collected in an annotation at 60 A. L. R. 1423.

Copies of the Rogers parole and revocation were attached to your letter dated June 22, 1942. Pertinent provisions of the parole are:

> "Now, therefore, I, Lloyd C. Stark, Governor of the State of Missouri, by Virtue of Authority in me vested and

for good and sufficient reasons appearing do, for the purpose of the parole, hereby commute the sentence of the said Norman L. Rogers, to a term ending the 23rd day of August, 1945, without benefit of the three-fourths law, * * * * * * * * * * * * * * * * * * upon the express conditions, however, that the said Norman L. Rogers, shall faithfully demean himself as a citizen of the State of Missouri and abide by the laws thereof,* * * * * * * * * * * * * * * *. This parole is issued upon the express understanding and condition that Charles C. Coxe, Parole Officer of the State of California, holds himself personally responsible to the Governor for Norman L. Rogers, proper employment, good behavior, and compliance with the conditions of this parole up to August 23, 1945,* * * * * * * * * * * * * * * * * *.

"Failing in any of which, or upon the order of the Governor at any time he may be arrested and returned to the penitentiary and without a hearing there to serve out the remainder of his sentence."

The revocation thereof in part states:

"REVOCATION OF CONDITIONAL PAROLE"

"* *

"And, whereas, it has been made to appear to the undersigned, Governor of the State of Missouri, that the said Norman Rogers has violated the terms and conditions of said Conditional Commutation Parole in this, to-wit: An FBI bulletin reports that subject is now serving from 1 to 10 years in Folsom Prison in California for Grand Larceny.

> Due to the above conviction, revocation of subject's parole is desired. and has not obeyed the laws of the State of Missouri or conducted himself in all respects as a law-abiding citizen since the date of his parole.
>
> "NOW, THEREFORE, in consideration of the premises and by virtue of authority in me vested, I, FORREST C. DONNELL, Governor of the State of Missouri, do hereby annul, cancel and revoke the conditional commutation granted the said Norman Rogers upon the said 25th day of February, 1941, and hereby order and direct that the Warden or Deputy Warden of the State Penitentiary arrest and obtain the said Norman Rogers and return him to the State Penitentiary at Jefferson City, Mo., where the Warden shall confine him until he shall have served the remainder of said 15 years' sentence which has not been served in accordance with the terms of the criminal judgment upon the date of his release from said Penitentiary on said Conditional Commutation Parole issued upon said February 25, 1941, aforesaid."

One of the conditions of the parole was that Rogers, "shall faithfully demean himself as a citizen of the State of Missouri and abide by the laws thereof * * *." That specific condition did not require Rogers to obey the laws of California. Therefore, his violation of the laws of the State of California does not constitute a violation of the aforesaid specific condition. If the revocation of parole were based solely upon violation of said specific condition, the revocation would be void.

Moreover, under the terms of his particular parole, the Governor had no right to make a determination whether Rogers had violated a specific condition, because no such right was reserved in the parole. In Ex Parte Strauss, supra, the court further said, at l. c. 1001 of 7 S. W. (2d):

> "* * * A terse yet comprehensive statement of it appears in Ruling Case Law as follows:
>
> "' * * * * * *, and in the absence from the pardon itself of express stipulations so authorizing the Governor, he has no authority to inquire into or pass upon the question of a violation of the condition or conditions of such pardon, or to order the rearrest of the convict, or to subject him to the execution of the original sentence imposed, and any order of the Governor undertaking to adjudge a violation of the conditions of his pardon by the grantee and revoking such pardon, and ordering his recommitment in execution of his original sentence is a nullity. * * * A condition in a pardon that the Governor may summarily determine whether the conditions have been complied with, and if he finds that they have not may revoke the pardon and order the reconfinement of the offender, is binding upon the convict, and authorizes his rearrest and commitment upon the terms and in the manner imposed. * * * * * * * * * * *.'"

Within the above quoted principles, while the reservation of a specific condition was imperfectly done, the Governor did reserve to himself a broad general condition and authority, which makes this revocation valid. In the last quoted paragraph of the parole, the words, "Failing in any of which," refer to the specific conditions. Immediately following is the reservation of the broad general power:

> "* * * or upon the order of the Governor at any time he may be arrested and returned to the penitentiary and without

> a hearing there to serve out the remainder of his sentence."

That portion of the parole made no specific restriction as to the reason for which the Governor could order the return of Rogers. Therefore, it means that the Governor may revoke it for any reason satisfactory to him. There is nothing which would require even that he state a reason. Ex parte Strauss, supra, and other Missouri cases there cited, ruled that the convict is bound by the conditions of the parole. The validity of this particular broad condition has not been adjudicated in Missouri, but is recognized as valid in other jurisdictions without exception, as shown by numerous decisions collected in 54 A. L. R. 1473, 1483, 1484.

In State ex rel. Davis v. Hunter, 100 N. W. 510, l. c. 512, 124 Ia. 569, 104 Am. St. Rep. 361, the court said:

> "But the order of suspension in the case before us contained the express condition that it might be revoked at the discretion of the executive, and should remain in force only during his pleasure; and it is plain, therefore, from its very terms, that no determination of any fact was essential to the authority of the Governor to terminate the suspension and cause the prisoner to be returned to the penitentiary. It cannot be contended therefore, that any judicial proceeding was necessary." (Italics ours.) That "suspension" was the equivalent of a parole under the Iowa statute. The revocation was not quoted but the court said that it specified that it revoked the parole "for good and sufficient reasons appearing to him (the Governor)."

And, in Ex Parte Butler, (1928) 269 Pac. 786, 787, 40 Okl. Cr. 434, the Criminal Court of Appeals of Oklahoma said:

> "The parole granted petitioner was an act of grace or favor upon the part of the state by its chief executive. Petitioner was free to accept the parole with its conditions, or reject it and serve his sentence. He chose the former, and stipulated that, for a violation of the conditions, or for any other reason deemed sufficient, the parole might be summarily revoked by the Governor, and petitioner should be remanded to the penitentiary to serve out the sentence. Upon its revocation, the legal status of the petitioner should be regarded the same as it was before the parole was granted and accepted." (Italics ours). This is in accord with earlier Oklahoma cases which forcibly state the rule, 54 A. L. R., supra.

In Exparte Frazier, (1922), 239 S. W. 972, 91 Tex. Crim. Rep. 475, the conditional pardon stated in part that ". . . if the said A. L. Frazier is guilty of any misconduct or violation of the laws of this state, or there arises any other good and sufficient reason in the opinion of the Governor, justifying him in doing so, this pardon is subject to be revoked at the Governor's discretion, * * *." The Governor's revocation stated it had been made known to the Governor that Frazier had "been guilty of conduct unbecoming a good citizen, * * *." The court said at l. c. 973 of 239 S. W.:

> "Of what use or avail would a court hearing or judgment be, when it is agreed upon and written into the document as decisive that whatever in the Governor's opinion justifies him shall be ground for revocation. * * * * * In our opinion the

> conditions imposed by the pardon granted appellant were neither illegal nor immoral, and by acceptance of same he bound himself to submit to a revocation when made by the Governor for any causes which, in the opinion of the latter, justified such action. Such revocation could not and did not deny to appellant his right to a writ of habeas corpus, but when brought before the courts in obedience thereto he has no right -- and we no power -- to go beyond the terms agreed upon by him in his acceptance, and by the Governor in his grant, of such pardon."

In our opinion, the fact that Rogers was convicted of a felony in another state is adequate ground (though no ground need be stated) for the revocation under the reservation by the Governor of the power to revoke, "upon the order of the Governor at any time . . . without a hearing."

Inasmuch as the revocation could lawfully be made, the Board of Probation and Parole could lawfully recommend such action. Section 9160, R. S. Missouri, 1939, in part, provides:

> "The Board of Probation and Parole shall have authority and it shall be its duty to * * * * * * * * * * * * * * * * * to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; * * * * * * * *."

The next question is, May Rogers be held to serve the full period of his fifteen-year sentence?

The above mentioned three-fourths rule of Section 9086, applies to any convict who:

> "* * * shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, * * *."

Your letter states that Rogers escaped from a prison farm, on September 21, 1935. The record clerk of the penitentiary has informed us that this fact was recorded at the time in a ledger called the "Escape Book." Your letter further states that the time of Rogers "was flattened," meaning that the records were made to show he was being held to serve the full period of his sentence, without benefit of the three-fourths law. The decision to hold a convict for the full period of his sentence is properly made in practice by the Warden, with the approval of the Commission of the Department of Penal Institutions, who are authorized by statute to administer the affairs of the penitentiary. In Ex parte Rody, 152 S. W. (2d) 657, l. c. 660, it was held:

> "* * * * * As stated in the Carney Case, the conditions of the three-fourths rule enacted by Sec. 9086, supra, must be read into every judgment of conviction. They offer a reward in the form of diminished incarceration to every convict for obedience to the rules of the prison and laws of the same.
>
> "But the enforcement of these rules and laws, so far as they affect the reward, is administrative, not judicial. Sec. 9086, itself, requires breaches thereof to be recorded on the prison records. Sec. 8985, supra, requires the Commission of the Department of Penal Institutions to make and enforce such by-laws rules and regulations as they deem necessary. And Sec. 9041, supra, requires the Warden of the Penitentiary to see

> that they are enforced. It is, of course, the duty of these officers to see that the statute laws governing the same subject matter -- the highest form of regulation except the Constitution -- are enforced. And it makes no difference that a breach of the law or regulation may also constitute a felony or misdemeanor, separately punishable as such."

When Rogers escaped, his conduct was certainly not "orderly and peaceable." Therefore, his right to the benefit of the three-fourths rule was forfeited.

Moreover, the escape was an "infraction of . . . the laws of," the prison, and, therefore, the three-fourths rule is not applicable. It was so ruled by the Supreme Court, in the recent case of Ex parte Rody, 152 S. W. (2d) 657, l. c. 658 -- 661:

> "The petitioner is confined in the state penitentiary and contends that under Sec. 9086, R. S. 1939, sec. 8442, Mo. Stat. Ann. p. 6214, enacting the so-called 'three-fourths rule', he is entitled to discharge. * * * * * * * * * * * * * * *
>
> "In his brief the Warden of the penitentiary, represented by the learned assistant Attorney General, concedes arguendo that petitioner's escape from the sawmill camp violated no rule of the institution, but contends that it did violate a law of the same, within the meaning of those words in the statute, the law being Sec. 4307, R. S. 1939, sec. 3913, Mo. Stat. Ann. p. 2751, which provides that 'if any person confined in the penitentiary for any term less than life shall escape from such prison, or, being

> out under guard, shall escape from the custody of the officers, he shall be liable to the punishment imposed for breaking prison.' * * * * * * * * * * * State v. Betterton, 317 Mo. 307, 292 S. W. 545, and Ex parte Carney, 343 Mo. 556, 122 S. W. 2d 888.* * * * * * * * *
>
> "We are unable to agree that State v. Betterton, supra, and Ex parte Carney, supra, support petitioner's first contention. On the contrary, the Betterton decision is against him. The concluding lines of the opinion held Sec. 4307 (then Sec. 3161, R. S. 1919) did apply to a prisoner escaping from a prison farm, and there is no difference in principle between escaping from a prison farm and a prison sawmill. * * * * * * * * * *."
>
> "* * * * * our writ of habeas corpus is quashed and the petitioner remanded to the custody of the Warden and the Commission of the Department of Penal Institutions."

When Rogers received a parole from the Governor, he was paroled from the service of a full fifteen-year sentence. The parole states the condition that it is, "without the benefit of the three-fourths law." That is one of the conditions which have been accepted by Rogers, and by which he is bound. However, the result would be the same, even if the parole had not contained that provision. None of the principles governing paroles, heretofore stated, include any rule by which a parole would relieve a convict from disciplinary action previously taken by penal authorities. In our opinion Rogers may be held to serve the full period of his fifteen-year sentence. Whether that will be done rests in the discretion of the Board of Probation and Parole, and the Governor, under Article V, Section 8 of the Constitution of Missouri, and Section 9160, supra.

The conviction of another offense while on parole is no lawful ground for depriving a convict of the benefit of the three-fourths law, under the rule of Ex parte Carney, supra.

CONCLUSION

Under the above authorities, it is our opinion that the period of time contemplated by the three-fourths rule established by Section 9086, R. S. Missouri, 1939, runs only while the convict is in the penitentiary, and the extent of the term of a parole is governed solely by the terms of the parole. The Governor may lawfully reserve and exercise the power to revoke a parole, for any reason deemed sufficient by him, without a hearing.

Where a convict has been lawfully deprived of the benefit of said three-fourths law, and thereafter is paroled, the parole may be revoked, and the convict may be required to serve the full period of his sentence, without benefit of the three-fourths law.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

EH/rv

PARDONS AND PAROLES: Parole violated during its term, may be revoked after end of such term, regardless when sentence would have expired.

July 8, 1942

FILED
26

1-28

Mr. Robert C. Edson
Director
Board of Probation and Parole
State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated July 1, 1942, which is in the following terms:

> "The above named subject pled guilty to the charge of larceny of an automobile in the Circuit Court of Cape Girardeau County and was assessed a sentence of two years. He was received in the Missouri State Penitentiary November 29, 1932. On October 7, 1933 Hon. Guy B. Park granted the subject a conditional commutation of sentence up to August 5, 1934. I am enclosing a copy of the original order of Governor Park.
>
> "According to a statement of facts dated May 26, 1924, S. P. Dalton, then Prosecuting Attorney of Cape Girardeau County, stated that, quote, 'on October 28, 1933, shortly after the above named defendant had been released from your institution . . . . . he came to Cape Girardeau where he met with several people. The group promptly formed a plan to steal an automobile and hold up some places and get some easy money . . . . ." This is sufficient informa-

tion I believe for you to understand that the new offense was committed October 28, 1933. The subject pled guilty to the charge of robbery in the Circuit Court of Cape Girardeau County and on May 17, 1934, was assessed a sentence of 15 (fifteen) years in the Penitentiary. On May 29, 1934, former Governor Guy B. Park revoked the subject's conditional commutation issued under #42002. Our records now show that upon his return to the penitentiary that he was required to serve the remaining portion of his sentence up to three-fourths of his time before he began serving his new sentence.

"Since three-fourths of the subjects sentence under #42002 had expired before the actual order of revocation by the Governor had been made we would appreciate knowing whether the Governor had the power to revoke the subject's conditional commutation.

"In order to clarify the situation further may we assume the hypothetical situation that in the Governor's original order of commutation the conditions of commutation were to be enforced until March 3, 1934, instead of August 5, 1934. All other conditions being the same would we have the authority to recommend revocation of the subject's conditional commutation? In other words does the Governor have the authority upon the recommendation of the Board to revoke the conditional release of an inmate of the Penitentiary after three-fourths of the subject's sentence has expired even though an act of violation was committed prior to the expiration of three-fourths of the subject's sentence? Assuring you your cooperation will be greatly appreciated, I am,"

Section 9086, R. S. Missouri, 1939, in part, provides:

> "Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, that he or she shall not have been indicted, informed against by the prosecuting attorney or circuit attorney or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the commission, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

Your first question is, May the Governor revoke a parole for violation of its conditions, committed during the parole term, where the revocation occurs after the date when three-fourths of the sentence would have expired, except for the parole?

The parole referred to in your letter contained the condition that the convict was to be on parole and subject to the terms of the parole up to August 5, 1934. On the ground of the violation of the conditions of the parole during its term, the revoation lawfully could be made,

regardless of when the sentence would have expired had the convict remained in the penitentiary. This was the effect of our opinion addressed to you, and dated June 24, 1942. The general rule is stated in these terms, in 39 American Jurisprudence, pp. 566, 567, Section 74:

> "* * * In accordance with these principles, it is well settled that where a prisoner is conditionally pardoned, upon breach of the condition the time he was at liberty under the pardon is not to be considered as time served on the original sentence, and he may be compelled to serve out the term which remained unserved at the time the pardon was granted and accepted. By breach or nonperformance of the conditions the pardon becomes void, and the status of the prisoner is the same as it was before the pardon was granted; or, as is sometimes said, the position of the prisoner on a violation of the conditions of his pardon is similar to that of an escaped convict. He cannot complain of the interruption of the execution of the sentence during the time he enjoyed his liberty, for it was secured by him by his acceptance of the conditional pardon.
>
> "A condition in a pardon that the convict shall be required to serve out the unserved portion of the term of his original sentence if he violates the terms of the pardon does not terminate with the expiration of the original term of sentence. Accordingly, the rule is laid down by many courts that a convict who has violated the conditions of a pardon may be compelled to serve out the unexpired term of his original sentence, even though the breach occurred after the date upon which his sentence as fixed by the court which sentenced him would have expired. * * * * *."

46 Corpus Juris, pp. 1202, 1203, states:

> "A breach of the condition of a pardon avoids and annuls it. Execution of the original sentence may then be enforced. This is true, although the term for which the convict was sentenced has expired unless the application of a different rule is required, by operation of a statute, or by the pardon itself, or because it is held that no conditions can be attached to a pardon that are to extend after the expiration of the term for which the prisoner was sentenced."

There is in Missouri, no statute or rule of decision which would prevent this action. The parole authorizes it.

The same volume, at p. 1209, Section 79, further states:

> "In a number of jurisdictions a parole may be revoked at any time, even after the expiration of the time for which the prisoner was sentenced, the time during which the prisoner is out on parole not being regarded as imprisonment. Under some statutes a parole which has not previously been discharged may be terminated after the expiration of the time for which the prisoner has been sentenced, for so long a period as the parole is operative by law, or where the parole has been violated before the expiration of the time for which the prisoner was sentenced, it may be revoked after the expiration of such time if the prisoner has not been discharged from the terms of the parole. * * * * * * * * * * *."

Your other question is, May the Governor revoke a parole for violation of its conditions, committed during

the parole term, where the revocation occurs after the end of such term?

The parole in the instant case, and all forms of parole which we have seen, contain the reservation that the revocation may be made, "at any time." That alone would appear to authorize the revocation in the circumstances stated by your question.

It is to be considered that a violation of a parole during its term, may not be discovered until after expiration of such term. Frequently, even when the violation has been discovered, the Governor wisely defers revocation until the fact of the violation of the parole (commission of a crime) has been finally determined by a court in a criminal prosecution. Such delay is favorable to the interests of the convict, because acquittal in court might prompt the Governor to withhold his revocation. The whole theory of executive clemency based on obedience to conditions of good conduct, would be destroyed if the revocation could only be made during the term of the parole. No rule of law, and nothing in the parole would require such an illogical result. For all of these reasons we believe that if the violation occurs during the term of the parole, the revocation may lawfully be made after the end of such term.

We have found only one case exactly in point, In re Eddinger, 211 N. W. 54, 55, 236 Mich. 668, where the court said:

> "* * * On June 12, 1923, he was placed on parole for the period of one year. * * * * * * * * * On July 7, 1924, after the parole period had expired, the Governor signed an absolute discharge, and caused it to be forwarded to H. S. Williams for delivery to Eddinger. Previous to this Eddinger had violated his parole and fled to California. The discharge was returned for cancellation. A warrant was issued. * * * * * * * * * * * *.

> "* * * Inasmuch as there was no delivery, the Governor had the power to revoke the discharge and cause the prisoner, who had violated his parole, to be apprehended and returned to prison to serve the balance of his sentence.
>
> "The contention that the prisoner cannot be required to serve the balance of his sentence because no proceedings were taken to return him to prison before the parole period had expired is so wholly without merit that it requires no discussion."

CONCLUSION.

In view of the above authorities, it is our opinion that where a parole having a definite term, is violated during such term, it may be revoked after the end of the term, regardless of when the sentence would have expired had the convict remained in the penitentiary.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

Approved:

VANE C. THURLO
(Acting) Attorney-General

EH/rv

BINDWEED: Section 14264 Laws of Missouri 1941 survey is so indefinite that it is unenforceable.

June 2, 1942

6-5

FILE 27

Honorable Sam T. Evans
Prosecuting Attorney
Gallatin, Missouri

Dear Sir:

Your request for an opinion has been referred to me. This request is as follows:

> "I should like to have your opinion concerning Section 14264, Laws of Missouri, 1941, at Page 302, concerning bindweeds.
>
> "The facts are these: Farm having bindweeds upon it is situated in Daviess County, Missouri; owner of farm resides in Texas; owner's agent who rents farm and collects rents resides in adjoining county; tenant of owner is in possession and control of the farm.
>
> "(1) Who is responsible for eradicating and controlling the bindweeds on above farm?
>
> "(2) According to Sec. 14264, is the owner subject to criminal prosecution?
>
> "(3) Is the agent subject to criminal prosecution?
>
> "(4) Is the tenant subject to criminal prosecution?"

Article 15 of Chapter 102 R. S. Mo., 1939, referred to "Canada and Scotch thistles", and did not refer to "bindweed."

Section 14260 R. S. Mo., 1939, in referring to the aforesaid provides as follows:

> "It shall be the duty of every owner, lessee or other occupant of any lands in this state, and of every railroad, partnership, lessee or other corporation of persons owning or operating any railroad in this state, within the limits of the right of way of such railroad, and on all grounds owned or controlled by such company, lessee or person, to cut or cause to be cut down all Canada or Scotch thistles standing, being or growing thereon, or on the road or highway passing through, by or over such lands or right of way, so often in each and every year as shall be sufficient to prevent said thistles from going to seed; and if any owner, lessee or other occupant of any lands, or any railroad company, partnership, lessee or other corporation or person owning or operating any railroads in this state, shall knowingly suffer any such Canada or Scotch thistles to grow thereon, and the seed thereof to ripen, so as to cause or endanger the spread thereof, such corporation, owner, lessee or other person shall forfeit and pay the sum of ten dollars for every such offense; and such sum forfeited may be recovered by civil action, in the name of the road overseer or other person having charge of the streets, roads or highways in the district or place where such thistles may be allowed to grow or seed, before any justice of the peace of the county, city, town or township in which the offense is committed; and all sums recovered by virtue of this section shall be paid to the use of the county school fund."

It is apparent that the intention of the Legislature in 1939 was to eradicate Canada and Scotch thistles in order to benefit agriculture in this State. In 1941, the legislature wishing to further protect farming repealed Section 14264 R. S. Mo., 1939, which is the last section in Article 15 Chapter 102, whth section has reference to the neglect of road overseers in their duties as defined in Section 14260 supra, In lieu thereof the General Assembly in 1941, passed Section 14264 and Section 14264a, referring to "bindweed" whish Sections are as follows:

Section 14264 Laws of Missouri, 1941:

> "It shall be the duty of any person or persons, association of persons, corporations, partnerships, the state highway commission, the county courts, the township boards, school boards, drainage boards, the governing bodies of incorporated cities, railroad companies and other transportation companies or their authorized agents and those supervising state-owned lands to control the spread of and to eradicate by methods approved by the State Department of Agriculture field bindweed (convolvulus arvensis) hereby designated as a noxious and dangerous weed to agriculture."

Section 14264a Laws of Missouri, 1941:

> "Any person who shall violate any of the provisions of this article shall upon conviction be guilty of a misdemeanor."

In other words, this Article as passed in 1939, had reference only to "Canada and Scotch thistles", but has since been amended to include "bindweed". Section 14260, supra, referrring to the former is in detail and is very plain. However, Section 14264, Laws of Missouri 1941, above, is general and vague as to the provisions contained therein and if standing by itself would

be almost impossible to enforce.

The supreme court in State ex rel. Dean vs. Daues 14 S. W. (2d) 990, held that in construing a statute, the entire statute must be considered in order that no section or part of a section in such statute shall fail. In that case the court said, at l. c. 1002:

> "* * * Furthermore, it is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed) pp. 731, 732, Sec. 380."

Also the court said:

> "Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect."

See also Mo. Digest, Title "Statutes" Key #206

Therefore, we must examine Article 15, Chapter 102 R. S. Mo., 1939, as amended in 1941, and allof its provisions in order that effect be given to all of such article, if possible, and so that no part of it shall be "inoperative." As can be seen, Section 14264 provides that it shall be the duty of practically all persons to eradicate "bindweed". The statute does not specify where the people are to eradicate such noxious weed, nor does it say how it is to be done. It does state that it shall

be done by methods approved by the State Board of Agriculture. However, what such methods are cannot be learned by reading the statutes. Furthermore, we are unable to learn of the manner in which this section is to be enforced by a study of the remaining parts and section of Article 15, Chapter 102.

It is presumed of course, that the Legislature meant that Section 14264 R. S. Mo., 1939, as amended by the Laws of Missouri 1941, should be in force, but the power to construe sections of the statutes by other sections relating thereto should not be abused. Certainly we cannot say in this case that a criminal prosecution could be based on this statute. In Diemer v. Weiss, 122 S. W. (2d) 928, the court said:

> "When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void; for if no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain.* * * * *"

The court also said in Ex Parte Taft v. Shaw, 284, Mo. 531, l.c. 544 -545: 225 S. W. 457, l.c. 461:

> "Statutes and ordinances which fix crimes, or quasi crimes, should so fix them that there can be no uncertainty. They should be so worded that one could read them, and know whether or not he was violating law. They should not be so worded as to leave their substantive elements to the caprices of either judge or jury. In other words the law should be complete and definite. * * * * * *"

In State ex inf. Crow vs. Street Railway Co. 146 Mo. 155, l.c. 167, 168; 47 S.W. 959 l.c. 961, the court said:

> "It is equally true that a mere collection of words can not constitute a law; otherwise the dictionary can be transformed into a statute by the proper legislative formula. An act of the legislature, to be enforcible as a law, must prescribe a rule of action, and such rule must be intelligibly expressed."

The sections in question, towit, 14264 and 14264a, Laws of Missouri 1941, at #302 attempt to provide a certain course of action with reference to "bindweed" and fixes a violation of provisions of section 14264 supra, as a misdemeanor. There is no doubt that by these two sections, the legislature tried to curtail and control the growth of "bindweed." But the manner in which this is to be done and the persons who are to do it cannot be reasonably deduced from the statutes. The Department of Agriculture has recommended methods which will probably eradicate "bindweed" but does not add anything to the provisions of the statute.

CONCLUSION

Therefore, it is the opinion of this Department, that none of the parties mentioned in your request would be subject to a conviction for a misdemeanor under the sections in question, since Section 14264 Laws of Missouri, 1941, is so vague and indefinite that it is unenforceable.

Respectfully submitted

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JSP:AW

CRIMINAL COSTS: On plea of guilty to a felony and parole after sentence State is liable for costs.

June 2, 1942

FILE 27

Hon. Sam T. Evans
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

We are in receipt of your letter of May 28, 1942, in which you request an official opinion as follows:

> "I should like to have your opinion on the following matter:
>
> "Where accused pleads guilty to burglary and grand larceny and is given a suspended sentence as provided by law is the State liable to pay fee bill, which includes State's witnesses and sheriff's mileage?
>
> "Thanking you for this favor, I am."

Section 9156 R. S. Missouri, 1939, reads as follows:

> "The circuit and criminal courts of this State, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court or courts, may place on probation any defendant eligible for judicial parole under Sections

> 4199 to 4211, inclusive, of Article 18, Chapter 30, Revised Statutes of Missouri, 1939. After a conviction, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation."

This section was enacted, and first appears in the Laws of Missouri, 1939, page 400.

The cost statutes applicable to your request are Sections 4221 and 4222, R. S. Missouri, 1939. Section 4221, supra, reads as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge

> of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 4222, supra, reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under Section 4221, supra, upon the conviction, or plea of guilty, the State is liable for the costs, and, under Section 4222, supra, upon conviction or plea of guilty the county is liable for the costs. Section 4221, supra, specifically states:

> " * * * shall be sentenced to imprisonment in the penitentiary, * * * * * ."

Section 4222, supra, specifically states:

> "* * * sentenced to imprisonment in the county jail, or to pay a fine, or both, * * * * * ."

Unless the defendant is sentenced neither the State nor the county is liable for costs until sentence is pronounced. It was so held in State of Missouri, ex rel., v. Carpenter, et al, 51 Mo. 555, l. c. 556, where the court said:

> "The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them. (1 W. S., pp. 348-9, secs. 1, 2.)
>
> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penetentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.
>
> "The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.

> "But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.
>
> "Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

Although the opinion in the above case was handed down in the February Term, 1873, it is the last and latest opinion on this subject.

A judgment, that is a verdict or plea of guilty, is not final until sentence is pronounced. It was so held in the case of Ex parte Hartley, 49 S. W. (2d) 119, l. c. 120, where the court said:

> "* * * In State v. Watson, 95 Mo. 411, 414, 415, 8 S. W. 383, and in State v. Schierhoff, 103 Mo. 47, 50, 15 S. W. 151, we have definitely ruled otherwise, on the theory that there is no

> final disposition of a cause until there is a final judgment, and a court does not lose jurisdiction of a case until final judgment is entered, though such be not done until a subsequent term. This is generally recognized in criminal cases. Where on appeal it appears that the defendant was convicted but not sentenced, the appeal is treated as premature, and the cause remanded to the trial court, with directions to pronounce sentence and enter up judgment against the defendant on the verdict of the jury returned in the cause, though the conviction was had at a previous term. State v. George, 207 Mo. 16, 105 S. W. 598."

Also in the case of State v. Seats, 21 S. W. (2d) 758, the court held that:

> "* * * No sentence was pronounced nor any judgment entered by the court. The appeal was premature. No judgment having been rendered, there was nothing from which to appeal. * * * * "

Of course, if sentence is pronounced and execution is suspended, as set out in Section 9156, supra, either the State or county would be liable for the costs in accordance with Section 4221 and 4222, supra. The suspension of execution is not a part of the case proper so as to effect the sentence. It was so held in the case of Lee v. Gilvan, 229 S. W. 1045, where the court said:

> "By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

Section 9156, supra, has not been passed upon by the Appellate Courts of this State, but the Supreme Court of the State of Kentucky in distinguishing between the "suspension of sentence" and "suspension of execution" held the courts have an inherent power for many reasons to suspend the sentence, and, for some reasons, to suspend execution of judgment. "Suspension of sentence" contemplates postponement of the rendition of judgment, while "suspension of judgment", or "suspension of execution of judgment" withholds the time of performance by defendant of an already rendered judgment. (Higgins v. Caldwell, 3 S. W. 1101, 1102, 223 Ky. 468.)

The court can withhold sentence of the term in which the defendant plead guilty or was convicted by jury. It was so held in the case of State v. Turpin, 61 S. W. (2d) 945, l. c. 948, where the court said:

> "* * * True enough it is the general rule that a court is powerless to modify, amend, or revise judgment and sentence after the lapse of the term at which the same were pronounced. 16 C. J. sec. 3099, p. 1315. But this is on the theory that with respect to such final orders the court's juris-

> diction is exhausted with the expiration of the term. In the instant case, however, by the entry made at the August term, the court expressly continued the cause, thereby retaining jurisdiction of it. As is said in Aetna Insurance Co. v. Hyde, 327 Mo. 115, 118, 34 S. W. (2d) 85, 87: '"So far as the correction or amendment of the judgment or decree itself is concerned, at least in matters of substance, the power ceases with the end of the term, unless otherwise provided by statute." * * * Of course, this general rule is subject to the well-recognized qualification that, if a court has retained and continued its jurisdiction in a particular cause by a reservation or other act, through a motion or other proceeding during the term, its power and control over its final judgment or decree survive(s) the end of the term at which it was rendered or granted.'"

CONCLUSION

In view of the above authorities, it is the opinion of this department that where a defendant pleads guilty to burglary and grand larceny, and is given a suspended sentence, neither the State nor the county is liable for the fee bill.

It is further the opinion of this department that where the defendant pleads guilty to burglary and larceny and is sentenced to the penitentiary, and is then paroled

the State is liable for the costs which includes State's witnesses and sheriff's mileage.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

OFFICERS: Trustee of county hospital subject to ouster, criminal prosecution, and civil suit for illegal purchase of supplies.

January 21, 1942

2-77

Hon. T. A. Faucett
Prosecuting Attorney
Callaway County
Fulton, Missouri

FILE
28

Dear Sir:

This department is in receipt of your request for an opinion under date of January 19, 1942, which reads as follows:

> "I am writing your office for an opinion, on the last clause in Sec. 15195, 1939 Revised Statutes, which reads as follows:
>
> > 'No Trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for said Hospital, unless the same are purchased by competitive bidding.'
>
> "Of course, this law applies to establishing and maintaining a County Hospital. We have one here in this County and it seems that one of the Trustees of the Hospital has furnished considerable supplies to this Hospital, without competitive bidding.
>
> "I don't think that there would be any question but that the contract would be void to start with, but if it was performed and the goods paid for, would there be any liability on the Trustees part, or would he forfeit his right to be Trustee, by reason of having done this?
>
> "I have my own ideas about this situation but would like to have an opinion from your office."

That part of Section 15195, R. S. Mo. 1939, which you set out in your request is worded in a plain and unambiguous manner. It may not be construed but must be given effect as written. St. Louis Amusement Co. v. St. Louis County, 147 S. W. 667.

The above partial section is mandatory and any contract for the purchase of supplies for a county hospital entered into by the trustees without competitive bidding is absolutely void.

In your request you state that the contracts have been performed and the goods delivered and paid for. You also state that one of the trustees has furnished considerable supplies to the hospital. The general rule is that neither party to an illegal agreement that has been executed on both sides will be aided in recovering what has been parted with under the agreement. This rule is set out in the case of Idel v. Hamilton-Brown Shoe Co., 121 S. W. (2d) 817, par. 3-4, where the court said:

> "'The general rule is that neither party to an (illegal) agreement that has been executed on both sides will be aided in recovering what has been parted with under the agreement.' 12 Am. Jur., Contracts, Sec. 213, p. 724. Numerous cases from the Supreme Court of the United States and from many states are cited supporting the general rule as stated in American Jurisprudence. Among the cases cited is Ullman et al. v. St. Louis Fair Ass'n, 167 Mo. 273, 66 S. W. 949, 56 L.R.A. 606. In the Ullman Case the court quoted with approval from Skinner v. Henderson, 10 Mo. 205, as follows (page 951): 'The rule in respect of money paid on illegal contracts appears in general to be that money so advanced may be recovered in an action for money had and received while the contract remains executory, because a violation of the law is thereby prevented; but, if the contract be executed, it cannot be recovered back.'
>
> "'In an executory, illegal and immoral contract the law allows for repentance, and

> money paid thereon may be recovered back; but, if the contract upon which the money is paid has been performed, then the law will not aid the party who has expended money thereon to get it back.' Burgess v. Manchester Inv. Co., Mo. App., 186 S. W. 1144, loc. cit. 1145, and cases there cited."

The above opinion is on the general rule between private individuals, but there are exceptions to that general rule where the public is interested. In the case of Witmer v. Nichols, 8 S. W. (2d) 63, par. 2-3, the court said:

> "It is to be first noted that the question of enforcing the contract or in any way giving it effect is not involved. The contract has been completely executed on both sides. What the plaintiffs seek is a recovery for the school district of the moneys paid out for the site. In so doing they recognize that under equitable principles the district is bound to restore to the rightful owners the possession of the land which it obtained in consideration for the money. Sparks v. Jasper County, 213 Mo. 218, 112 S. W. 265. The general rule is that where the parties to an illegal contract are in pari delicto, and the contract has been fully executed on both sides, neither will be aided in recovering what has been paid out under the contract. The rule is without application, however, in cases in which the public interest will be better promoted by granting than by denying relief. Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 534, 44 N. E. 353; 6 R. C. L. 829, sec. 220."

Under the above opinion, even though the parties to the illegal contract have fully executed the contract, the courts will aid one of the parties where the public is interested.

According to the above opinion of the court, the county could bring a civil action against the trustee who furnished the supplies to the hospital for money had and received. The question as to the amount of the recovery would depend upon the facts in each and every case.

You also inquire as to the question of the forfeiture of office of the trustee. There is no question but that the trustee could be ousted for violation of his duties as trustee of the hospital in furnishing supplies in direct violation of Section 15195, R. S. Mo. 1939. It was so held in the case of State v. Wymore, 119 S. W. (2d) 941, l. c. 944, where the court said:

> "In other words, under the statute, the offending official 'forfeits by the act forbidden' (State ex inf. v. Ellis, 325 Mo. 154, 161, 28 S. W. 2d 363, 366) and is subject to any remedy available to the people."

The trustee who furnished the supplies to the hospital in violation of the clause set out in your request, and the other trustees, if members of a conspiracy, can be prosecuted criminally. The main section under which a criminal prosecution could be maintained is Section 4482, R. S. Mo. 1939, which reads as follows:

> "Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand

> or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

Other criminal sections under which the trustee who illegally furnished supplies to the hospital could be prosecuted are Sections 4339 and 4340, R. S. Mo. 1939. These two sections are misdemeanors, but Section 4482, supra, is a graded felony.

That the trustee who illegally furnished supplies to the hospital, and the other trustees, if guilty of conspiracy in the illegal transaction, could be removed from office and could be subjected to criminal prosecution was held in the case of Bakersfield News v. Ozark County, 92 S. W. (2d) 603, par. 7-9, where the court said:

> "If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' (Mo. St. Ann. sec. 11202, p. 6143), he may be removed from office by the method provided in sections 11202-11209, R. S. 1929 (Mo. St. Ann. secs. 11202-11209, pp. 6143-6146). He would be subject to criminal prosecution under sections 3945-3950 and 10187, R. S. 1929 (Mo. St. Ann. secs. 3945-3950, 10187, pp. 2761-2763, 3695)."

The procedure for the ousting of a county officer under the facts stated in your request is set out in Section 12828, R. S. Mo. 1939, which reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such

> office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

This section was enacted in accordance with Section 7, Article XIV, of the Constitution of the State of Missouri.

As to who shall bring an ouster proceeding under the facts stated in your request, is set out in Section 12829, R. S. Mo. 1939.

CONCLUSION

Under the above authorities, it is the opinion of this department that a trustee who has furnished considerable supplies to the county hospital of Callaway County, the furnishing of which was not open to competitive bidding, can be ousted from office.

It is further the opinion of this department that a civil suit can be brought against this trustee for money had and received under an illegal contract.

It is further the opinion of this department that the trustee, under the facts set out in your request, can be prosecuted criminally under Sections 4482, 4339 and 4340, R. S. Mo. 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:HR

COUNTIES: May purchase road machinery out of any surplus in Class 5.

2-16

February 9, 1942

FILE 28

Hon. R. M. Fendorf
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 7, 1942, which reads as follows:

> "On September 18, 1941, the county court of this county entered into a 'lease agreement' with a road machinery company, under which the county as lessee purports to rent a caterpillar tractor and road grader from the company as lessor. The termination date of the lease period is given as March 1, 1942, at which time the lessee has the option of purchasing the machinery at an agreed value of $3523.25. Rent in the amount of $3430.00 was paid in advance for the original lease period (from 9-18-1941 to 3-1-1942). Later, a similar contract was entered into for the lease of another road machine.
>
> "The initial payment or 'rent' was made from Class 5 of the county revenue. At the date of the agreements, there were several WPA road projects under construction in the county, and these machines were acquired for use on those projects. The county court paid the rent out of Class 5 on the theory that such payments were in furtherance of relief work in the county; in other words, that funds could be drawn out of Class 5 for direct relief purposes and that the furtherance of the WPA projects, either with cash, material or equipment, indirectly amounted to the same thing.

"All WPA road projects have now been closed in the county, although at least one is incomplete. The county court now contemplates the purchase of this machinery under the agreement with funds from Class 5. I should like to have the opinion of your department as to the propriety of such a disbursement.

"The budget for 1941 did not specifically list these expenditures, but $22,469.29 were set up for 'relief and miscellaneous.' Disbursements from Class 5 did not exceed the budget, and the budget for 1941 would not be exceeded even if the payments now due be charged against the 1941 estimate. The 1942 budget does not list these machinery payments specifically under any class. There is set up in Class 5 the sum of $10,000.00 for 'miscellaneous and emergency.' If the machinery payments are made from Class 5, they will have to come out of the last mentioned appropriation."

Class 5 of the budget law, as set out in Section 10914, Laws of Missouri, 1941, page 652, reads as follows:

"Class 5. Contingent and emergency expense.- The county court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the court proposes the funds in this class shall be used, shall be shown."

Class 5 of the county budget law, as set out in Section 10911, Laws of Missouri, 1941, page 651, reads as follows:

> "Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2,3,4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in proceding classes."

Under Section 10911, supra, class 5 refers to the classification of proposed expenditures, while class 5 under Section 10914 refers to the classification of estimated expenditures. Under both Sections 10,911 and 10914 the surplus from classes 1,2,3, and 4 may be transferred to class 5 for all lawful purposes, excepting no payment shall be allowed from funds in class 5 for personal service, such as salary, fees, wages etc.

We are assuming from your request that Miller County is financially able to pay all of the estimated expenditures and warrants outstanding in all of classes 1, 2, 3, and 4, as estimated for the year 1941.

We are also assuming that the county will have sufficient funds to pay all of classes 1, 2, 3, and 4 of 1942. The county court has authority to buy road machinery providing the purchase can be made on a cash basis from the money received during the year in which the purchase was made. The county court was authorized under Section 8595 R. S. Missouri, 1939, which partially reads as follows:

> "Whenever any public money, whether arising from taxation or from bonds

> heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. * * * "

The county budget act did not take away the duties of the county court to transact all county business, but merely sets out a form of procedure which would prohibit the county from becoming indebted to more than the estimated receipts of taxes coming in.

It was so held in the case of Traub v. Buchanan County, 108 S. W. (2d) 340, l. c. 342, where the court said:

> "* * * The effect and intent of the budget law, as we understand it, is to compel, or at least to make it more expedient for the county courts to comply with the constitutional provision, section 12, art. 10, Mo. Constitution, which provides that a county shall not contract obligations in any one year in excess of the revenue provided for that year. The budget law leaves the transaction of business to the county courts. But the law provides (section 19, p. 350, 1933 Laws (Mo. St. Ann. sec. 12126s, p. 6434)):

"'No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating.'

"No power possessed by the county court was thereby curtailed. The budget officer simply determines whether sufficient money is provided with which to pay the obligation intended to be incurred by any contract or order presented to him for indorsement. This is a mere matter of bookkeeping. If the cash is on hand or has been provided for, it is the duty of the auditor or budget officer to make such indorsement upon the order or contract. If not, he merely refuses to make the indorsement. Prior to the enactment of the budget law, a county court had no right to incur obligations in any one year in excess of the revenue provided for that year. By the enactment of the budget law, the Legislature has merely provided ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income. The power of the county court not having been curtailed by the enactment of the budget law, the point made by respondent is without merit and is ruled against him."

The above case has been approved in the case of Gill v. Buchanan County, 142 S. W. (2) 665.

Under the above opinion the county court is empowered to buy road machinery, providing the surplus from classes one, two, three, four and five of the budget act would permit such a purchase. By the general law the county court has the authority to transfer unneeded funds from one fund to another, which is - unneeded money in classes one, two, three and four can be transferred to class five. The county court is authorized to make such a transfer by reason of class five of Section 10914, Laws of Missouri, 1941, page 652 and also by Section 13829, R. S. Missouri, 1939, which reads as follows:

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

CONCLUSION

Since under the law the county budget is now being prepared by the separate county courts, and in view of the fact that there is sufficient money to pay for the road machinery out of the 1941 budget, we are of the opinion that this purchase as set out in your request may be made out of the surplus funds which are now or may be in class five of the county budget of 1941.

In view of the fact that you say there would be sufficient funds to make the purchase out of the 1942 budget, we are of the opinion that the road machinery may be purchased out of class five, of the 1942 budget, provided that there are sufficient funds to pay all outstanding warrants or anticipated indebtedness

in all of classes one, two, three and four of the 1942 budget. To be sure that the purchase of machinery could be lawfully made at this time, we would suggest that since the 1941 budget has a surplus that the machinery be purchased from it.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WJB:RW

PURCHASING AGENT: Purchasing Agent is not permitted under the statutes to take out insurance policies on any of the State institutions.

April 29, 1942

FILE
28

Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

Your request for an opinion on an insurance matter has been referred to me. The request is as follows:

> "Will you please render this office an opinion as to whether the purchase of insurance, fire, explosion, accident, liability, and/or theft for state departments and institutions comes within the jurisdiction of this office.
>
> "At this time I have an order to purchase an insurance policy for the Missouri State Trachoma Hospital at Rolla, Missouri, covering damage to buildings or equipment and personal injury caused from explosion of the boilers, air tanks, and/or furnace of this institution."

There are two questions to be considered in the expending of State funds. First, is such expense authorized by statute and second, has there been an appropriation for such purpose? Article IV, Section 48, of the Constitution of Missouri, is the basis for the first question, said article and section reading as follows:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to

> grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

As to the second question we must look to Article X, Section 19, of the Constitution of Missouri, which provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In other words, in order for the State institutions and departments to carry insurance of any kind upon their properties, the officials managing such institutions must have authority by statute to make contracts for insurance and the legislature must have made an appropriation for the payment of the premiums for such coverage.

Section 13043, R. S. Mo. 1939, provides as follows:

> "No warrant to be drawn or paid unless money appropriated for payment. No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

There is no specific statute in this State which provides that the State of Missouri shall carry any insurance on the buildings and property owned by the State. Therefore, it will be necessary that we look to the statutes creating the boards or heads which manage, control and operate these institutions and departments to ascertain what authority that such boards or heads have with regard to insurance contracts, and then look to the appropriation act to learn whether or not appropriation has been made for the purchase of any insurance for the particular departments and institutions.

In your request you ask that our opinion cover "state departments and institutions." In view of the fact that there is no general statute providing for the purchase of insurance by the State, consequently, we would be forced to examine the statutes setting up and governing the action and powers of the Board of control or head of each department, bureau and institution in the State of Missouri. However, since you specifically state that your problem has to do with a policy of insurance on the Trachoma Hospital at Rolla, we will therefore confine our views to that particular institution. But in answering your query with reference thereto, we will necessarily set up the method of determining this insurance question in each of the other State institutions and departments.

Section 9735, R. S. Mo. 1939, with referance to the State Board of Health, reads as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

In the Laws of Missouri for 1937, at page 161, the appropriation act for the construction and equipping of the Trachoma Hospital is set out, this act providing as follows:

> "Section 130. Trachoma Hospital Building and Equipment.--There is hereby appropriated out of the State treasury, chargeable to the general revenue fund, the sum of Seventy-five Thousand Dollars ($75,000.00) for the construction and equipping of a Trachoma Hospital at Rolla, Missouri; including new buildings, building equipment, heating plant, light plant, water supply and plumbing; labor, materials, furniture, advertising, architectural service and supervision services, superintendence and inspection, and all necessary incidental and miscellaneous expenses and contingencies incurred in the construction and equipping of the building. All materials contracted for shall be of the best quality, and preference shall be given to Missouri materials and Missouri labor, where the same are of a suitable character and can be obtained at reasonable market prices."

The appropriation bill for this institution for 1939-40 is set out on page 126 of Laws of Missouri for 1939, Section 40-a, and provides as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of $50,000.00, for the use of the Department of Health for the years 1939-1940 to be expended for the Trachoma Hospital and the prevention of blindness hereinafter stated:
>
> "A. Personal Service:
>
> "Salaries of: Surgeon in charge of Trachoma Hospital, assistant physicians, hospital nurses, attendants, cooks, maids, janitors and other necessary personnel. . $25,000.00
>
> "D. Operation--General Expenses:
>
> Communications, printing and binding, transportation of things, travel within and without the State, rent, other general expense ; materials and supplies; educational, scientific, laboratory and recreational supplies, laundry, cleaning and sanitation supplies, medical, surgical and hospital supplies, light, heat, power and water supplies, stationery and office supplies 25,000.00
>
> TOTAL OUT OF GENERAL REVENUE . . . . . .$50,000.00"

The appropriation act setting aside the money for 1941-1942 is set out in Laws of Missouri for 1941, page 96, and reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Seventeen Thousand Five Hundred Dollars ($17,500.00) for the use of the Department of Health for the period beginning January 1, 1941 to June 30, 1941 to be expended for the Trachoma Hospital and the prevention of blindness hereinafter stated:

"A. Personal Service:

"Salaries of: Surgeon in charge of Trachoma Hospital, Assistant physicians, hospital nurses, attendants, cooks, maids, janitors and other necessary personnel . .$10,000.00

"D. Operation--General Expenses:

"Communications, printing and binding, transportation of things, Travel within and without the State, rent, other general expense: materials and supplies: educational, scientific, laboratory and recreational supplies, laundry, cleaning and sanitation supplies, medical, surgical and hospital. supplies, light, heat, power and water supplies 7,500.00

Total out of General Revenue .$17,500.00"

As can be seen from reading the statute creating the Board of Health and also the different appropriation acts, nowhere is any mention made of "insurance" or "insurance premiums."

Referring again to Article X, Section 19 of the Constitution, cited supra, we quote the following phrase,

"* * * * and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; * * * *." Can we say that any of the provisions of the appropriation acts set out above, refer to "insurance premiums"? We think not; and further we think that when the Legislature failed to include "insurance premiums"or "insurance" in the appropriation acts, cited supra, it served notice upon the public that it did not intend that any of the moneys set aside for the Trachoma Hospital should be used for the payment of premiums on any kind of insurance to be carried on the property of this particular institution and that the State of Missouri carry its own insurance and assume the loss, if any, on these buildings and other property.

Turning to the question as to whether or not your department should purchase the insurance on any of the property of the State institutions or departments, we will cite you to the powers of the State Purchasing Agent as defined in Section 14590, R. S. Mo. 1939, which provides as follows:

> "The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

As can be seen the powers are to purchase all "supplies, except printing, binding and paper," and further shall negotiate certain leases and purchases of lands. Obviously, the only power under which it could be contended that the purchasing agent could contract for insurance, would be under the term "supplies." This brings us to the definition of the term "supplies" as used here.

"Supply" or "supplies" is defined as:

> "The amount of a commodity available for meeting a demand."
>
> ---Funk & Wagnalls Standard Dictionary.
>
> "Provisions."
>
> ---Encylopedia Brittanica.
>
> "That which is supplied: sufficiency of a thing for want: a stock: a fund."
>
> ---Worcesters English Dictionary.
>
> "Supply is used chiefly in the plural--'supplies,' and has been variously defined as meaning accumulated stores reserved for distribution; available aggregate of things needed or demanded in amount sufficient for a given use or purpose; necessities collected and held for distribution and use; quantity of something furnished or on hand; quantity of something supplied or on hand; stock, store or stores; such things as are used to meet a want."
>
> ---60 C. J., 1167.

Under none of the definitions of the word "supply" or "supplies," cited above, are we able to place insurance of any kind. The only case we find in point is Miller Ins. Agency v. Porter, 20 Pac. (2d) 643, 93 Mont. 567, in which the court said:

> "The ambiguity existing in the term 'supplies' as used in the statute, the practical construction excluding insurance policies from the term, as used in Section 256, supra, and the sanction of the Legislature to such interpretation by reason of its inaction lead to the conclusion that, and we hold, that fire insurance policies are not included in the word 'supplies.'"

The fact that this case cites only fire insurance would have no effect, as we think that, as far as the power to purchase is concerned, the particular type of insurance whether it be fire, explosion, accident, liability or theft, they would all be governed by the same rules.

An insurance policy is a contract and has been defined as follows:

> "'Insurance' as that term is commonly understood, is a contract whereby a promisor, for a consideration usually called a premium, becomes bound to indemnify or compensate the promisee or one designated by him for loss or damage from stated causes in a definite or ascertainable amount."
>
> --State ex rel. Herbert v. Standard Oil Co., 35 N. E. (2d) 437, 440, 441; 138 Ohio St. 376.

> "'Insurance' is a contract by which one party, for an adequate consideration paid to him, undertakes to indemnify or guarantee the other against loss by certain specified risks; an agreement wherein one becomes surety for another that the other shall not suffer loss or damage upon the happening of certain contingencies, upon specified terms."
>
> --Commerce Title Guaranty Co. v. United States, D. C. Tenn., 32 Fed. Supp. 75, 77.

> "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency."
>
> --32 Corpus Juris 975.

We could continue to cite definitions of "insurance" for an indefinite period, but it is apparent that the term "supplies" as used in Section 14590, R. S. Mo. 1939, was not intended by the Legislature to include "insurance" or "insurance premiums."

Conclusion

It is the opinion of this department, that unless a statute empowers the managing boards or heads of the institutions and departments of the State to contract for insurance coverage on the property which they control, and unless the appropriation acts affecting their institutions or departments set out an amount to be paid for such insurance, that such managing boards and heads of institutions and departments can not contract for or purchase said insurance.

It is also the opinion of this department that the Board of Health does not have power given it by statute to purchase insurance for the Trachoma Hospital at Rolla, and that no appropriation has ever been made to purchase such insurance, and, therefore, that no insurance can be purchased for such institution.

It is further the opinion of this department that the Purchasing Agent of the State is not given the authority, nor does he have the jurisdiction, if any, to purchase insurance for the divers institutions and departments of the State.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

STATE PURCHASING AGENT: Station wagon is a passenger car and cost cannot exceed $900.00.

- -

April 29, 1942

FILE 28

Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

This department is in receipt of your request for an official opinion, which reads as follows:

> "I have a request from the State Board of Health to purchase one station wagon automobile. Will you please advise me at your earliest opportunity if, in your opinion, Section 72 of House Bill 581 is applicable in this instance. The funds for payment of same, I understand, are chargeable against Venereal Disease Control Fund under Section 81 of the same bill.
>
> "This station wagon will be used primarily for the transportation of patients to a proposed hospital to be located at Monett, Missouri. For your information, it is my understanding that the automobile manufacturers list station wagons entirely separate from their regular passenger cars. However, neither are they listed as trucks."

Laws of Missouri 1941, page 219, Section 72, provides as follows:

> "Passenger cars shall not cost in excess of $900.--No passenger car shall

> be purchased from the funds appropriated by this Act for the use of any officer or employee of any department, board, bureau, commission or institution for which any appropriation is made by this Act at a cost, including any automobile traded in, to exceed $900.00 each."

The question presented in your request is whether a station wagon is a "passenger car" within the meaning of the above section. A station wagon is defined in Webster's New International Dictionary, Second Edition, as:

> "An automobile with a wooden or wood-colored body built to resemble that of a light open wagon, with two or more cross seats and a flat top."

We believe it is common knowledge that a station wagon is used primarily for the conveyance of persons rather than property and its chief advantage is its ability to convey a larger number of persons than an ordinary automobile, because of its greater number of seats.

In Hall v. Federal Life Insurance Company, 71 S. W. (2d) 762, a car is defined as any vehicle primarily intended for the transportation of persons.

As pointed out in Monroe's Admr. v. Federal Union Life Insurance Company, 65 S. W. (2d) 680, 251 Ky. 570:

> "The words 'automobile' and 'car' are used interchangeably; 'car' being a substitute or synonym for 'automobile.'"

In State v. Rector, 40 S. W. (2d) 639, 328 Mo. 669, our Supreme Court said:

> "The word passenger is defined as a passerthrough or passerby, wayfarer or traveler."

With the above definitions in mind, we believe that "passenger car" as used in Laws of Missouri, 1941, page 219, supra, means an automobile which is constructed and used for the conveyance of persons and is contradistinguished from a "truck", which is constructed and used for the conveyance of property. This distinction is found in those cases dealing with accident insurance policies covering injury or death while riding in a "passenger" automobile. Poncino v. Sierra Nevada Life and Casualty Company, 286 Pac. 729, 104 Cal. App. 671; Taft v. Md. Casualty Company, 191 S. E. 10, 211 N. C. 507; In re Temple, 20 Fed. Supp. 593.

CONCLUSION

It is, therefore, the opinion of this department that a station wagon is a "passenger car" within the meaning of Laws of Missouri, 1941, page 219, Section 72.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

COMMISSIONER OF PUBLIC PRINTING: Not required to furnish blank paper to any departments.

June 18, 1942

618

FILE
28

Mr. John A. Ferguson
Acting Chairman
Public Service Commission of Missouri
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 4th, with enclosures.

Briefly stated the question presented by you is whether the Commissioners of Public Printing are required to furnish to the Public Service Commission for official business mimeograph paper on which no printing appears. Enclosed with your letter are a requisition for blank paper, addressed to the Commissioners of Public Printing, requesting 10,000 sheets of mimeograph paper; a letter from the Commissioners of Public Printing, dated April 28, 1942, addressed to the Honorable Frederick Stueck, Chairman, Public Service Commission; and two memoranda from the Counsel of the Public Service Commission, addressed to the Chairman, on the subject about which you inquire.

To assist in the determination of the exact duties of the Commissioners of Public Printing we have had recourse to the original act creating that body and the title contained thereon. We find the title set out in Laws of Missouri, 1870, at page 79, as follows:

> "An act to provide for the execution and supervision of the state printing and binding, and abolishing the office of public printer."

We call your attention to the fact that the title of the act makes no reference to the furnishing of any materials

other than those to be subject to the processes of printing and binding. After providing that the Secretary of State, State Auditor and State Treasurer shall be the Commissioners of Public Printing, the act defines various classes of state printing. This is Section 14976, R. S. Mo. 1939, which is as follows:

> "The printing for the state shall be divided into three classes, to be let in separate contracts, as follows: The printing of all bills in bill form for the two houses of the general assembly, together with such resolutions and other matters as may be ordered by the two houses, or either of them, to be printed in bill form, the printing of all reports and all communications and other documents ordered by the general assembly, or either branch thereof, other than such as shall be printed in pamphlet form, shall constitute the first class, and shall be let in one contract. The printing of the journals of the senate and house of representatives, and of such reports, communications and other documents as enter into and make a part of the journal, or the appendixes thereto, all reports and all communications and other documents ordered by the general assembly, or either branch thereof, or by the executive departments, to be printed in pamphlet form, together with the volumes of public documents, the printing of the general and local laws and joint resolutions, shall constitute the second class, and shall be let in one contract. The printing of all blanks, circulars and other work necessary for the use of the executive departments, other than such as shall be printed in pamphlet form, shall constitute the third class, and be let in one contract: Provided, that the general assembly or either house thereof may, by resolution, change the form of any printing that may be ordered by such house, and the class to which such form of printing shall belong shall determine the price to be paid therefor."

Briefly stated this section divides the state printing, over which the Commissioners have supervision, into three classes. In the third are found the materials which the executive departments usually require. The sections following provide in great detail the exact manner in which the state printing shall be done. In some instances the type to be used is set out. The law also provides for the binding contracts, for all legislative journals and such other book work as may be ordered by the proper authorities.

Section 14992, R. S. Mo. 1939, sets out the duties of the Commissioners and requires them to examine the proof sheets of all work, keep an accurate account of all paper delivered to the public printer, to see that full number of copies of each job is delivered to the proper department, and finally to audit all accounts for printing and binding under the provisions of Chapter 120, R. S. Mo. 1939.

Section 14997, R. S. Mo. 1939, specifically deals with the paper for the state printing, and is as follows:

> "The paper for the state printing aforesaid, and stationery for the use of the executive departments, shall be in the custody and under the control of the secretary of state, who is hereby required to keep an accurate account of his receipts and issue thereof, and he shall keep the books and records of the commissioners of the public printing, spreading therein the minutes of their various meetings, and full copies of all bills of paper or stationery purchased by the state. For this purpose he shall weigh and count articles as they come in, entering them in a stock book kept for that purpose. He shall from time to time, as the same may be needed, deliver over to each contractor suitable paper for the printing which said contractor is required by his contract to do, and he shall before the issue of such paper, if necessary, cut it to such a size as may be fairly covered by different forms of type, so as to reduce the amount of press-work to a reasonable basis. He shall take

> and preserve from each contractor a receipt for all paper so delivered, and at the annual settlement, on or before the first day in July, each contractor shall deliver to the secretary of state all paper which has not been used in the state printing; and if any such paper shall have been wasted or converted to any other use, the contractor to whom the same shall have been delivered shall be charged with the value thereof, together with a penalty of fifty per cent, and the amount shall be deducted from his account: Provided, that it is hereby made the duty of the secretary of state to issue paper to the state contractor or contractors only upon requisitions for the exact amount needed for each separate job of work, as nearly as may be ascertained, and to take back into the general stock of the state such paper as may be left over after each job is completed. And as full compensation for his services as custodian and supervisor of the printing, paper and stationery of the state, the said secretary of state shall receive the sum of two hundred and fifty dollars per annum."

In two places in this section mention is made of delivery of paper in the possession of the Secretary of State as accountant for the Commissioners of Public Printing. In each instance the delivery referred to is limited to the state contractor. In one clause he is required to "deliver over to each contractor suitable paper for the printing which said contractor is required by his contract to do," and in the other "to issue paper to the state contractor or contractors only upon requisitions."

In the final section of the chapter, Section 14999, R. S. Mo. 1939, the Commissioners are required to contract for all paper to be used for the state printing in the following language:

> "The commissioners of printing shall on or before the first day of July of each

year give notice that sealed proposals will be received at the office of the secretary of state for the paper for the state printing, for stationery for both branches of the general assembly and for each and all of the state departments and bureaus for the term of one year from the first day of July. In said proposals shall be distinctly and specifically stated the price per ream for the book paper for the state printing, the price per ream for all other paper and the price per article, dozen, gross or quantity for all articles of stationery required for the general assembly or either house thereof, and for the state departments and bureaus. Each proposal shall be accompanied by a bond executed in due form by the bidder with at least two good and sufficient sureties satisfactory to the commissioners of printing in the penal sum of ten thousand dollars, conditioned for the faithful performance, pursuant to this chapter, of his or their contract, and for the payment as liquidated damages by such bidder or bidders to the state of any excesses or costs over the bid or bids of such bidder which the state may be obliged to pay for such paper or stationery by reason of the failure of such bidder to complete his contract. No bid unaccompanied by such bond shall be entertained by the commissioners of printing. If the commissioners of printing shall have reason to believe that at any letting of contracts for paper or stationery the bidding therefor is unfair, fraudulent or exorbitant, they shall, if they deem it for the interest of the state, set aside said bidding and relet the contract. In the meantime they shall provide for the paper for the state printing and for the stationery for the general assembly and the executive departments."

No where in the entire chapter relating to the Printing Commissioners do we find any specific duty devolving upon them to furnish paper to any other than the State Printing Contractor, and we believe that the prices to be obtained under the last section above cited relate to all sizes and kinds of paper on which it is contemplated that printing in some form will be required. We find no provision in the chapter which could be extended to refer to any paper except that which is to be furnished to the printer under a requisition by some department, bureau or state officer. The appropriations made by the 61st General Assembly disclose the following to the Commissioners of Public Printing (Laws of Missouri, 1941, page 131):

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Two Hundred Twelve Thousand Five Hundred Dollars ($212,500.00) for the use of the Commissioners of Public Printing as follows:
>
> "Printing Reports and Documents. .$ 37,500.00
> "Purchase Paper for State Printing 175,000.00
>
> "Total . . . . . $212,500.00"

We direct your attention to the fact that the paper to be purchased under this act is limited to that "for state printing." Furthermore, the last General Assembly made an appropriation to the Secretary of State for stationery and office supplies to the executive offices of the state and the Supreme Court "for stationery and office supplies," which, if the opinion of counsel for the Public Service Commission is correct, must necessarily be included in the articles to be furnished by the Commissioners of Public Printing. We agree that modern definitions of the word "stationery" include all writing materials, blanks, books, envelopes, ink, paper, pens etc., (59 C. J. 336; 40 Words & Phrases, page 78).

The appropriation just referred to is found in Laws of Missouri, 1941, page 128, and is as follows:

> "Materials and Supplies consisting of stationery and office supplies for the executive offices of the State and Supreme Court . . . . . .$12,000.00"

We also call your attention to an item included in the appropriation for the Public Service Commission found at page 51, Laws of Missouri, 1941, as follows:

> "General expense: including communication, printing and binding, insurance and premium on bonds, transportation of things, travel within and without the state and other general expense, material and supplies; consisting of stationery, library and office supplies . . . . $7,162.00"

It is the conclusion of this Department that the duties of the Commissioners of Public Printing require them to furnish only such paper as may be requisitioned by the various departments, bureaus and officers to be delivered to the State Printing Contractor and upon which the latter is to perform work under his contract, and they are not required to furnish blank paper directly to any department, bureau or officer.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RLH:EG

STATE PURCHASING AGENT: Permitted to purchase coal other than that mined in Missouri for use by State Social Security Commission.

August 17, 1942.

FILED
28

Honorable Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

The Attorney-General wishes to acknowledge receipt of your letter of August 10th in which you request an opinion from this Department. Your request, omitting caption and signature, is as follows:

> "Will you please issue this office an opinion as to whether or not Section 14619 R. S. Missouri, 1939, applies to the purchase of coal by this department for the State Social Security Commission for distribution to relief clients in the city of St. Louis.
>
> "This matter has been brought to my attention by Mr. Curran of the Curran Coal Company, St. Louis, a copy of whose letter is attached as well as a copy of the invitation to bid in question.
>
> "At the same time, I would appreciate your opinion as to whether there are any statutes in the state of Missouri which would prohibit me from purchasing coal which meets the specifications of the St. Louis City Smoke Ordinance."

In order to arrive at a solution of this matter we will first cite the authorities which we think will govern. Consequently, the first authority we will cite is Section 9396, R. S. Mo. 1939, which provides as follows:

> "A State Social Security Commission is hereby created and established. It shall be vested with and possessed of the powers herein specified, and also all other powers necessary or proper to enable it to carry out fully and effectually the purposes stated herein or duties imposed by any state law upon the Commission or in amendatory laws. Said Commission is created for the purpose of acting as a State agency to administer state plans and laws involving:
>
> "(1) Pensions or assistance to persons seventy years of age or over or who, after December 31, 1939, is sixty-five years of age or over, who are incapacitated from earning a livelihood and are without means of support;
>
> "(2) Aid to dependent children;
>
> "(3) Aid or relief in cases of public calamity;
>
> "(4) Child welfare services;
>
> "(5) Any other plan wherein duties are imposed by any state law upon the State Commission."

We will next cite you to the first two paragraphs of Section 9397, R. S. Mo. 1939:

> "Whenever in this law, or in any proceedings under this law, the following words or terms are used, they shall be deemed and taken as the meaning ascribed as follows:
>
> "State Commission shall mean the State Social Security Commission as herein created; * * * * * * * * * * * * * *"

Further we will cite you to Section 14590, R. S. Mo. 1939, which provides for the purchase of supplies for the several departments as follows:

> "The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

We then wish to call your attention to Section 14616, R. S. Mo. 1939, which reads as follows:

> "Every commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body shall purchase and use only those materials, products, supplies, provisions and other needed articles produced, manufactured, compounded, made or grown within the state of Missouri, when they are found in marketable quantities in the state and are of a quality suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states: Provided, however, that quality and fitness of articles shall be considered in purchasing or letting contracts for articles herein mentioned."

The final provision of the statute which we wish to cite you is Section 14619, R. S. Mo. 1939, which provides as follows:

> "That the board of trustees or other officer or officers in charge of every institution in the state of Missouri which is supported in whole or in part by public funds, and who are required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the state of Missouri, if the cost of coal mined in the state of Missouri is not greater than the cost of coal mined in any other state or states, including the cost of transportation."

By a study of Section 9396, supra, and the first two paragraphs of Section 9397, supra, we quickly come to the conclusion that the State Social Security Commission is a state and not a federal department. In Section 9396, cited above, we find the following:

> "Said Commission is created for the purpose of acting as a State agency * * *."

Section 9397, supra, provides:

> "State Commission shall mean the State Social Security Commission as herein created."

In view of the fact that the State Social Security Commission is a state department, Section 14590, supra, imposes the duty on the State Purchasing Agent to purchase all supplies to be used by that department. Therefore, it becomes the duty of the State Purchasing Agent to purchase the supplies of coal for the use and needs of said commission. This being true, the only question remaining in your request is relative to the type of coal to be purchased for the use of the relief clients of the State Social Security Commission in the City of St. Louis.

As can be seen from Section 14619, supra, all officers, or in this case the Purchasing Agent, who purchase coal in this State for the use of State "institutions" shall purchase coal which is mined in this State if the cost of such coal is not greater than the cost of coal mined in any other state or states, including the cost of transportation.

Further, it is common knowledge that coal mined in the State of Missouri is a type of coal which does not conform to the requirements of the St. Louis City Smoke Ordinance, which ordinance was held constitutional in the late case of Ex parte Ballentine v. Nester, handed down by the Supreme Court of Missouri on August 6, 1942, and which has not as yet been reported in the official reports.

It is clear that Section 14619, referred to above, refers to state "institutions." The question then confronts us as to whether or not the State Social Security Commission is a State "institution" within the meaning of this section. For a definition of the State Social Security Commission we will cite you to the case of Howlett v. The Social Security Commission, 149 S. W. (2d) 806 (Mo. Sup.). In that case this Commission is defined as follows:

> "The State Social Security Commission is an executive governmental agency (State ex rel. Hackmann, 314 Mo. 43, 282 S. W. 1007) and like the Workmen's Compensation Commission, the Public Service Commission and the State Highway Commission, the Social Security Commission exercises quasi judicial powers."

Following such definition above, we are of the opinion that the State Social Security Commission cannot be placed under the term "institution" as referred to in Sections 14619 and 14620 of the Revised Statutes of Missouri for 1939. Furthermore, as can be seen from a study of Section 14619, cited above, the coal purchased under that particular section is to be used for "fuel purposes in such institutions." As we understand your inquiry you do not contemplate such state of facts. In view of the fact that the Commission is not an "institution" under the special section (Section 14619) with regard to the purchase of coal, and that under said section the purchase of coal for the use of such state "institutions" is for "fuel purposes" only, the purchase of supplies and coal for such Commission for the use stated in your inquiry will be governed by the general statute referring to Missouri products, which is Section 14616, set out above. This section provides that Missouri products, materials and supplies should be purchased for state use but there is a proviso at the end of the statute which states:

> "Provided, however, that quality and fitness of articles shall be considered in purchasing or letting contracts for articles herein mentioned."

As we have stated above, it is well recognized that Missouri does not produce coal which conforms to the standard as required by the St. Louis City Smoke Ordinance. Therefore, such Missouri coal, applying the proviso above, is not of the correct quality or fit for use in the restricted areas of the City of St. Louis by the relief clients of the State Social Security Commission. Therefore, we feel that if the Purchasing Agent is convinced that Missouri coal is unfit for use in the City of St. Louis, he is, under the statutes, at liberty to purchase other coal which does conform to the Smoke Ordinance of such city.

Conclusion.

Therefore, it is the opinion of this department, under the authorities cited above, that there are no statutes in the State of Missouri which would prohibit you from purchasing coal which meets the specifications of the St. Louis City Smoke Ordinance.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

PURCHASING AGENT: Purchasing agent may enter into contract, the terms of which are carried into the next biennium.

August 31, 1942

9-10

FILED
28

Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under August 29, 1942, which reads as follows:

> "Will you please give me your opinion as to whether it is possible for me as State Purchasing Agent to enter into contracts for the furnishing of supplies for state departments and/or institutions extending beyond the biennium.
>
> "I am particularly interested at this time in the matter of entering into contracts for the supplying of coal for the various state institutions for a period of approximately a year beginning sometime during the month of September. This, as you know, would carry the contract over into the next biennium.
>
> "Enclosed is a copy of our contract form used for the past year's contract, and the form for our contract for the coming year would be approximately the same. I wish especially to call your attention to the fact that although estimates of our requirements are given, the period of the contract is the deciding factor instead of the amount. We specifically state in the second paragraph of 'Miscellaneous

> Conditions'; 'The tonnage requirements for the various institutions as shown on the proposal sheet are approximate and are subject to the actual amount of coal required by the institution for the contract period'. * * * * * "

Section 48, Article IV, Constitution of Missouri, reads as follows:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Under the above section of the Constitution the state cannot be bound by any contract not authorized by law.

In the contract attached to your request, we find the following clause:

> " * * * In the event the appropriation for any Institution or Institutions shall become exhausted before completion

> of the contract and until further funds are available, the contractor may upon 30 days' notice to the State Purchasing Agent cancel the remaining portion of the contract; or the contractor may complete the contract as awarded without any recourse against the State of Missouri for interest charges or damages for failure to receive payment, as outlined in the preceding paragraph."

This clause specifically releases the State from any liability on the contract if the appropriation for any institution or institutions shall become exhausted before completion of the contract. All that is necessary is that the contractor give thirty days' notice to the State Purchasing Agent cancelling the remaining portion of the contract. It is true that the contract carries over into the next biennium, but the State does not pay out any money until the coal is delivered.

Section 14594 R. S. Missouri, 1939, which is a part of the State Purchasing Act, and which was enacted in the Laws of Missouri, 1939, Page 410, reads as follows:

> "On or before November first of each year, each department shall submit to the purchasing agent a classified list of its estimated needs for supplies for the following year. The purchasing agent shall consolidate these and may purchase the entire amount or such part thereof at one time as he shall deem best. Any contract for such purchases may provide only the price at which the supplies needed during the year shall be purchased and that the supplies shall be delivered in such amounts and at such times as ordered throughout the year

> and be paid for at such time and for such amounts as delivered. In such case, certification from the auditor shall be required only for the amount ordered at any time.

Under this section the State Auditor is not required to certify as to the full amount of the contract, but only certifies for the amount ordered at the time of delivery.

Section 19, Article X of the Constitution of Missouri, partially reads as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * *."

Since, under Section 14594, supra, the certification of the Auditor is only made at the time of the partial delivery which does not violate Section 19, Article X, of the Constitution of Missouri, supra, for the reason that at the time of the certification there was sufficient money in the appropriation to the certain institutions to pay for the delivery at that time.

If the next General Assembly, which appropriates for the next biennium does not appropriate for the purchase of coal under the contract which you intend to enter into, then the contract is void as to the payments for further deliveries, even though, under the terms of the contract, the contract is voidable, in case there is not sufficient money appropriated, or the appropriation has been exhausted.

We are not holding that the State is bound for the full amount of the contract under the appropriation made for this biennium, or that a later legislature can appropriate for the full amount of the contract, if the State was bound for the full amount of the contract during this biennium.

We are holding that since the State is only bound at the time of the delivery of the coal, then the contract is not in violation of Section 19, Article X of the Constitution of Missouri.

It has been held in this State, that where the validity of the contract depends upon the delivery of a certain article, at a different biennium, it is not creating a debt against the State during the time of the biennium in which the contract was entered into by the State.

In the case of State ex rel. v. Geiger, 246 Mo. 74, l. c. 95, the court said:

> "But in passing, in order to show the deep desire of the people of the State to observe and live up to those constitutional prohibitions against the State or any of its political subdivisions going in debt, except as therein provided, the Legislature duly enacted Sec. 1378, R. S. 1909, which under severe pains and penalties, stated therein, also prohibits the board of managers, and all other officers and agents of such institutions, from contracting any debt in the name of any such institution for the payment of which there had not previously been made an adequate appropriation.

> "Under this view of the law, counsel for relator, notwithstanding the stringency of its provisions, further insists that since the contract in question expressly stipulates that the hospital agreed to take its entire water supply from the water company for a period of ten years from December 31, 1905, said water to be supplied by meter measurements, at the rate of ten cents per thousand gallons, to be paid for monthly, clearly comes within the rulings of this court as announced in the cases previously cited. In other words, that no debt was incurred on behalf of the hospital, when the contract in controversy was entered into, nor until the water was furnished by the relator and actually received and used by the former, which under the terms of the contract, was to be paid for monthly, and consequently the indebtedness was incurred monthly, and not from year to year, nor for a period of ten years."

The court further said, at l. c. 100:

> "We are, therefore, of the opinion, that the eleemosynary institutions of the State are public corporations and are embraced within the provisions of Sec. 12, Art. 10 of the Constitution, and that the contract made and entered into, by and between the water company and the board of managers of Hospital Number 2 was valid when made, and that the debts incurred thereunder were from month to month, for the water furnished and used from month to month, and

> not from year to year, nor for a period of ten years, as contended for by counsel for respondents; and since the appropriation approved March 24, 1911, for the support and maintenance of this institution for the years 1911 and 1912, was sufficient for all purposes, and made prior to the time the debts were incurred, they are valid, or rather were not prohibited by said section 12 of the constitution."

This case is very similar to the facts set out in your request, and the court held that since the State was not liable under the contract until the delivery of a certain supply of water, it did not violate the Constitution in regard to creating a debt against the State.

CONCLUSION

It is, therefore, the opinion of this department, that even though, under the terms of the contract, the compliance with the contract is carried over into the next biennium, there is no law that prevents the purchasing agent from entering into such a contract, so long as proper appropriations are made by the legislature to pay the amount due for the delivery of the coal under the contract during this biennium.

Under the contract, the payment for the delivery of the coal in another biennium is not a violation of the Constitution for the reason that the delivery is made in

another biennium when the purchase price is paid through an appropriation made for another biennium.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY COURTS: Whenever two judges of a County Court concur in the payment of a claim against the County, it is the duty of the Presiding Judge of said Court to sign the warrant for the payment of said claim.

October 1, 1942

10/1 FILED 28

Hon. A. T. Faucett
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This is to acknowledge your letter of recent date requesting an opinion from this department reading as follows:

"I am writing you for an opinion regarding a sterilizer, bought by our County Hospital from The American Sterilizer Company at Erie, Pennsylvania.

"It seems that the Board of Trustees, of our County Hospital, took the matter up with our County Court in regard to buying a sterilizer for the Hospital. And the Hospital authorities were advised by the County Court, so I understand, that if they thought the Hospital should have the sterilizer, they should go on and buy it, which they did.

"It was shipped to the Hospital on February 7, 1942, and I am sending you a copy of the contract. However, the contract and notes described therein, were never properly signed and the $401.00, cash payment was never paid.

"The Sterilizer Company is now threatening to take the sterilizer out of the Hospital.

"Two of the County Court Judges are willing to pay for the sterilizer, but the Presiding Judge of the County Court refuses to sign the warrant for the first payment.

"I might also say that the Hospital is now in the red and has no money on hand, but two of

> the Judges are willing to make these payments out of, what they call, an incidental fund which is really the general revenue fund, and they now have in this fund about $6000,00 which is used for emergency purposes. They have raised the taxes for next year, to obtain additional revenue for the Hospital and I think this additional revenue will take care of all the Hospital needs.
>
> "I should like to have your opinion as to whether or not there would be any way to compel the Presiding Judge to sign this warrant or pay for the sterilizer in any other manner."

From an analysis of the facts presented by your request, we conclude that the only question before you for determination is whether the Presiding Judge of the County Court may be compelled to sign a warrant for the payment of a claim which has been duly allowed by said Court. In this respect, we assume that the sterilizer to which you refer has been purchased in accordance with law, and that there is sufficient money in the general revenue fund of the County.

Your attention is directed to the provisions of Section 13831 of R. S. Mo., 1939, which provides in part as follows:

> "When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, * * * * * * * *"

Attention is further directed to the provisions of Section 13832 of R. S. Mo., 1939, which provides in part as follows:

> "Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, * * * *" (Under-scoring ours.)

The provisions of these statutes are clear, unambiguous, and no room for the construction of the same exists. Cummins v. Public Service Company, 66 S. W. (2d) 290. Moreover, under the provisions of Section 13832 supra, it is clear that whenever a warrant shall be drawn for an amount ascertained to be due to a person that it is mandatory on the part of the president of the court, while the court is in session, to sign such warrant. The signing of a warrant is merely ministerial, and does not require the exercise of any discretion. That this interpretation is correct is supported by the use of the word "shall" appearing in said section. Furthermore, if the president of the court refuses to sign the warrant, he may be prosecuted under the provisions of Section 13843 of R. S. Mo., 1939.

We are enclosing a copy of an opinion dated April 14, 1941, directed to Mark Wilson, Prosecuting Attorney, with respect to what action may be maintained against the president of a township board who refused to sign a warrant for a payment on a rock crusher when two members of the township board approved the payment, which opinion, we think, by analogy is here applicable, insofar as bringing about the result of having a warrant duly signed as required by the provisions of Section 13832, supra.

CONCLUSION.

It is the opinion of this department that the Presiding Judge of the County Court is required to sign a warrant for the payment of an amount ascertained to be due by the County Court under the provisions of Section 13832, supra, whether or not such Judge concurs in the payment of the amount which has been ascertained to be due. In the event the Presiding Judge fails to perform the duty enjoined upon him by statute he may be prosecuted. Other appropriate action in the form of mandamus may be used in compelling the performance of a duty which is clearly ministerial in nature.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General
RCS:ww

CRIMINAL LAW: Postdated check on bank in which there is no account; cannot be prosecuted under Section 4694, R. S. 1939, without other misrepresentations.

January 24, 1942

FILE 29

Mr. James A. Finch, Jr.
Assistant Prosecuting Attorney
318 Broadway
Cape Girardeau, Missouri

Dear Sir:

We are in receipt of your request for an official opinion, dated January 22d, which reads as follows:

> "The Supreme Court in the case of State v. Taylor, 73 S. W. (2d) 378, held that one may be prosecuted for a misdemeanor for giving a check with insufficient funds in the bank even though the check was postdated. In that case the court dealt with the statute whereby there is a prima facie evidence of intent to defraud if the check is not paid within five days after receiving notice that the check had not been paid. I should like to have your opinion as to whether a defendant could be prosecuted under the felony section for giving a check on a bank in which he had no account where the check is postdated. Assume a situation in which the maker of the check had no account in the bank at the time he gave the check and had no account in the bank subsequently, either between the time the check was given and the date shown on the check or on or subsequent to the date appearing on the check. In your opinion could there be a prosecution under those circumstances under the felony section, or would it be necessary to bring the prosecution under the misdemeanor section.

> "Secondly, I should like your opinion as to whether the State pays the costs of extradition proceedings where necessary in a situation where the charge is one for a misdemeanor. In other words, if under the above state of facts you are of the opinion that the prosecution must be under the misdemeanor section, will the State pay the necessary extradition costs of extraditing the defendant on such charge, or is that expense which must be borne by the County?"

Under the facts stated in your request, we are assuming that you are relying solely on the fact that the check was postdated and the writer of the check had no funds in the bank at the time the check was written. You do not state any other false representations made by the defendant other than the writing and delivering of the postdated check. If any other false representations were made, which were representations of an existing fact and not of an event or fact that would occur in the future, it would be possible to obtain a conviction under the felony section, which is Section 4694, R. S. Mo. 1939. It has been held in this State that the mere promise of the defendant that a check would be paid, is insufficient under the felony section. On the other hand, it has been held that a conviction may be had under the misdemeanor sections where the check is postdated, for the reason that the Legislature saw fit to enact a separate law with reference to evidence on a check drawn upon a bank and payment refused on account of insufficient funds. The sections under the misdemeanor sections are 4695, 4696 and 4697, R. S. Mo. 1939.

The Supreme Court in construing the felony section (4694) in the case of State v. Mullins, 237 S. W. 502, l. c. 504, said:

> "So the only evidence offered which proved any of the alleged misrepresentations was the promissory statement of the defendant that his check would be paid. As seen above, that is not a false pretense within the meaning of the statute.

"It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses.

"Section 3554 is as follows:

"'Sec. 3554. Notice--Five Days--How--Evidence. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon (together with the drawee thereof the amount due thereon), together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.'

"Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole.

> "For the purpose of this case we will assume, without deciding, that this section is applicable to the present transaction. * * *"

The Supreme Court of this State in construing the misdemeanor sections, that is, 4695, 4696 and 4697, in the case of State v. Taylor, 73 S. W. (2d) 378, l. c. 385, said:

> "This court in the Shelby Case and in prior decisions upheld the power of the General Assembly to declare by statute the rule of prima facie evidence laid down in section 4116. The like power, asserted in section 4306, is not questioned. And since the latter section makes no distinction between predated, truly dated, post-dated, or nondated checks, the facts which the statute makes prima facie evidence should be applicable to post-dated checks as well as to predated, truly dated, or nondated checks."

Section 4306, mentioned in the above opinion, is now Section 4696, R. S. Mo. 1939.

In answer to the second part of your request, and in view of the fact that we are holding that a conviction cannot be had upon the felony section, that is, 4694, where the evidence rests solely upon a postdated check drawn upon a bank in which the drawer had no account, we are holding that the defendant may be charged under the misdemeanor sections, provided proper notice has been given as set out in Section 4696, supra.

Of course, a conviction may be had against a defendant under the misdemeanor sections, but in order to obtain a conviction on a postdated check it would be necessary that the five days' notice be given. This section (4696) covers merely the matter of evidence of the intent to defraud and the knowledge of insufficient funds in the bank.

As to the matter of the extradition of the defendant in this case, we are enclosing an opinion rendered by this office on January 5, 1934, to Honorable Walter G. Stillwell, Prosecuting Attorney of Marion County, in which we held that the expenses of the messenger is fixed in amount by the Governor and is solely within his discretion. It is only under very extraordinary circumstances that the Governors of this State have granted requisitions on misdemeanor charges.

Conclusion

In view of the above authorities it is the opinion of this Department that a conviction cannot be maintained and upheld under the felony section (4694) against a person who gives a postdated check upon a bank in which he has no account, if the check is the sole evidence of the false representation. It is further the opinion of this office that a conviction can be had under the misdemeanor sections (4695, 4696 and 4697) against a person who gives a postdated check upon a bank in which he has no account, provided he is given the proper notice as set out under Section 4696, R. S. Mo. 1939.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

JB:EG
Enc.

MISSOURI REAL ESTATE COMMISSION - Trustee buying property to protect taxes is not required to have license from Commission.

February 24, 1942

Hon. James A. Finch, Jr.
Assistant Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

FILE 29

Dear Sir:

We are in receipt of your request for an official opinion, which reads as follows:

"Section 11,131, R. S. Mo. 1939, provides for the appointment by the County Court of a suitable person to act as trustee for the county to bid at tax sales under Section 11,130, said purchases to be made by such person as trustee for the county. Such lands or lots so purchased shall then be sold and deeds ordered executed and delivered by the trustee on order of the County Court; the proceeds of the sale to be applied to the payment of costs and taxes. The trustee receives some compensation out of the proceeds, the amount being determined by the County Court, but not to exceed 10% of the purchase price received.

"Senate Bill No. 87, adopted at the 1941 session of the Legislature, and appearing at page 424 of the Session Acts of 1941, sets out the Act creating the Missouri Real Estate Commission, and provides that persons buying and selling real estate with certain exceptions must obtain a license from the Real Estate Commission.

> Section 3 of that Act provides in part that it shall not apply to 'any person selling real estate under order of any court.'
>
> "The Missouri Real Estate Commission has advised the Trustee acting for the County Court of Cape Girardeau County that inasmuch as he receives some compensation for his services he must have a license to authorize him to act in that capacity. I should appreciate the opinion of your office as to whether the trustee designated by the County Court of Cape Girardeau County is required to have a license to act in that capacity. It is my understanding that this person does not otherwise engage in business as a real estate agent, and my request is based upon the assumption that the only sales made by him are of land purchased by him as trustee for the county, same being ultimately sold by order of the County Court pursuant to the provisions of Section 11,131."

Laws of Missouri, 1941, page 424, provides for a Missouri Real Estate Commission to control and regulate the buying and selling of real estate in Missouri, by persons in the real estate business.

Section 1 of the Act provides that a license must be procured from the Missouri Real Estate Commission by every real estate broker, or salesman.

In Section 3 of the Act, a real estate broker is defined as:

> " * * * any person, copartnership association or corporation, foreign or domestic,

> who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a co pensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of oth rs; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. * *"

Section 3 further provides, however, that:

> " * * * nor shall this act apply to a receiver, trustee in bankruptcy, administrator, executor, or any person selling real estate under order of any court, nor to a trustee acting under a trust agreement, deed of trust, or will, nor to the regular employees thereof; * * *." (Underscoring ours.)

Section 11131 R. S. Missouri, 1939, provides that a county court of any county in order to protect itself from loss upon taxes due them, may, because of inadequate bids upon property sold for such taxes, appoint a trustee to purchase said lots. This trustee holds the property for the benefit of all the funds entitled to participate in the taxes against said property. The statute further provides that:

> " * * * All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court. * * Compensation to trustees as herein

> designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees * * * ."

There is no doubt that a county court, in ordering a sale of the land, acts judicially. As was said in the case of Dumm v. Cole County, 287 S. W. 445, l. c. 448:

> " * * * The county court is a court of record and in acting upon matters within its discretion, it exercises judicial functions. In this case Cole county stood in or attempted to assume the relation of an owner or proprietor. The county court acted as for an owner. If the land in suit was property held by Cole county, the determination of the county court that it was expedient to sell it in the manner and for the purpose provided by the statute was a matter within the discretion and power of that court."

A reading of the above, discloses that the trustee receives his compensation only when the land is sold, which property is sold upon the order of the county court. We believe it is clear that the trustee, as such, comes within the exemption above, that is, that he is a "person selling real estate under the order of any court", and, therefore, does not have to have a license to transact such sale. We are aware of the case of Kansas City v. Fee, 160 S. W. 537, 174 Mo. App. 501, in which it is held that a fireman employed by a school district came within the purview of a city ordinance requiring all firemen in charge of steam boilers to obtain a city license. This case might be controlling if the statute did not specifically exempt persons selling under an order of court.

CONCLUSION

A trustee appointed by a county court to purchase lands to protect the tax lien of the county, and to sell such property, is not required to obtain a license from the Missouri Real Estate Commission.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

AO'K:RW

SCHOOLS: Vacancy occuring in a town or city school board should be filled at the next annual school election, regardless of when the vacancy occurs.

April 3, 1942



Mr. Jno. Ed. Fuhrman
County Superintendent
of Schools, Linn County
Brookfield, Missouri

Dear Sir:

We have your letter of April 1,which reads as follows:

> "Relative to our telephone conversation Tuesday afternoon, March 31, 1942, in regard to the Browning Public School, Browning, Mo.
>
> "Friday night, March 27, 1942, one of their directors resigned whose term was not up this election year.
>
> "As prescribed by law the election notices were already posted, March 23, 1942. The question is: Can they vote for three directors this school year, one to fill the unexpired term or should they appoint a director to fill the vacancy and he in turn would hold office until the annual meeting date in April, 1943?"

Although your letter does not so state, we have learned from other sources that the Browning School District is a six director district.

Section 10468, R. S. Missouri 1939, provides as follows:

> "The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occuring in said board shall be filled in the same manner and with like effect as vacancies occuring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

The Supreme Court in the case of State ex rel. vs. Harper, 336 Missouri, 717; 80 S. W. (2) 849, held that directors who were appointed to fill vacancies occuring on a Board of Directors of such a school district serve only until the next school election, and that those appointed to fill the vacancies did not remain members after the date of said election. Therefore, whether or not the vacancy you speak of has been filled, on April 7, 1942 the office of the director who resigned will be vacant, thereby making three vacancies on said Board. Said Section 10468, also provides that at the next annual meeting a director shall be elected for the unexpired term for the director whose office is vacant. It would seem therefore, that when a vacancy occurs on a Board of Directors of such a district the law requires that at the next succeeding election someone should be elected to fill out the unexpired term of the director whose office has been vacated.

We find no statute which requires that in a town or city district notice be published notifying the public that directors will be elected at the coming school election. Neither is there any provision in the law for a candidate for the office of school director in such a district to file his name as candidate. The voters are free at such an election to vote for whomever they care to, and the parties receiving the highest number of votes would be elected. Section 10469, R. S. Missouri 1939, provides that in such a

district the voters shall annually elect two directors. This provision takes care of two vacancies which occur by expiration of office every year. Section 10468, supra, provides that at the next annual meeting, after a vacancy has occured in the Board during the interim between elections, a director shall be elected for the unexpired term. It would seem therefore that the law contemplates that at the annual election in such district all vacancies then in the Board of Directors should be filled. In the case you mention there will be the two regular vacancies and the vacancy created by the resignation of the third director.

CONCLUSION

It is, therefore, the opinion of this office that at an annual school election in a town or city school district all vacancies in the Board of Directors at the time of such election should be filled by the voters. In your case, one of those elected would be for the unexpired term of a resigned director and two would be for full terms.

Yours truly

Harry H. Kay
Assistant Attorney Teneral

APPROVED:

ROY McKITTRICK
Attorney General

HHK:EAW:MW

COUNTY OFFICERS:
DEPUTY ASSESSOR
ROAD OVERSEER:

Deputy assessor may also hold the position of road overseer.

July 11, 1942

778

FILED
31

Mr. J. L. Freeman
Assessor of Moniteau County
Tipton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date which is as follows:

> "I have a deputy assessor who has been appointed road overseer in this county. Is it legal for me to retain him as a deputy, as he will be drawing two salaries from the county?"

Section 8516, R. S. Mo., 1939, provides for the appointment of road overseers and their qualifications and salary. Section 8518 provides that the overseer is to give a bond. Section 8519 provides that the overseer shall make monthly statements and file them with the county clerk. Section 8520 provides that the road overseer shall keep the roads in repair according to the engineer's specification. Section 8521 provides that the overseer shall report to the County Court. Section 8522 provides numerous duties such as keeping roads in good repair, cutting and removing of brush, dragging or shovelling off the snow, etc. In addition he is a collector of poll tax providing the County Court shall by record adopt this Section. There are other sections dealing with ditching and other general road work. All of which compose the duties of the road overseer.

Section 10946 provides that the deputy assessor may be appointed, who is to take an oath the same as the assessor and provides that he shall have the same powers and duties as the assessor himself while he is employed as such deputy. The deputy assessor is paid out of the fees allowed to the assessor and is answerable to him directly. The assessor may hire or fire the deputy at his pleasure.

The only question here involved is whether or not these two offices are incompatible. There are a long line of cases in this State which hold to the doctrine that a person cannot hold two public offices when the duties of the same are incompatible. In the case of State ex rel. v. Bus, 135 Mo. 325, l.c. 330, the rule is set out as follows:

> " * * * * * The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers, secs. 50, 51.
>
> "The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4 B. & Ad. 9.
>
> "'The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary.' 1 Dill. Mun. Corp. (4 Ed.), sec. 225; People ex rel. v. Brooklyn, 77 N. Y. 503. * * * * "

It is further set out in State ex rel. McAllister v. Dunn, 277 Mo.38, l.c. 44, as follows:

> " * * * * * It is elementary law that one may not hold two offices the duties of which are incompatible. * * * * * "

In the case of State ex inf. v. Breuer, 235

Mo. 240, l.c. 247, the Court said as follows:

> * * * * * His term as judge had not expired and he had not resigned. Speaking for the court, Judge W. GRAY said: 'Under this provision a judge of a court of record is clearly ineligible to a seat in either house of the Legislature whilst he holds the office of judge. The existence of the two offices in the same individual is incompatible, and is peremptorily prohibited. * * * *.'"

In the early case of State of Missouri ex rel. v. Lusk, 48 Mo. 242, the Court said as follows:

> "A writ of quo warranto was sued out of the Cole Circuit Court against the defendant to test his right to hold the office of county clerk, he having been elected to and having entered upon the duties of the office of clerk of the Circuit Court. The relator claims that by this act he has in effect surrendered the office of county clerk, for the reason that the duties of the two offices are incompatible in law. If this were so, there is no doubt that the acceptance of the second office would vacate the first (State ex rel. Owens v. Draper, 45 Mo. 355); and counsel have given some forcible illustrations of the difficulty arising under some circumstances in holding both offices by the same person. * * * * *"

The term "incompatible" is defined in the case of Johnson, 21 P. 2d 813, as follows:

> "Term 'incompatible' is defined as not compatible, incapable of harmonizing or agreeing, mutually repelling, incongruous. Things are incompatible when they cannot coexist, and inconsistent when they are opposed to to each other."

The test, therefore, to determine whether or not the duties of two public offices are incompatible is whether or not the duties of those offices would directly conflict with each other making it so that a person holding the offices could not honestly and fairly administer the duties of the two offices. We cannot find such incompatibility in the office of deputy assessor and a road overseer. The duties of the two offices are absolutely different and are not conflicting in any manner. In passing, we might say that the deputy assessor does not derive his pay from his county but from the fees which the assessor is entitled to in his office.

CONCLUSION

It is, therefore, the opinion of this office that a person may hold the office of deputy assessor and road overseer in Moniteau County.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OFFICERS: Deputy County Clerk may attest county warrants.

COUNTY CLERKS:

August 17, 1942

8 25

FILED
31

Hon. Robert H. Frost
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of August 11, 1942, which reads as follows:

> "At the request of the members of the County Court of Clinton County, I am asking for an opinion on the following set of facts.
>
> "The County Clerk has instructed his deputy not to attest any warrants which have been ordered paid by the County Court for bills which have been duly allowed but insists that he and he only attest them. At times the clerk is absent from his office for days at a time and when the court meets in his absence they cannot pay any bills as he is not there to attest the signature of the presiding judge thereby delaying the payment of claims which are just and many of which are for labor performed by persons who need their money.
>
> "The question which the courts ask is this: Is the County Clerk given the authority to pass upon the allowance

> of claims against the county and has he any authority to refuse to attest a warrant as long as there are funds out of which to pay said warrant and further can the County Court make an order authorizing and directing the deputy County Clerk to attest these warrants."

Clerks of courts are only ministerial officers of the court. It was so held in Caldwell v. Cockrell, 217 S. W. 524, 280 Mo. 269; State ex rel v. Priest, 152 S. W. (2d) 109, and Cannon v. Nikles, 151 S. W. (2d) 472.

Under Section 13831 R. S. Missouri, 1939, the county court, when ascertaining any sum of money due from the county, shall order its clerk to issue a warrant and, under Section 13832 R. S. Missouri, 1939, it is the duty of the president of the county court, who is the presiding judge, to sign the warrant, and it is the duty of the clerk to attest the warrant. Under Section 36, Article VI of the Constitution of Missouri, the county court shall have jurisdiction to transact all county and such other business as may be prescribed by law. By virtue of Section 36, Article VI, of the Constitution of Missouri, the legislature enacted Sections 13824 and 13825 R. S. Missouri, 1939, which refer to the auditing, settling of claims, and the issuing of warrants for the payment of the same.

Section 13299 R. S. Missouri, 1939, reads as follows:

> "Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of

> their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Under the above section the deputy clerk may, in the name of his principal, perform the duties of the clerk.

That a deputy may perform the same duties as the clerk under whom he serves, was held in the case of Springer v. McSpadden, 49 Mo. 299, l. c. 300, where the court said:

> "The acknowledgment is in due form, and it was taken and certified by the deputy of the circuit clerk in the name of the principal. It is now claimed that the acknowledgment was fatally defective; that the deputy had no right to take the same, and that no one but the principal in his own proper person could perform that act. The statute enacts that every clerk may appoint one or more deputies, who shall be at least seventeen years of age, and have all other qualifications of their principals, and take the like oath, and may, in the name of their principals, perform the duties of a chief clerk. (Wagn. Stat. 259, Sec. 16.) Section 12 of the chapter in relation to conveyances (Wagn. Stat. 275) designates how the certificate of acknowledgment shall be granted, and declares that when granted by the clerk of a court it shall be under the hand of the clerk, and seal of the court

of which he is clerk. Section 13 requires the person making the acknowledgment to be personally known to the officer taking the same, and the succeeding sections provide for proving the identity of the grantor by subscribing witnesses where he is not personally known to the officer.

"Although the statute, when speaking of the duties and powers of the clerk in respect to taking acknowledgments, refers to him alone, yet it by no means follows that he cannot act by deputy. The law, in prescribing the duties of clerks, invariably designates the clerk alone, yet the functions of his office may always be performed by deputy duly appointed.

"No discrimination is made by saying that the clerk shall do certain acts in his own proper person, and that others may be done by the deputy; but the language is broad and explicit, that the deputies may, in the name of their principals, perform the duties of the chief clerk. The deputy has no authority to act in his own name, but when he performs an official act in the name of the principal, it is the act of the principal himself. Taking the acknowledgment of deeds and granting certificates thereon are among the powers expressly devolved upon the clerk, and the deputies, acting in the name of their principals, have the same power as the clerks themselves.

> As an historical fact, we know that the deputies have exercised this power in the name of their principals ever since the organization of this State. The practice has been universally acquiesced in by the courts and the profession, and, as far as our knowledge extends, it was never before challenged. To sanction the ruling of the Circuit Court in this case would be to unsettle and destroy the title to nearly all the land in the State."

Wagner's Statute, 1872, Sec. 259, Par. 16, in the above quoted portion, is now Section 13299 R. S. Missouri, 1939.

Also, in the case of In Re: Rothwell, 44 Mo. App. 215, l. c. 221, Par. 1, the court held the authority of the deputy county clerk, unless otherwise limited, is commensurate with that of the officer himself.

The above case was based upon Section 1971 R. S. Missouri, 1889, which is now Section 13299 R. S. Missouri, 1939.

CONCLUSION

It is, therefore, the opinion of this department, that the county clerk has no authority to pass upon the allowance of claims against the county.

It is further the opinion of this department, that the county clerk has no authority to refuse to attest a warrant, as long as there are funds out of which to pay said warrant.

It is further the opinion of this department, that the county court may make an order authorizing and directing the deputy county clerk to attest warrants, but such an order is not necessary for the reason that deputy county clerks, under the law, are authorized to attest county warrants.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY TREASURER - OFFICERS -
BONDS: County court can refuse to accept a surety bond from a county treasurer.

November 17, 1942

11-25

FILED
31

Hon. Robert H. Frost
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated November 13, 1942, which reads as follows:

> "Will you please give me your opinion regarding Section 3238 Revised Statutes 1939 as regards the liability of a County to approve a surety bond for a County Treasurer. As I read the section, the county court has a right to refuse to consent to the filing of a surety bond. The Treasurer of our county has always given a surety bond and it has always been approved. The question now arises that if the court approves the bond, will they not be liable for the cost thereof. And second, can they refuse to approve the bond even though they will have to pay the cost thereof."

Under Section 13795 R. S. Missouri, 1939, the county treasurer must enter into a bond to the county, within ten days after his election, or appointment.

Section 13795, supra, reads as follows:

> "The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

This section appears in the reenacted Laws of 1937, page 424. Under this section the sureties are resident landholders of the county.

Section 3238 R. S. Missouri, 1939, partially reads as follows:

> "Whenever any officer * * * of any county of this state, * * * shall be required by law of this state, * * * to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * * county, * * * enter into a surety bond, * * * with a surety company * * * authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

This section was first enacted in Laws of 1937, page 190, section 1.

Both of the above sections appear in the Laws of Missouri, 1937, Section 13795, supra, being a reenactment and Section 3238, supra, being the first enactment of that law. These sections appear in the Laws of Missouri, 1937, therefore, both sections should be read together.

Where two acts relating to the same subject matter are passed at the same session of the legislature, they are in para materia, and, to arrive at the true legislative intent they must be construed together. (Hull v. Baumann, 131 S. W. (2d) 721.)

Under Section 13795, supra, it is mandatory that the county treasurer give a bond in a certain amount, and with certain sureties, and, under Section 3238, supra, the alternative to Section 13795, supra, is that the county treasurer may elect not to give the bond as set out under Section 13795, supra, and may, with the consent and approval of the county court, enter into a surety bond. When the county court consents to, and approves of, the giving of such a bond by the county treasurer, it is mandatory that they pay the costs of the premiums for the bond. In reading Section 3238, supra, it is very noticeable that it sets out the election of the county treasurer to give a surety bond, and the consent and approval of the governing body which in this case is the county court, and further says:

> " * * * and the cost of every <u>such</u> surety bond shall be paid by the public body protected thereby." (Underscoring ours.)

In other words, the county court shall pay the costs of every such surety bond, where the county treasurer elects to give such a bond, and the county court consents to,

and approves the giving of such a bond. That the county court is liable for the costs was held in the case of Motley et al v. Callaway County, 149 S. W. (2d) 875, l. c. 877, where the court said:

> " * * * The Legislature, no doubt taking notice of the results of some of these during recent depression periods, considered that surety company bonds could give better protection to public funds in the custody of public officers. It, therefore, authorized such a bond for county officers if the officer elected to furnish it and the county court approved it. It also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. So when consent and approval for the officer to purchase such a bond at public expense was given in advance by 'the public body protected,' * * * * * * * * * * *." (Underscoring ours.)

Under the above holding, it is necessary that the consent and approval for the officer to purchase such a bond must be given by the county court in advance of the giving of such bond. The wording of Section 3238, supra, is very plain and unambiguous. The primary rule of construction is to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object, and the manifest purpose of the statute. (Artophone Corporation v. Coale, 133 S. W. (2d) 343.)

The main question in your request is whether or not the court is liable for the cost of the surety bond where it approves the bond. The bond could not be given unless the county treasurer elected to give such a bond and the county court consented to the acceptance of it.

Your second question in your request is: Can they refuse to approve the bond even though they will have to pay the cost thereof? As stated before, such a bond cannot be given unless the county treasurer elects to give such a bond, and the county court consents to and approves of, the giving of such a bond.

CONCLUSION

It is, therefore, the opinion of this department that if the county treasurer elects to give a surety bond, as set out in Section 3238, supra, instead of a property bond, as set out in Section 13795, supra, and the county court consents to, and approves of, the giving of such a bond, then the county is liable for the premiums on such a bond.

It is further the opinion of this department that the county court can refuse to consent and approve to the giving of a surety bond by the county treasurer, and, in that event, such a bond cannot be given by the county treasurer, and it follows, that the county would not be liable on any premium on such a bond, for the reason that the county treasurer should give a personal property bond as set out in Section 13795, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CIRCUIT CLERK: Recorders of Deeds - Deputies for circuit clerks, who are ex officio recorders of deeds should be approved by judge or judges of the circuit court.

December 29, 1942

FILED
31

Honorable Robert H. Frost
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 22, 1942, which reads as follows:

> "In our county the circuit clerk is also ex-officio recorder of deeds and as such recorder of deeds is entitled to a deputy recorder. Who has the authority to approve or disapprove of this deputy. Does the Circuit Judge have the authority to disapprove a deputy recorder or is the question of approval with the county court."

According to the last Federal decennial census, the population of Clinton County is 13261.

Section 13149, Laws of Missouri, 1941, page 525, reads as follows:

> "The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 19,000 inhabitants or more."

This section is a re-enactment of Section 13149 R. S. Missouri, 1939, in that it reduced the population therein set out from 20,000 to 19,000. It also specifically states, "ex officio recorders."

The term "ex officio" denotes by virtue of the office. (King v. Physicians' Casualty Ass'n of America, 150 N. W. 1010, 1011, 97 Neb. 637.)

"Ex officio" means "from office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position; also used of an act done in an official character, or a consequence of office, and without any other appointment or authority than that conferred by the office." (Lobrano v. Police Jury of Parish of Plaquemines, 90 So. 423, 424, 150 La. 14.)

Also, following the reasoning in the last two preceding cited cases the Supreme Court of this State, in defining, "ex officio", in the case of The State ex rel. McGrath v. Walker, 97 Mo. 162, l. c. 163, said:

> "Section 18, of article 10, of the same instrument provides: 'Sec. 18. There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state and attorney general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are or may be prescribed by law.'

> "It will thus be seen from the provisions of the constitution just noted, that the state officers mentioned in section 24, supra, are not ex-officio members of the state board of equalization, that is, their membership of that board is not the result of their holding certain state offices; but is the result of their appointment to such board, by an independent and distinct provision of the constitution. 1 Burrill Law Dict., title ex-officio. But for such independent provision they would not have been members of such board." (Underscoring ours.)

Also, Vol. 25 C. J., page 169, defines, "ex officio", as follows:

> "By virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office."

Since the circuit clerk, by virtue of his office, in counties having a population of less than 19,000, is the ex officio recorder of deeds, then we must examine the law in reference to the appointments of deputy circuit clerks, and not deputy recorders of deeds.

Under Section 11812 R. S. Missouri, 1929, the appointments of deputy clerks, as to number, compensation and other qualifications, were approved by the judge or judges of the circuit court. But in the re-enactment of the same section by the legislature (Section 11812, Laws of Missouri, 1933), such approval

was taken away from the judge, or judges of the circuit court, and was placed under the county court.

The St. Louis Court of Appeals, in construing an enactment of Section 11812, Laws of Missouri, 1933, which placed the approval under the county court, in the case of State ex rel. Hill v. Thatcher, 94 S. W. (2d) 1053, par. 2, said:

> " * * * In our view the estimate for the salary of any assistant clerk of the circuit court falls in the same category, since it is specifically provided under section 11812, Laws of Mo. 1933, that every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such officer, with the approval of the county court, and that the county court in its order permitting the clerk to appoint such deputies and assistants 'shall fix the compensation of such deputy or assistant * * * and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it.' Certainly, in light of this specific statute, where the county court shall have, in conformity therewith, approved of an appointment of a deputy or assistant of a circuit clerk and has fixed the compensation of such deputy or assistant, the estimate of expenditures submitted by the circuit court and the clerk of the circuit court to the budget officer

> under the Budget Law must designate therein that amount so fixed by the county court.
>
> "In this connection we call attention to the fact that when the Legislature in 1933 repealed the then existing section 11812, Rev. St. of Mo. 1929 (Mo. St. Ann. Sec. 11812, p. 7031), and enacted a new section of the statute under the same number, a comparison of the new with the old section will disclose that the only change accomplished was to take the approval of the selection of deputies and assistants of the clerk of the circuit court and the fixing of the compensation of such deputies and assistant clerks from the circuit court and place it in the hands of the county court."

The opinion in this case was rendered June 2, 1936.

By reason of the holding in the above case, the legislature re-enacted Section 11812, as set out in Laws of Missouri, 1933, so as to place the approval of the deputies in the office of the circuit clerk under the judge or judges of the circuit court. The enactment of this section clearly shows it was the intention of the legislature that the approval should be given by the judge or judges of the circuit court, under whom the deputy clerks were employed and not for the approval to be given by the county court, under whom the deputy clerks were not employed.

Section 11812, re-enacted in Laws of Missouri, 1933, page 369, and re-enacted in Laws of Missouri, 1937, page 444, is now Section 13434 R. S. Missouri, 1939, and reads as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge or judges of the circuit courts, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office. The judge or judges of the circuit court, in its order permitting the clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting an appointment to be made."

The above section clearly states that the number of deputies, the compensation and period of time for which the deputies are to be employed, must be with the approval of the judge or judges of the circuit court.

CONCLUSION

It is, therefore the opinion of this office that, in counties having a population of less than 19,000, such as Clinton County, where the circuit clerk is also ex officio recorder of deeds, his deputies must be approved, or disapproved, by the judge of the circuit court, and not by the county court, for the reason that the deputies are not deputy recorders of deeds, but are deputy circuit clerks, acting as deputy recorders of deeds.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SCHOOLS: School board cannot use surplus to purchase defense bonds.

April 23, 1942

Hon. J. R. Garrison
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

FILE
32

Dear Sir:

We are in receipt of your letter of April 22, 1942, in which you request an official opinion, as follows:

> "I would like to know if the School Board of a closed school could invest their surplus funds in Defense Bonds?
>
> "The County Sup't. of Schools and myself are of the opinion that they would be entitled to so invest their funds. We would appreciate it very much if you would give us your opinion concerning this matter."

For the purpose of this opinion, we are assuming that in your statement of facts you refer to a common school.

Section 13829, R. S. Missouri, 1939, provides that where there is a balance in any county treasury in this state to the credit of any special fund which is no longer needed, the balance must be transferred to the credit of the general revenue fund of the county. This section applies to a balance of any special fund.

Section 13776, R. S. Missouri, 1939, provides for the loaning out of money in the hands of the treasurer of a county collected for the purpose of constituting a sinking fund for the payment of the principal of an indebtedness incurred for which bonds are outstanding or are in litigation.

Section 13777, R. S. Missouri, 1939, provides for the loaning of the money collected in for the purpose of paying out of the sinking fund for the payment of the bonds outstanding and further provides that upon a loan of such money so collected the county shall cause the mortgage to be secured by lien on real estate with other restrictions.

Section 13782, R. S. Missouri, 1939, provides that in case the county court has loaned the money held for the purpose of paying the bonds and interest outstanding which are in litigation or undue may, instead of loaning the money and taking as security loans on real estate, purchase bonds of the United States or the State of Missouri, which bonds are to be held in trust for the fund or funds to which the money applied to their purchase belong and shall be so expressed in the public records of the county.

From the facts stated in the request for this opinion the funds expected to be used are from the school surplus funds and are not from funds collected in for the purpose of paying off a bonded indebtedness.

There is no question but that the county court is limited to their statutory powers and duties and would be liable if they misuse the funds out of the general revenue. That the county court must follow the statutes specifically was held in the case of Missouri Twp., Chariton County v. Farmers' Bank, 42 S. W. (2d) 353, l. c. 356, where the court said:

> "These statutes were enacted by the Legislature for a purpose, that is, to safeguard the funds of the public, to establish a regular procedure, and prescribe an orderly manner in which the public funds may be expended. * *"

It has also been held that the county courts are not the general agents of the county or of the state and their powers are limited and defined by law. It was so held in King v. Maries County, 249 S. W. 418, pars. 1-2, where the court said:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. Butler v. Sullivan County, 108 Mo. 630, 18 S. W. 1142; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492, 158 S. W. 590; Steines v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 S. W. 64."

Also, in the case of Morris v. Karr, 114 S. W. (2d) 962, par. 3, the court said:

"In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely

irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

Also, in the case of Jensen v. Wilson Twp., Gentry County, 145 S. W. (2d) 372, pars. 1-2, the court said:

"The only question for our determination is whether the warrants are void because they were issued on claims which had not been verified. We find no decision of our courts on this precise question. However, we have considered Section 12301 and other sections pertaining to the allowance and payment of claims. We have said these statutes are enacted to establish a regular and orderly procedure in the expenditure of public funds for the purpose of safeguarding the funds and to permit the violation of these statutes would open the door to fraud. Accordingly, we held that laws for the protection of public funds must be heeded and said that this court should announce rules of law which require a compliance with such laws and should not permit an evasion of their plain intent and purpose. Missouri Township, Chariton County v. Farmers' Bank of Forest Green, 328 Mo. 868, 42 S. W. 2d 353."

Section 10434, R. S. Mo., 1939, reads as follows:

"Whenever it shall be found that any school district has any surplus funds in the county treasury, the directors of such school district may make application, in writing, to the county court, setting forth that school funds are

> accumulating beyond the wants or necessities of such district. Upon such application, it shall be the duty of the county court to cause such funds to be loaned for the use and benefit of such school district."

Also, Section 10435, R. S. Missouri, 1939, reads as follows:

> "Such school funds shall be loaned at the same rate of interest and in the same manner as township school funds are loaned: Provided, that no school tax shall be levied in such district other than for incidental expenses during the time for which such surplus fund is sought to be loaned; and provided further, that a free public school shall be maintained in such school district for at least eight months in each year."

The above section provides that the school funds shall be loaned at the same rate of interest and in the same manner as township school funds are loaned.

Township school funds are loaned, as set out in Section 10383, R. S. Missouri, 1939, which reads as follows:

> "Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent per annum, upon conditions and subject to the restrictions hereinafter set forth."

The manner of loaning the money is set out in Section 10384, R. S. Missouri, 1939, which does not provide for the purchase of Defense Bonds.

Section 10385, R. S. Missouri, 1939, specifically sets out the form of mortgage notice of sale, fees, etc., and does not provide for the purchase of Defense Bonds.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the school board of a closed school cannot invest its surplus funds in Defense Bonds, and, if the school is permanently closed, the surplus should be returned to the general fund, as provided in Section 13829, R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MUNICIPAL CORPORATIONS:
MARSHAL: VACANCY - Marshal of City of the third class does not forfeit office by being drafted into the Army.

December 30, 1942

r 8

FILED
32

Honorable J. R. Garrison
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 28, 1942, which reads as follows:

> "The Mayor and City Council of the City of Warrensburg have requested me to write you for an opinion concerning their City Marshal.
>
> "The facts are as follows: The Marshal was drafted into the Army last week. His term does not expire until April of 1943. He appointed no deputy and there is no Marshal at this time. The Mayor and Council desire to know whether they will have to pay the Marshal his salary for the next four months even though he is not here and has appointed no deputy. I might add that Warrensburg is a City of the third class. They are also going to appoint a marshal.
>
> "I am writing you at the request of Mayor Shelton and am sure that he and the City Council will appreciate it if you will forward an opinion concerning this matter."

Section 6869 R. S. Missouri, 1939, reads as follows:

> "The following officers shall be elected by the qualified voters of the city, to wit: Mayor, police judge, attorney, marshal, assessor, collector, and treasurer. The terms of office of each of the said officers shall be two years, except the office of mayor, which shall be a four-year term. This section shall not apply to any of said officers elected prior to the date it becomes effective, but any person holding any of the said offices at the time this section becomes effective shall serve the term for which he was elected. All officers shall hold office until their successors are duly elected and qualified. The attorney shall be a person learned in the law."

The above section specifically states that the term of office of the marshal in a city of the third class is two years.

In your request you state that the city marshal of the city of Warrensburg was drafted into the Army. It has been held by the Supreme Court of this State, that where a county officer has been drafted into the Army he does not forfeit his office. It was so held in the case of State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri, Relator v. Wade Wilson, Respondent, No. 38087, (not reported). In that opinion the court in stating the facts of that particular case, and in holding that the officer did not forfeit his office by being drafted into the Army said:

"At the general election in 1938 one John R. Wall was elected circuit clerk for the usual term of four years. He discharged the duties of his office until February 16, 1942 when he was inducted under the Selective Service Act into the Army of the United States as a private. He was sent to Fort Leavenworth, Kansas and later to Camp Roberts, California. After Wall's induction the circuit clerk's office was carried on by his deputy until April 7, 1942 when she turned over the office to respondent under threat of being held in contempt of the circuit court.

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

Under Section 6875 R. S. Missouri, 1939, the mayor may, with the consent of the majority of all the members elected to the city council, remove from office for cause shown, any elected officer of the city.

Section 6904 R. S. Missouri, 1939, reads as follows:

> "The council shall, by ordinance, provide for the removal of any marshal, assistant marshal or policeman guilty of misbehavior in office."

Under this section an ordinance must be passed to provide for the removal of the marshal.

In Section 6875, supra, which provides for the removal of an elected officer, it is specifically stated, "for cause." But, under the holding of the case of State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri v. Wade Wilson, supra, the drafting of an elected officer into the United States Army is not a "cause" sufficient to forfeit the office. The Court in the Wade Wilson case, further, in construing Section 18, of Article II of the Constitution of Missouri, said:

> "We have held in a case similar to this where a circuit judge was called into active military service that Art. II, Sec. 18 of our Constitution, 'that no person elected or appointed to any office shall hold such office without personally devoting his time to the performance of the duties to the same belonging,' was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer and did not apply to the situation we were there considering. State ex rel. McGaughey v. Grayston Mo. , 163 S. W. (2d) 963. * * * * * *."

It is true, that under Section 6875, supra, the mayor and council may remove an elected officer in cities of the third class for cause, but the Supreme Court of this State, in the case of State ex rel. v. Bright, 224 Mo. 514, l. c. 529, in passing upon such an ordinance, said:

> "The ordinance in question provided for the suspension of any officer of the city for such acts of malfeasance and misfeasance and of official incompetency, as are contained in these charges against the city marshal.
>
> "These constitutional questions are really outside of a discussion necessary to determine this case. The question here is what is the real character of this court of impeachment? If it is a court within the meaning of the Constitution, then all questions as to constitutionality of the laws under which the court acts can be determined in a proceeding in prohibition, but if it is not such court, then relief must be sought in some other proceeding. So that after all the sole question to be determined is the character of the body which was trying McNeill for his official life. To our mind it is not such a body to which a writ of prohibition can be directed."

In the above holding, it is very significant that the suspension of the officer must be for malfeasance, misfeasance or incompetency.

Section 6898 R. S. Missouri, 1939, reads as follows:

> "The marshal shall be chief of police, and shall have power at all times to make or order an arrest with proper process, for any offense against the laws of the city, and keep the offender in the city prison or other proper place to prevent his escape, until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence. He shall collect all fines assessed in the police court, and pay the same into the city treasury."

Under this section the marshal of a city of the third class, such as Warrensburg, shall be the chief of police.

Section 6899 R. S. Missouri, 1939, reads as follows:

> "There may be one assistant marshal, who shall serve for a term of one year, and shall perform the duties of the marshal at such times as the marshal may be absent, disqualified or unable to act. At other times, the assistant marshal shall render services as a regular member of the police force."

Section 6901 R. S. Missouri, 1939, reads as follows:

> "The manner of appointing the assistant marshal and all policemen of the city, as well as the duties of the same, shall be defined by ordinance."

Under the above two sections there may be an assistant marshal, who may be appointed under an ordinance which has been passed by the city council. In the Wade Wilson case, supra, the court, in its opinion said:

> "We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the appointment of respondent was unauthorized. * * * * * *
>
> "We can readily anticipate that local inconvenience can result where an officeholder goes to war. It seems to us that some provision might be made, where there is none at present, for a substitute, an officer locum tenens, to fill the office while the regular officer is performing the greater duty of defending his country. Wounded soldiers are already returning to civilian life. Supposing there is an office-holder among them, would there be anyone who would not agree but that he should serve out his term of office if he were able? So it should be with every soldier who has the good luck to return. (We use the term soldier to include all ser-

vice men.)

"However, the matter of providing for substitute officers is for the attention of the Legislature which will convene within a month. The Supreme Court of Florida recently held constitutional an act which secured to all state and county officers their tenure in case they were called to the armed forces and which authorized the governor to designate another to perform the duties of the office during such absences but not longer than the remainder of the term. Re Advisory Opinion, Fla. , 8 So. (2d) 26, 140 ALR 1481. * * * "

In the matter above set out, in the first paragraph, the court specifically held that the office of circuit clerk was not forfeited by reason of his being drafted into the Army.

In the second paragraph above set out, the court, in reviewing its holding, suggested that the legislature next convening should make some arrangement for the appointment of a temporary officer during the absence of the elected officer.

Under the facts set out in your request and under this holding as above set out, the legislature of this State saw fit to enact Section 6899, supra, which provided that the assistant marshal shall perform all of the duties of the marshal when he may be absent, disqualified or unable to act.

Under Section 6901 R. S. Missouri, 1939, the legislature provided that the manner of appointment of the assistant marshal should be governed and defined by ordinance.

I am assuming that the city of Warrensburg has such an ordinance.

In your request, you also state that the mayor and city council will appoint a marshal. Under the holding in the Wade Wilson case, supra, there is no vacancy in the office of the marshal of Warrensburg, but the mayor and council may appoint an assistant marshal who shall perform the same duties as the marshal.

Also, under the holding of the Wade Wilson case, supra, no proceeding can be had at this time to oust the marshal. The holding specifically states:

> " * * * 'An office presently filled cannot become vacant without a removal either voluntary or involuntary.' State v. McClinton, 5 Nev. 329. Wall has not voluntarily removed himself from his office. In fact the contrary has been indicated by him. No involuntary proceeding to remove him from office was had. Nor could such a proceeding be carried on over objection because of the Soldiers' and Sailors' Civil Relief Act so long as Wall is on active duty. 50 U. S. C. A. Appendix, Sec. 501 et seq."

You also ask whether the city will have to pay the marshal his salary for the next four months, even though he is not here and has appointed no deputy. The Supreme Court of this State has held that so long as an elective officer holds his office, has not forfeited it, and has not been ousted by any proper procedure, he is entitled to a salary.

In the case of Bates v. St. Louis, 153 Mo. 18, l. c. 20, the court said:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office . . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office."' (Givens v. Daviess Co., 107 Mo. loc. cit. 608, 610; Fitzsimmons v. Brooklyn, 102 N. Y. 536; State ex rel. Chapman v. Walbridge, 153 Mo. 194.)

"As is well said in Throop on Public Officers, sec. 500, quoting from Robinson, J., in People v. Green, 5 Daly (N. Y.), pp. 268, 269:

"'The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, <u>such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties</u>. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others

> they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office "for better or worse;" and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties . . . . The fees or salary of office are "quicquid honorarium," and accrue from mere possession of the office'" (Underscoring ours.)

Also, in the case of Cavanee v. City of Milan, 99 Mo. App. 672, which is a case where a marshal had sued the city of Milan for his salary which he claimed due him, even though, through illness, he had not performed his duties, at page 674, the court said:

> "And plaintiff was entitled to his salary for the time during which he was sick and unable to perform the duties of the office. Bates v. St. Louis, 153 Mo. 18; State v. Walbridge, idem, 194."

CONCLUSION

It is, therefore, the opinion of this department, that the marshal of the city of Warrensburg has not forfeited his office by reason of his having been drafted into the Army, and the mayor and city council of the city of Warrensburg cannot appoint a marshal where there is no vacancy.

It is further the opinion of this department that the mayor and city council of the city of Warrensburg may appoint an assistant marshal who shall perform the same duties as the marshal.

It is further the opinion of this department, that the city of Warrensburg should pay the marshal his salary for the next four months, providing he retains his office as marshal.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION: Co-operative stores are subject to taxation
MERCHANTS TAX: as merchants.

- -

December 31, 1942

12-31

FILED
32

Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement of facts and request:

> "There is operating at Tipton, Mo., the Co Mo Electrical Co-operative, which is a non profit corporation, operating through the REA. The question has arisen as to whether or not this corporation is subject to a merchant tax.
>
> "The Co Mo. is composed of a group of members who are charged a membership fee and pay a certain rate per kilowatt for electricity they use. They do not sell electricity to anyone other than a member of their organization. They have, in their office and store at Tipton, a few electric stoves, refrigerators and irons which they will sell only to members of their organization, and not to the public. This merchandise is bought by the co-operative and sold to their members at cost and transportation. This concern is not doing a general merchandising business. Only a member of the co-operative can do any business whatsoever with the organization.
>
> "Is this non profit corporation subject to a merchant's tax?"

From your statement there is no question but what this co-operative store owns or holds some personal property. The personal property owned and held by this store, and which you describe in your letter, does not come within any class of exemptions, either under the Constitution or the Statutes. Under Section 10940, R. S. Mo. 1939, it is provided that every person owning or holding property on the first day of June shall be liable for taxes thereon for the ensuing year. If this firm is not taxed as a merchant then it would have to pay the tax under this section. Section 11303, R. S. Mo. 1939, defines the term "merchant." This section reads as follows:

> "Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

This section is all inclusive and does not exclude stores such as co-operative.

Under Section 11309, R. S. Mo. 1939, the merchant, for the purpose of assessment, is required to make a statement of the greatest amount of goods, wares and merchandise which he may have had on hand at any time between the first Monday in June next preceding.

This co-operative electrical company, as we understand it, was incorporated and organized under the provisions of Article 28, Chapter 102, R. S. Mo. 1939. Under Section 14406, of this chapter, co-operatives organized thereunder are authorized to sell articles of merchandise. This does not confine the sales of such co-operative group to its own members. We think the fact that it sells merchandise, regardless of to whom, would put it in the class of the merchants, and taxable as a merchant.

CONCLUSION

It is, therefore, the opinion of this department that the Co. Mo. Electrical Company is subject to taxation as a merchant.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

MOTOR VEHICLES: Rules governing right of way, erection of stop signs and failure to observe same and speed permitted on highways of the State.

January 3, 1942

FILE 33

Honorable M. Stanley Ginn
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Mr. Ginn:

We are in receipt of your letter of December 19, 1941, wherein you request our opinion based on the following facts:

> "A question has arisen in our office which is to be determined by the laws and rules of the road prevailing in Missouri relative to the operation of motor vehicles at points where side roads intersect arterial highways.
>
> "We would appreciate very much if you would supply us with a copy of the law or regulations of the State of Missouri concerning the following items:
>
> "(1) Law or regulation governing right-of-way at intersection of cross road and arterial highway where there is a stop sign for the party entering the arterial highway.
>
> "(2) The law or regulation governing the vesting authority in a state official to erect stop signs at various intersections.
>
> "(3) The law or regulation providing for the fine and punishment of

those failing to observe stop signs at the intersection of an arterial highway with a cross road.

"(4) The law governing the speed of automobiles and trucks on the highways of Missouri."

It is well established that the "State has right to regulate and control the movements of motor vehicles over its highways," (Park Transportation Co. v. Missouri State Highway Commission, 332 Mo. 592, 60 S. W. (2d) 388, l. c. 391), and pursuant to said authority the General Assembly has enacted an Act regulating and licensing the operation of motor vehicles (Sections 8366-8470, R. S. Mo. 1939).

Section 8385, subsection "1" R. S. Mo. 1939, provides that:

"An operator or driver of a motor vehicle shall have the right of way over an operator or driver of another motor vehicle who is approaching from the left on an intersecting highway and shall give the right of way to an operator or driver of a motor vehicle approaching from the right on an intersecting highway. The right of way shall mean the right to proceed when two or more vehicles will reach such intersection at approximately the same time."

We note that the facts submitted relate to laws "governing right of way at intersection of cross road and arterial highway."

Section 8367, R. S. Mo. 1939, defines the term "highway" as:

"Any public thoroughfare for vehicles, including state roads, county roads

> and public streets, avenues, boulevards, parkways or alleys in any municipality."

And in the case of Phillips v. Henson, 326 Mo. 282, 30 S. W. (2d) 1065, l. c. 1068, the court said:

> "* * *, it is reasonable to conclude that the word 'highways' was used in the statute in its popular rather than its technical sense, and was intended to include all highways traveled by the public, regardless of their legal status."

Thus, irrespective of whether it is a state or county road "where two cars arrive at an intersection at approximately the same time, the car coming from the right has the right of way" (Roberts v. Wilson, 33 S. W. (2d) (Mo. App.) 169, l. c. 172). In other words, any car approaching from the driver's right on an intersecting highway has the right of way, while such driver has the right of way over any driver of a motor vehicle approaching from the left.

Since the first three questions relate to entering an intersection where there is a stop sign, we will consider them together.

Section 8755, R. S. Mo. 1939, provides that the State Highway Commission may erect "danger signals or warning signs" at "highway intersections or other places along the state highways which the Commission deem to be dangerous."

The case of Roberts v. Wilson, supra, in considering Section 8755, supra, declared that there is no statute requiring one to observe the warning of a stop sign, but points out that failure to obey such warning sign may be found to constitute common law negligence. The court said (l. c. 172):

> "There is no statute, so far as we know, requiring one to observe the warning implied in the stop signal, yet defendant's failure to obey it was a matter

> for the consideration of the jury, in connection with the general negligence pleaded. Egan v. Palmer; Mitchell v. Brown, supra, It may well be noted that under section 17, p. 138, 1st Extra Session Laws 1921, the state highway commission is authorized to erect warning signs at points on highways within its discretion; and section 14 of the act further defines the commission's rights and duties in this respect. It naturally follows that when such warning signs are placed, any one who fails to observe and obey them is not acting in an ordinarily prudent manner, and may be found guilty of common-law negligence by the jury. Foulks v. Lehman (Mo. App.) 17 S. W. (2d) 994."

Not only have we found no statute requiring one to halt at a stop sign when approaching an intersection, but we have also found no statute prescribing any fine or punishment for failure to observe a stop sign at an intersection.

Section 8383, R. S. Mo. 1939, provides as follows:

> "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian

> traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: Provided, however, that no person shall operate a solid tire commercial motor vehicle having a rated live load capacity of two (2) tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two (2) tons and not more than five (5) tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five (5) tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

A person approaching an intersection and failing to stop might by reason of the time of day, amount of traffic, condition of highway, and other considerations, be found guilty of violating the above statute for failure to drive in a careful and prudent manner. In determining, however, whether the above section was violated, the guilt of the driver could not be conditioned upon the mere failure to halt at a stop sign.

Section 8395, subsection "b", R. S. Mo. 1939, provides that municipalities may by ordinance require vehicles to stop before crossing certain designated streets and boulevards:

> "Municipalities may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; establish one-way streets and provide for the regulation of vehicles thereon; require vehicles to stop before crossing certain designated streets and boulevards; limit the use of certain

> designated streets and boulevards to passenger vehicles; prohibit the use of certain designated streets to vehicles with metal tires, or solid rubber tires; regulate the parking of vehicles on streets and prohibit or control left-hand turns of vehicles; require the use of signaling devices on all motor vehicles, and prohibit sound-producing warning devices, except horns directed forward. No ordinance shall be valid which contains provisions contrary to or in conflict with this article, except as herein provided."

The above subsection provides, however, that no ordinance shall be valid which is contrary to or in conflict with the Motor Vehicle Act.

In the case of City of Cape Girardeau v. Bennett, 27 S. W. (2d) (Mo. App.) 447, l. c. 448, the court in holding that a prosecution would lie for the violation of a city ordinance requiring the operation of motor vehicles in a careful and prudent manner, said:

> "There is some feeble attempt made to attack the ordinance, but the ordinance conforms to the state laws, and there is nothing in the ordinance which in any way conflicts with the statute. Municipalities are given authority to establish by ordinance reasonable regulations for the driving of motor vehicles within their limits, and a prosecution will lie for the violation of such ordinances, prohibiting the operation of motor vehicles in other than a careful and prudent manner. Laws of Missouri 1921 (Ex Sess.) Section 19, p. 91; City of Mexico v. Sharp, 221 Mo. App. 195, 300 S. W. 308."

A municipal ordinance requiring a person to observe a stop signal and providing a fine or punishment for failure

to observe same would obviously not be in conflict with a state statute since there is no statute (except those relating to municipalities) governing stop signs.

From the foregoing we are of the opinion that:

(1) Any motor vehicle approaching from the driver's right on an intersecting highway has the right of way, while such driver has the right of way over any driver or operator of a motor vehicle approaching from the left;

(2) The State Highway Commission has the authority to erect a stop sign as a warning signal on an intersection of a highway and municipalities have authority by ordinance to erect stop signs on such streets and boulevards as they may designate;

(3) There is no state statutes requiring one to observe a stop sign at an intersection nor is there a statute imposing a fine or other punishment for failure to observe and obey said stop sign. However, in failing to observe and heed a stop sign a person may be found guilty of common law negligance by a jury in a civil suit for damages arising out of an accident;

(4) A municipality may by ordinance require a driver to stop at certain designated streets and boulevards and may impose a fine or other punishment for failure to observe such stop signal.

(5) Section 8383, R. S. Mo. 1939, sets out the law governing the speed of automobiles and trucks on the highways of Missouri.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

OFFICERS: Conviction in Federal Court does not create vacancy.
VACANCY : Service can be had on officer at usual place of abode.

March 17, 1942

3-18

Hon. J. R. Gideon
Prosecuting Attorney
Taney County
Forsyth, Missouri

FILE
33

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"Sherman R. Bray, County Treasurer of Taney County, entered a plea of guilty of using the mail to defraud. You probably are familiar with the case as the trial was in the Federal Court in Jefferson City.

"Bray has not resigned, although he is now serving time in a Federal Prison, but is attempting to hold said office and has installed a deputy in said office who is acting for said treasurer.

"When he was sentenced and incarcerated did that create a vacancy in said office, or will it be necessary to institute quo warranto proceeding to have the office declared vacant? This man, so I understand, is incarcerated outside the state of Missouri and if an action must be filed what method would have to be used to obtain service?"

Your first question is whether or not the fact that Sherman R. Bray was sentenced and incarcerated would create a vacancy in the office.

Section 2, Article VIII of the Constitution of Missouri, provides, as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people: Provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 4561, Article 5, Chapter 31, R. S. Mo., 1939, reads as follows:

> "Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Pro-

> vided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

Section 4796, Article 8, Chapter 31, R. S. Missouri, 1939, reads as follows:

> "Every person who shall be convicted of any felony, punishable under any of the provisions of this article, shall be thereafter disqualified from holding any office of honor, profit or trust, or of voting at any election eithin this state."

In construing the above section of the Constitution, and the two sections as enacted by the legislature by reason of said Article VIII of the Constitution of Missouri, this office, on October 3, 1938, rendered an opinion to the Honorable J. E. Woodmansee, Chairman of the Board of Election Commissioners in Jackson County, Kansas City, Missouri, in which we held that persons convicted in the Federal Court, or in the courts of other states, are not disqualified to vote in Missouri. The question of holding office is also taken up in the sections which refer to the qualifications to vote, and for that reason we hold that the conviction in a Federal Court does not disqualify a person from holding office in this State. We are enclosing a copy of the opinion herein described.

Section 18, Article II of the Constitution of Missouri, reads as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

By reason of the above section of the Constitution, the legislature enacted Section 12828 R. S. Missouri, 1939, which reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

The above section is not applicable to proceedings for the removal of an officer under a particular statute,

for the reason that this section applies where there is no such particular statute. (State ex rel v. Peters, (App.) 94 S. W. (2d) 930; State ex rel v. Sartorius, 95 S. W. (2d) 873.)

Section 12828, supra, declares that the officer shall forfeit his office if he fails to personally devote his time to the performance of the duties of such office. Under this section of the statutes it makes no difference if the officer has a competent deputy in charge of the office, he must personally devote his time to the office. It was so held in the case of The State ex rel Tilley v. Slover, 113 Mo. 202, l. c. 206, where the court said:

> " * * * The grave abuses that could, and did creep into the public service under that law, by which the honors and emoluments of an office could be accepted by one person and the performance of its duties 'farmed out' to another, for convenience or profit, furnished a cogent and sufficient reason for this constitutional enactment. The wholesome doctrine that 'public office is a public trust' was fortified by its provision, declaring it also a personal trust, and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies, who, under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance. That this wise and salutary provision of the constitution may be enforced through the provisions of the statute under consideration as to this particular class of officers, we have no doubt."

Also, in the case of State v. Yager, 250 Mo. 388, l. c. 403, where the court said:

> " * * * The defendant was the sheriff of Pike county. It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909), unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom. In other words, defendant had no right wilfully, without cause, to absent himself from his county and State, as the record shows that he did, during the two days mentioned in the instruction complained of in this case. If he had the right to so absent himself for two days, without any excuse whatever, and wilfully, as he did, then he had the right to absent himself for two months or two years, and it is no excuse that during his absence his deputies may have performed as well, or better than he, the duties made incumbent upon him by law. Especially upon the facts in this case was this instruction properly refused and the converse thereof properly given. This is so for the reason that the proof shows that the absence of the sheriff from his attendance on the court was due to the fact that he had fled to a foreign State with the intention and solely for the purpose of avoiding arrest upon a warrant for a criminal offense, to-wit, for assault and battery, which warrant was, as he well knew, in the hands of the coroner of

> Pike county for service on him. What is here said will dispose of the exceptions taken by defendant to the refusal of the court to permit him to show that during his absence certain deputy sheriffs properly performed the duties of his office. As we have said, it was no excuse for his dereliction that certain deputies appointed by him may have done the work for which he was elected. There are certain elements of personal selection and personal responsibility imputed as dominating the minds of the voters in the election of officers who shall perform the statutory duties in the several counties. To take the view of defendant would be tantamount to saying that the selection of the voters is transferable and delegable on the part and at the unrestricted will of the elected, a thing which the Constitution itself specifically negatives, by providing generally that officers shall devote their time personally to the duties of the several offices to which they have been elected. (Constitution of 1875, art. 2, sec. 18.) We must therefore rule these objections and all of them against defendant."

You also inquire how to obtain service upon the defendant, or officeholder, who is now serving time in a federal prison outside the State of Missouri.

Section 12829 of Article 3, Chapter 83, reads as follows:

> "When any person has knowledge that any official mentioned in section 12828 of

> this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

In the filing of the complaint against Sherman R. Bray, County Treasurer, this section of the statute should be specifically followed. The procedure under this section of the statute is the same as the civil procedure in civil actions, or suits. It was so held in State v. Yager, 250 Mo. 388, at l. c. 401, where the court said:

> "Turning to the other objection, that this is not such a case as contemplates the granting of a change of venue, we find that the statute which prescribes some at least of the procedure required to be followed in actions under this article to remove derelict officers, provides that 'all actions and proceedings under this article shall be in the nature of civil actions, and tried as such.' (Sec. 10209, R. S. 1909.) We thus observe that the Legislature itself has seen fit, for reasons no doubt sufficient to the lawmakers, to prescribe specifically the nature of this proceeding, and that they have denominated it in express language a 'civil action.' * * * * * * *."

Also, Section 12833, Article 3, Chapter 83, R. S. Missouri, 1939, partially reads as follows:

> "* * * All actions and proceedings under this article shall be in the nature of civil actions, and tried as such."

Since the procedure under Section 12829, supra, is the same as in other civil actions, service can be had upon the officeholder, or defendant, in the same manner as in other civil actions. The service can be obtained by personal service as set out in Section 880 R. S. Missouri, 1939, which partially reads as follows:

> "A summons shall be executed, except as otherwise provided by law, either:

> * * * * * by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years; * * * * * * * * * * *."

By leaving a copy of the petition, which is the same as the complaint, and a copy of the writ, with his wife, or child over the age of fifteen years, proper service could be had. If he has no usual place of abode, where the above service can be had, it will be impossible to file any proceedings, for the reason that the service in this action cannot be had by order of publication as set out in Section 891 R. S. Missouri, 1939.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that the conviction in a Federal Court of Sherman R. Bray, County Treasurer of Taney County, does not create a vacancy in the office of County Treasurer.

It is further the opinion of this department that service can be had upon Sherman R. Bray, who is now confined in a Federal Prison outside of the State by leaving a copy of the complaint and writ at his usual place of abode, with a member of his family over the age of fifteen years.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ANIMALS: An attempt to administer a lethal dose of poison to a dog is a misdemeanor.
CRIMES:

June 20, 1942

FILED
33

Mr. L. F. Gingery
Rushville, Missouri

Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is, in part, in the following terms:

"I am writing you for some information which I need very bad at this time. We have had a lot of dogs poisoned here the last few years and we have worked hard to catch up with the guilty parties and now we have caught him * ** putting it out was seen and got the party who was watching got the stuff and brought it to me and I sent it to the Jensal Laboratory and their test showed it contained strychnine.

"Now our attorneys say there is no state law against poisoning dogs. They say they are not classed in Missouri as a domestic animal so we can not file under the section of the statutes covering domestic animals, therefore they don't know what to file under.

"* *

"I sure will appreciate any information you can give me to help me out in this matter.

"I was told that several years ago Champ Clark had a case in court and it was established in this case that a dog was a

domestic animal. But we cannot find anything to establish this.

"If you know of any prosecuting attorney who has handled a case like this and got a conviction I would sure like to know who he is.

"* * * * *Now that we have the evidence we sure would like to find a statute that we can convict on.

"Thanking you in advance for any information that you might give me in this matter, I will await an early reply."

Section 4556, R. S. Missouri, 1939, provides:

"Every person who shall willfully administer any poison to any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or to any domestic fowl, or shall maliciously expose any poisonous substance, with intent that the same shall be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years or in the county jail not less than six months, or by fine not less than two hundred and fifty dollars or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

The courts of Missouri have not ruled on the question whether a dog is included in the provisions of Section 4556, supra, which prohibits poisoning "any cattle . . . or other

domestic animal." In general, the courts of some other states have held that a domestic animal is one "belonging to the house," and that a dog is a domestic animal. People v. Campbell, N. Y., 4 Parker, Cr. R. 386, 393; Wilcox v. State, 28 S. E. 981, 101 Ga. 563, 39 L. R. A. 709; Manies v. State, 32 S. W. (2d) 470, 116 Tex. Cr. R. 542.

On the other hand, courts of other states have held that a domestic animal is one which, in its domestic state, "furnishes some support to the family," or "adds to the wealth of the community," and that a dog is not such an animal. State v. Harriman, 75 Me. 562, 564, 46 Am. Rep. 423; Skog v. King, 254 N. W. 354, 355, 214 Wis. 591.

Regardless of whether a dog is a domestic animal, as that term is used in a general sense, it would appear that a dog is not a domestic animal in the sense in which that term is used in said Section 4556. It must be noted that the term, "domestic animal" follows more particular words -- "cattle, hog, sheep, etc.", Within the rule known as ejusdem generis, when a general term ("domestic animal") follows particular terms, the general term is limited in its meaning to things of the same nature or class as those meant by the particular terms. It was so held in State ex rel. Goodlow v. Wurdeman, 227 S. W. 64, 67, 286 Mo. 153, where the court said:

> "It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind."

It appears that the term, "domestic animal," as used in Section 4556, supra, includes only animals of the same kind or class as cattle, sheep, etc. Inasmuch as a dog is not of that kind or class, it would seem it is not included in the term, and that that section does not apply to dogs.

In a prosecution for killing a dog, in State v. Mease, 69 Mo. App., 581, l. c. 582, the St. Louis Court of Appeals

affirmed a judgment quashing an information, and said:

> "* * * It is unquestionably the law that dogs are property in Missouri and that damages may be recovered civilly for injuries to them. It is also true that they are the subject-matter, by special statutes, of larceny. R. S. 1889, sec. 3535. But it was not an offense at common law to kill a dog, and in that respect the common law is still in force in this state. * * * * * *."

When that decision was written in 1897, it is true there was no statute prohibiting the killing of a dog. There was then in force R. S. 1889, Section 3620 (mentioned in that opinion), which in part provided:

> "Every person who shall . . . kill . . . any cattle of another . . . shall, upon conviction, be punished by imprisonment in the penitentiary . . . or . . . in the county jail . . . or by a fine . . . or by both such fine and imprisonment."

Those provisions were carried forward in Revised Statutes of 1899, Section 1987. The terms, "hog, sheep, goat," were added in Laws of 1909, page 459, section 1987, and carried forward with the felony provisions in Revised Statutes of 1909, section 4627; and, Revised Statutes of 1919, Section 3414. This statute was amended in Laws of 1929, page 166, section 3414, so as to provide:

> "Every person who shall wilfully and maliciously or cruelly kill, maim, wound, beat or torture <u>any dumb animal</u>, whether belonging to himself or another, shall upon conviction be punished by imprison-

> ment in the county jail for not more than three months, or by a fine of $50.00 or by both such fine and imprisonment, provided that nothing herein contained shall be construed to prohibit or interfere with any scientific experiments or investigations, provided further, that nothing in this section shall apply to the hunting or trapping of wild animals."
> (underscoring ours)

In the same form, that statute was carried forward in Revised Statutes of 1929, Section 4168, and is now Revised Statutes of 1939, Section 4557.

The reduction of punishment by the provision of making the offense only a misdemeanor, and the use only of the term, "any dumb animal," may be regarded as an indication of a legislative intent to broaden the scope of the statute so as to include many more animals.

It has been held that the term, "dumb animal" includes "every living" animal. People v. Brunell, N. Y. 48 How. Prac. 435, 447.

In McDaniel v. State (1879) 5 Tex. App. 475, l. c. 479, the Court of Appeals of Texas affirmed a conviction for killing a dog, under a statute prohibiting the killing of "any dumb animal," and said:

> "* * * The information is a good one. It is made an offence by our statute to wilfully and wantonly kill a dog, as it is to kill any other dumb animal, the property of another. Pasc. Dig., arts. 2344, 2345."

Section 4557, supra, also prohibits torturing any dumb animal.

The Springfield Court of Appeals held that Section 4557, supra, includes dogs, by affirming a conviction of torturing a dog, in State v. Kemp, 137 S. W. (2d) 638.

It is noted that in this case the person did not succeed in killing a dog, or even in poisoning it. But he did put out the poison; he did attempt to poison a dog. With evidence of the lethal amount of poison, this would constitute an attempt to kill the dog. Section 4835, R. S. Missouri, 1939, in part, provides:

> "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:* * * *

> "* * * But he would be guilty of an attempt to commit the fraudulent crime notwithstanding there was no insurance, 16 C. J. sec. 96, p. 117, since the requisite elements were present: (1) An intent to commit the crime; (2) an overt act toward its commission; (3) failure of consummation; (4) apparent possibility of commission, State v. Block, 333 Mo. 127, 131, 132, 62 S. W. (2d) 428, 431. * * * * * * * * *."

It appears that the putting out of a lethal dose of poison constitutes the overt act and apparent possibility of commission.

In our opinion the facts stated in your letter constitute the misdemeanor of attempting to kill a dumb animal, namely, a dog.

Section 4559, R. S. Missouri, 1939, provides:

> "It shall not be necessary to show on the trial of any offense for malicious trespass or injury to property specified in this article that the offense was committed from malice conceived against the owner of the property, or against the animal or property injured; but if the act was wrongfully, intentionally and willfully done, it may be inferred that it was done maliciously."

CONCLUSION

On the above mentioned authority, it is our opinion that one who wilfully and maliciously exposes a lethal amount of poison with intent to poison a dog, is guilty of the misdemeanor of attempting to kill a dumb animal, punishable by one-half of the jail sentence or fine, or one-half of both, provided by statute for killing such animal.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

EH/rv

BOARD OF EQUALIZATION: Deputy Surveyor in Jackson County is not entitled to sit as a member of the Board of Equalization in absence of surveyor and is not entitled to per diem compensation.

July 10, 1942.

7-11

FILED
33

Mr. Floyd R. Gibson
County Counselor's Office
Kansas City, Missouri

Dear Mr. Gibson:

Your letter of July 3, 1942, requesting an opinion has been referred to me. This request, omitting caption and signature, is as follows:

> "The Presiding Judge of the County Court of Jackson County has requested me to write you for an opinion on the following: Is the Chief Deputy Highway Engineer, who is recognized by the Court as being the acting Highway Engineer in the place of Col. Thompson, Highway Engineer recently called to army service, authorized to sit as a member of the Board of Equalization in the place of the elected Highway Engineer? And if so, would the acting Highway Engineer be entitled to the same per diem compensation as is paid other members of the Board?"

Article 9, Chapter 46 of the Revised Statutes of Missouri, 1939, provides for the office of County Highway Engineer. Section 8660, R. S. Mo., 1939, which is in the Chapter aforesaid provides as follows:

> "The county court of the several counties in this state may, in their discretion appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for

his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund; Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand

> inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads, outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be ex officio county highway engineer: Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

As can be seen, the Surveyor of Jackson County is the ex officio County Highway Engineer in view of the fact that such County has a population of over fifty thousand (50,000) inhabitants and has a taxable wealth in excess of forty-five million dollars, to-wit, approximately six hundred and thirty-five million dollars ($635,000,000.00) and contains Kansas City, which city has a population of over one hundred thousand (100,000).

Section 13208, R. S. Mo., 1939, pertaining to surveyors is as follows:

> "Deputies may be appointed by any surveyor who, before they proceed to discharge their duties, shall take an oath well, truly and faithfully to discharge the duties of deputy surveyors."

Section 11001, R. S. Mo., 1939, in speaking of the County Board of Equalization provides as follows:

> "There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization; Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

It will be seen from this Section that the Surveyor of a County is a member of the Board of Equalization and not necessarily the County Highway Engineer. As stated above, however, the Surveyor of Jackson County is ex-officio County Highway Engineer, and would serve on the Board of Equalization, but in his capacity as Surveyor. Therefore, if a Deputy is to serve, it would be the Deputy Surveyor of Jackson County and not the Chief Deputy Highway Engineer. Of course, it is possible that the latter is also a Deputy Surveyor, but he will serve on the Board of Equalization as Deputy Surveyor and not as Chief Deputy Highway Engineer.

As to the powrs of deputies, we will first cite you to 46 Corpus Juris, at page 1063, which is as follows:

> "When the law authorizes an officer to appoint a deputy without any express limitation upon his power, the duties of the office may be performed by either and a deputy may exercise any of the duties pertaining to his office, as the necessity or convenience of the public may demand their use."

This question of the powers of a deputy arose in the case of State v. Carey, 1. S. W. 143, 318 Mo. 613. The Court in discussing this point cited Mechem's Office and Officers, p. 571, which stated the following:

> "* * * * *'Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.' * * *"

In the case of Small v. Field, 14 S. W. 815, 102 Mo. 104, the Court held that the deputy of an officer may do every act which his principal might do. However, there is a limitation on the powers of deputies. As shown above it is a well settled rule that deputies may perform all the duties of their superior as long as such duties are merely ministerial. But when there is occasion for discretion to be exercised then the deputy cannot act since the powers of an officer which call for the use of discretion on his part cannot be delegated.

In Revised Volume 1 of McQuillin on Municipal Corporations, Section 394, page 1101, we find the following:

> "As appears in various parts of this work mere ministerial duties may be delegated but the general rule is that if from the nature of things to be done the officer is required to perform duties involving the exercise of discretion and judgment he cannot in any manner delegate them."

Also in 46 Corpus Juris, at page 1033, we find the following:

> "An officer to whom a discretion is intrusted cannot delegate the exercise thereof, but ministerial duties, except where there is a statutory prohibition, may be delegated." Citing State v. Reber, 226 Mo. 229, 126 S. W. 397, and Matthews v. Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

Now the question arises as to the nature of the duties the surveyor has on the county board of equalization,

i.e., are the duties of a ministerial nature or are they duties involving the exercise of the discretion on the part of the officer?

In the case of State ex rel. Arnold v. McCune, 252 S. W. 657, the court held that the board of equalization in the exercise of its powers acts judicially, and has general jurisdiction of all subject matters in regard to taxation of property in the county, and while acting within its jurisdiction its judgments and findings are not to be impeached.

Where the board of equalization acts judicially it is presumed that an officer on such board must exercise discretion on any decisions which he reaches while sitting as a member of such board. Therefore, if the deputy surveyor of Jackson County is allowed to sit as a member of such board of equalization during the absence of the surveyor, he will be required to exercise his discretion on any acts which he performs while a member of that board. In view of the fact that an officer may not delegate any powers requiring the exercise of discretion we feel that a deputy surveyor of Jackson County cannot sit as a member of the board of equalization of such county.

Conclusion

Therefore, it is the opinion of this Department that the Deputy Surveyor of Jackson County, Missouri, is not empowered to sit or be a member of the board of equalization of the aforesaid county; and it is further our opinion that the Chief Deputy Highway Engineer is also precluded from sitting on the Jackson County Board of Equalization. The other matter about which you asked our opinion, namely, as to whether or not the men mentioned above would be entitled to the $5.00 per diem, of course is answered in this conclusion, since if they are not permitted to sit they certaintly would not be entitled to the per diem compensation.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

VANE C. THURLO

PUBLIC SERVICE COMMISSION: Association hauling for hire furniture
MOTOR VEHICLES: of its members subject to Public Service Act.

December 30, 1942

20 (2)

12-31

FILED
33

Mr. M. Stanley Ginn
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion relative to a matter submitted by Captain W. J. Ramsey and which reads:

> "(1) The Agricultural Transportation Association of Springfield, Ill., leases trucks from individuals who are members of the Association and contracts to haul furniture of another member through the State of Missouri to Kansas, charging this member $150 for the trucking service. This fee is other than the Association dues.
>
> "(2) In case the individual moved is not a member of the Association and part of the fee charged for hauling is set aside as a membership fee, would this movement come under the Public Service Commission?"

The law is well settled that a person may lease a truck for a period not to exceed ten days and haul his own goods without coming within the Public Service Act. But here we have an entirely different set of facts. The Association leases the truck, it happens that the lessor is a member of said Association though that is immaterial, and the Association then agrees, for a stipulated amount of money, to haul furniture belonging to another individual who is also a member from the State of Illinois through Missouri to the State of Kansas.

Section 5720 (b), defines "motor carrier" as used in

Laws of Missouri 1941, page 523, is as follows:

> "(b) The term 'motor carrier', when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier: Provided, however, this article shall not be so contrued as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation. And provided further, this article shall not be so contrued as to apply to motor vehicles operated between the State of Missouri and an adjoining state when the operations of such motor vehicles within the State of Missouri are limited exclusively to a municipality and its suburban territory as herein defined."

Section 5720 (C), page 523, Laws of Missouri 1941, defines "contract hauler" as used in the same Article and reads:

> "(c) The term 'contract hauler,' when used in this article means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under

> special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

Section 5721, R. S. Missouri 1939, contains certain exceptions to Article VIII, Chapter 35, R. S. Missouri 1939, regulating transportation of persons and property by motor vehicles and reads:

> "The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This article shall not apply to trucks used in work for the state or any civil subdivision thereof."

It is apparent that such Association does not come within the above exceptions.

Section 5726, R. S. Missouri 1939, specifically vests in the Public Service Commission authority to license, supervise

and regulate every "contract hauler" except as provided in Section 5721, supra, and reads in part:

> "The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every contract hauler in this state except as provided in section 5721 and to approve schedules containing the minimum charges of such contract haulers and to prescribe reasonable rules and regulations governing the filing and keeping open for public inspection of such schedules: * * * * * * * * * * * * * * *."

Section 5723, R. S. Missouri 1939, is authority for the Public Service Commission to regulate all motor carriers and reads in part:

> "The public service commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the accounts, schedules, service and method of operating of same; to prescribe a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no others; to require the filing of annual and other reports and any other data; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.
>
> "(b) The public service commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined:* * * * * * * * * * * * * * *

As was held in Schwartzman Service vs. Stahl, 60 Federal (2) 1034, l. c. 1037, the State has authority to regulate motor vehicles upon the highways. The court said:

> "At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford et al. (D. C.) 53 F. (2d) 509.
>
> "Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle,' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause.' Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596."

In Prouty vs. Coyne, 55 Federal (2) 289, l. c. 292, the court held that a state may tax interstate commerce and in so holding said:

> "* * * * * * * * * *The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, provided the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. (Cases cited.)."

See also State vs. Public Service Commission, 108 S. W. (2) 116, l. c. 119, wherein the court said:

> "Is the tax imposed upon the appellant (an interstate carrier), by section 5272 as added by section 1 of the Laws of 1931 (Mo. St. Ann. Sec. 5272, p. 6689) for the use of the highways in this state a reasonable charge and a fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon? If so, then the tax is valid, even if it is a burden on interstate commerce. Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; Prouty v. Coyne (D. C.) 55 F. (2d) 289."

In the instant case the name "Agricultural Transportation Association" indicates to the writer that said Association is organized for the purpose of transporting agriculture products belonging to the members of that Association and no one else and for no other purpose under some kind of a limited or special contract. Not knowing all the facts such as the purpose, organization of the Association, whether the payment of membership fees limits the membership, by-laws, etc., it is difficult to pass intelligently upon this question. We are assuming, for the purpose of this opinion, that said Association is in the nature of a cooperative association created for the benefit of its members and no one else. Naturally, its charter or by-laws must prescribe certain purposes for such organization and it is limited to those particular functions. Unless this Association, under the above facts, comes within the above statutory provisions defining motor carrier and contract hauler it does not come under the jurisdiction and supervision of the Public Service Commission.

Whether or not a person or association is a common carrier is a question of fact. However, we think this Association is not a common carrier. This Association apparently is not indiscriminately dealing with the general public. In Osage Tie and Timber Company vs. Gorg-Murphy Timber & Grain Company, 191 S. W. 1026, l. c. 1028, the court defined who is a common carrier and said:

> "* * *It appears that on the Osage river plaintiff was engaged principally in transporting it own ties, and that thereafter it was engaged almost exclusively, if not entirely so, in transporting ties for defendant.

> "'The test of whether the business is a public calling is whether there is indiscriminate dealing with the general public. 1 Wyman on Pub. Service Corp. Section 227. It is the willingness to serve all that makes the employment a public one. If the carrier, however, does not deal with the public indiscriminately as a matter of routine, but in effect makes an individual bargain in each case, this course of business shows that the service is upon a private basis. 1 Wyman on Pub. Serv. Corp. Section 239. * * * * Whether a person is not a common carrier is to be determined from the facts bearing upon the nature of the calling, the basis on which he contracts and whether he holds himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him.'
>
> "See Campbell v. Storage & Van Co., 187 Mo. App. loc cit. 570, 571, 174 S. W. 140, loc. cit. 141, and authorities cited."

In Dairymen's Co-op. Sales Asso. vs. Public Service Commission, 98 A. L. R. 218, the court held that such an association was not a common carrier but a private carrier. (See also Public Utilities Commission vs. Haines, 171 N. E. 255.)

Therefore, we must conclude this Association is not a common carrier, nor is it a public carrier when operated for its members only under a special contract but more in the nature of a private carrier. (Hissem vs. Guran, 112 Ohio State 59, 146 N. E. 808.) Neither do we think that such an Association is a motor carrier.

In Board of Railroad Commissioners et al vs. Gamble-Robinson Company et al., 111 Pac. (2) 306, l. c. 310-311, we find the court lays down a very clear definition of motor carrier which does not include one carrying one's own goods which transportation is incidental to their business and we think such definition clearly takes this Association out of such classification as a motor carrier. In so holding the court said:

> "It is well settled that a person who transports merely himself or his own property is not a carrier, and that by defining a carrier as one operating motor vehicles for the trans-

portation of 'persons and/or property' the legislature must have meant 'other persons and/or the property of others.' A person may be compensated directly or indirectly for transporting his own property, as the defendants have been in this instance. He may also be compensated directly or indirectly for transporting his own person, as is the doctor or the carpenter, plumber or tinsmith who conveys himself by motor vehicle to perform work at the premises of others. Their charges must necessarily defray their transportation expense, directly or indirectly. In such case they might strictly be claimed to be motor carriers within the terms of the Act because they are operating motor vehicles for the transportation of their own persons; but no one would seriously make such contention, because it would not be reasonable. Certainly no one would criticize reading the word 'other' into the definition in that connection, for no other meaning could have been intended unless everyone who conveys himself to work by a motor vehicle is within the definition and must obtain a certificate of public convenience and necessity from the Board of Railroad Commissioners. But it is no less inevitable that the same concept be read into the other half of the expression 'persons and/or property.' Certainly the doctor, carpenter, plumber or tinsmith, who could not logically be considered a carrier for transporting his own person, would not be brought within the definition because he carried his own instruments, tools and equipment; nor can the farmer who carries his own produce to market, or the wholesaler, jobber or retail grocer, who delivers his own merchandise in the regular conduct of his business. It would do violence to reason to construe a definition of motor carrier so as to include one's own person or property.

"A leading decision so holding is Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486, 490, in which the court said: 'One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of trans-

portation. He is not a carrier unless he engages in the business of transportation of the persons or property of other for compensation. One who transports merely his own goods, is of necessity engaged in some business other than transportation, and the transportation of such goods is no more than an incident to such business. So, also, one, who transports the goods of another as a servant or agent of such other, is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one, who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation, is engaged in the business of transportation and is a carrier.'

"Other cases to the same general effect are People v. Montgomery, supra; Murphy v. Standard Oil Co., 49 S. D. 197, 207 N. S. 92; City of Sioux Falls v. Collins, 43 S. D. 311, 178 N. W. 950, and Roundtree v. State Corporation Commission, 40 N. M. 152, 56 P. 2d 1121; and while it may be said that the statutes of those states are not identical with ours, this court more than merely suggested a like construction of our own statute in Christie Co. v. Hatch, 95 Mont. 601, 28 P.2d 470, 472, when it said: 'Defendants and interveners are not motor carriers engaged in the business for hire, within the meaning of chapter 184.'"

Nor are we convinced that this Association is a "contract hauler" under the foregoing statutory definition. If our assumption is correct that the Association is transporting only products of its members and no one else and that it is operating within the provisions of its charter and by-laws, it falls more in the classification of a private carrier or as an individual transporting his own goods and not in the business of transporting for hire which indicates goods belonging to others.

As held in Davis v. People ex rel Public Utilities Commission 247 P. 801, l. c. 802, in determining whether a business is a common carrier, or we add, contract hauler or motor carrier, the important thing to determine is just what is the nature of said business and what is permitted under its charter and by-laws. There-

fore, unless there is something else to show that this plan was a mere scheme, device, or subterfuge to avoid the duties and responsibilities of a common and public carrier, or contract hauler as defined in the statutes, such action on the part of said Association does not come under the regulation of the Public Service Commission.

If, however, the facts are that this is an action against the driver and owner of said motor vehicle and the Association is in fact paying the owner and driver of his own motor vehicle to haul said furniture for a member of said Association and the driver and owner holds himself out to the general public for transportation of persons and property for hire he is evading the Public Service Act and would be a common carrier and subject to the Public Service Commission regulations.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARH:RAW

TOWNSHIP WARRANTS: Township warrants cannot be used to pay township taxes, even if for the same year.

January 29, 1942

2-3

Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri

FILE
34

Dear Sir:

We are in receipt of your request for an opinion, dated January 6, 1942, which reads as follows:

> "Please favor my office with an opinion on the following matter:
>
> "If a taxpayer has a 1941 township warrant for $3.00, drawn on the road and bridge fund, and offers same in payment of road & bridge taxes for the year 1941 in the amount of $3.00, is the township collector required to accept such warrant in payment of such tax; and is the township trustee in turn required to receive such warrant and give the collector credit therefor as cash?
>
> "Under the same facts as above, if the warrant is for $10.00 and the road & bridge tax only $3.00, can the warrant be used to pay other taxes, for example, township revenue?"

Section 11082 R. S. Missouri, 1939, reads as follows:

> "Except as hereinafter provided, all state, county, township, city, town,

> village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

According to the facts in your request, the question of whether or not the warrant was issued during the year for which the tax was levied and attempted to be paid is not in issue. The above section provides that the payment of certain taxes should be in certain legal tender. It also provides exceptions as to warrants drawn by the state auditor, jury certificates of the county, past due bonds or coupons of certain government organizations; but it does not describe the exception of township warrants, either general or warrants upon the road and bridge fund.

This section prescribes mainly the payment of certain taxes in certain legal tender. It is very noticeable that in this section the word "shall" is used. When the word "shall" is used it has been construed to be mandatory upon the duties of the officer.

In the case of State v. Wurdeman, 246 S. W. 189, l.c. 194, Par. 6,7, the court said:

> "* * * The statute says the defendant 'shall be entitled to be discharged' save in the two excepted situations, supra. Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. Especially is this true in a statute calling for strict construction."

In the construction of statutes one must take into consideration the exceptions as stated within the body of the same section. It is very noticeable, under Section 11082, supra, that the exceptions as to the payment of legal tender of all taxes does not include township warrants. That such exceptions must be strictly construed was held in the case of State v. Breckenridge, 282 S. W. 149, l. c. 150, where the court held:

> "* * * The language of the exception ought not to be enlarged in its scope by an interpretation out of accord with its ordinary meaning. As a rule, exceptions in statutes are strictly construed."

It has also been held in this State that the general rule is that where a certain procedure is set out for the carrying out of any statutory law it excludes any other procedure. Under the facts in your request, and under Section 11082, supra, all taxes must be paid in certain legal tender which does not include warrants.

In the case of State v. Smith, 111 S. W. (2d) 513, l. c. 514, Par. 2, the court, in upholding this rule said:

> " * * * To uphold appellant in his contention would 'violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another.' State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, loc. cit. 692, 195 S. W. 714, 716."

It has also been held, in this State, that, in the interpretation and construction of the statutes the legislative interpretation may be referred to. It was so held in the case of State ex rel Board of Fund Com'rs., et al. v. Smith, Auditor, 96 S. W. (2d) 348, l. c. 352, (Par. 4), where the court said:

> "While great weight and deference will be given by the courts to the legislative interpretation of acts of the General Assembly as indicated in this case by the House resolution above referred to, such interpretations cannot be binding or conclusive when opposed to the clear meaning of the act."

Section 11082, supra, before 1929 did not include the following, which now appears in the Revised Statutes of Missouri, 1939:

> "* * * past due bonds or coupons of any county, city, township, drainage district, levy district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied

> for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose * * * ."

In 1929, Section 12903 R. S. Missouri, 1919, which is now Section 11082, R. S. Missouri, 1939, was amended by inserting, between the word "township" and the word "or", in the eighth line of said section, the following words: "drainage district, levy district." In other words, until 1929 the section did not apply to drainage districts or levy districts.

By passing this amendment in 1929 the legislature construed that under Section 11082, supra, all taxes must be paid in legal tender with the exception of warrants given by certain governmental agencies described in the exceptions. The exceptions did not include drainage districts. In construing this section, in the case of Kercheval v. Ross, 7 F. Supp. 355, l. c. 356, the court said:

> "When the bonds held by plaintiffs were issued and sold, the Missouri statute providing for the manner of payment, and the legal tender therefor, read thus: 'Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes.' Laws of Missouri, 1911, p. 418.
>
> "<u>There are exceptions to the above statute, but they have nothing to do with drainage districts.</u> There was added to the above statute, by an amendment made in the year 1929 (Laws of Mo. 1929, p. 432 (Mo. St. Ann. Sec. 9911, p. 7963)), an exception to the general requirement

> of the statute which did have to do with drainage districts, which read as follows: 'Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose.' Section 9911, R. S. Mo. 1929 (Mo. St. Ann. Sec. 9911, p. 7963).
>
> "Perforce the terms of the statute last quoted, defendants admit that they have accepted in payment of drainage taxes past-due bonds and coupons of defendant drainage district, and concede that they will continue to do so, unless restrained.
>
> "So, plaintiffs contend that, as to an insolvent drainage district, and as to them, as the owners, holders, and bearers of well-nigh one-half of the outstanding bonds of defendant district, the above statute passed in the year 1929 is unconstitutional, for that it is in violation of both section 10 of article 1 of the Federal Constitution, and of section 15 of article 2 of the Constitution of Missouri of 1875, which sections each forbid the state of Missouri from passing any law impairing the obligation of a contract."

At page 359, in the same case, the court further said:

> "* * * I am not saying that a state has no constitutional power to pass a statute which makes state and county warrants, and bonds and other obligations, of its own divers subdivisions

> and instrumentalities of government, legal tender for the payment of debts due to the state or its subdivisions of government. This a state may do as to future debts. Of course, a state could not make such obligations legal tender for the payment of all debts, both public and private, because of the plain letter of the Federal Constitution. The question here cuts deeper, however, and simply stated, is: May a state by statute change the legal tender in which the debts of its governmental subdivisions are by law made payable, as to debts created on the faith of an existing law, without impairment of the obligation of a contract? I am of opinion that a state has no such power. It is so clear that what is attempted to be done here does violate the obligation of a contract, that the proposition scarcely needs argument or citations of authority. But the cases so holding, both that the thing here done does constitute the violation of the obligation of a contract, and that such is forbidden to a state, are numerous. * * * * * * * * "

This case was an injunction suit brought in the Federal Court which assumed jurisdiction for the reason that the legislature, by its amendment of the section which is now Section 11082, passed the amendment of said section in 1929, which impaired the obligations of contracts under Article 1, of Section 10 of the Constitution of the United States. The court, in the above partially quoted opinion, held to the effect that since all of the bondholders of the drainage district had purchased the bonds involved, before the passing of the 1929 amendment, the bondholders who had attempted to pay their taxes in the drainage district and receive credit of one hundred per cent upon their

investment, when, in truth and fact, the bonds were only worth sixty cents on the dollar, the passing of the amendment would be a violation of the contract entered into by the other bondholders, and the legislative amendment was unconstitutional as to the purchase of all the bonds. In other words, the Federal Court, in so holding, held that the exception must specifically state and direct the warrant that could be used in the payment of taxes.

In reading Section 11082, supra, and according to the holding in Kercheval v. Ross, supra, it is not specifically stated that warrants issued by a township road district could be used in the payment of taxes levied and assessed by the township road district.

CONCLUSION

In view of the above authorities, it is the opinion of this Department, that if a taxpayer has a 1941 township warrant for three dollars, drawn on the road and bridge fund, and offers the same in payment of road and bridge taxes for the year 1941, in the amount of three dollars, the township collector is not required to accept such warrant in payment of such tax, and the township trustee in turn is not required to receive such warrant and give the collector credit therefor as cash.

It is further the opinion of this Department that since we have ruled that the warrant cannot be used, as set out in the first paragraph of this conclusion, we need not answer the second paragraph of your request as to whether or not the warrant can be used to pay other taxes such as township revenue.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:RW

CRIMINAL PROCEDURE: Approved form of information on Section 4694 R. S. Missouri, 1939, in reference to "no funds" check.

June 2, 1942

1-3

Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

FILE
34

Dear Sir:

We are in receipt of your letter of May 25, 1942, in which you request an approved form of information, charging a defendant with obtaining property by means and use of a check drawn on a bank in which he has no funds.

Your request does not refer to the evidence which should be submitted on such a charge, but we are submitting parts of an opinion which was furnished James A. Finch, Jr., Assistant Prosecuting Attorney, at Cape Girardeau, Missouri, which is entitled "Criminal Law: Postdated check on bank in which there is no account; cannot be prosecuted under Section 4694, R. S. 1939, without other misrepresentations." This opinion was rendered January 24, 1942.

In that opinion we stated as follows:

> "* * * It has been held in this State that the mere promise of the defendant that a check would be paid, is insufficient under the felony section. On the other hand, it has been held that a conviction may be had under the misdemeanor sections where the check is postdated, for the reason that the Legislature saw fit to enact a separate law with reference to evidence on a check drawn upon a bank and payment refused on account of insufficient funds. The sections under the misdemeanor sections are 4695, 4696 and 4697, R. S. Mo. 1939.

"The Supreme Court in construing the felony section (4694) in the case of State v. Mullins, 237 S. W. 502, l. c. 504, said:

> 'So the only evidence offered which proved any of the alleged misrepresentations was the promissory statement of the defendant that his check would be paid. As seen above, that is not a false pretense within the meaning of the statute.
>
> 'It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses.
>
> 'Section 3554 is as follows:
>
> '"Sec. 3554. Notice--Five Days--How--Evidence. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds

> in, or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon (together with the drawee thereof the amount due thereon), together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."
>
> 'Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole.
>
> 'For the purpose of this case we will assume, without deciding, that this section is applicable to the present transaction. * * * '

"The Supreme Court of this State in construing the misdemeanor sections, that is, 4695, 4696 and 4697, in the case of State v. Taylor, 73 S. W. (2d) 378, l. c. 385, said:

> 'This court in the Shelby Case and in prior decisions upheld the power of the General Assembly to declare by statute the rule of prima facie evidence laid down in section 4116. The like power, asserted in section 4306, is not questioned. And since the latter section makes no distinction between predated, truly dated, postdated, or nondated checks, the

> facts which the statute makes prima facie evidence should be applicable to postdated checks as well as to predated, truly dated, or nondated checks.'
>
> "Section 4306, mentioned in the above opinion, is now Section 4696, R. S. Mo. 1939."

Under the above quotation, which refers to the case of State v. Mullins, 237 S. W. 502, l. c. 504, the fact that a check is drawn on a bank in which the drawer had no account is not sufficient evidence for a conviction under Section 4694 R. S. Missouri, 1939, but there must be some other false representations with the intent to cheat and defraud.

Attached, you will find an information based upon Section 4694 R. S. Missouri, 1939, in reference to the obtaining of property by means and use of a check drawn on a bank in which the drawer of the check has no funds.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

"Carl F. Wymore, Prosecuting Attorney within and for the body of the County of Cole and State of Missouri, under his official oath and according to his best information, knowledge and belief, informs the court that one _____, on the ____ day of _____, _____, at the City of _____, County of Cole, State of _____, did unlawfully, feloniously, knowingly and designedly with the intent then and there to cheat and defraud one _____, did falsely and fraudulently represent, pretend and state to the said _____, that he the said _____, had lawful money of the United States deposited to his credit in the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of _____, and that said money was subject to be checked out of said bank, and that he had sufficient money deposited in said bank to purchase and pay for _____ of the value and purchase price of _____ Dollars, and the said _____ further falsely pretended and represented to the said _____ (herein set out other evidence, if any, of the nature of the trick or fraud committed by defendant described with certainty), that the said _____, believing the said false pretenses and representations so made by the said _____, and being deceived thereby, was by reason thereof then and there induced to sell and deliver to the said _____, _____ the personal property of _____ for the purchase price of _____ Dollars and the said _____ gave the said _____ his _____ personal check for the above amount drawn on the 'Bank of _____', in payment for said _____ and the said _____ relying upon the statements so made by the said _____, and believing them and each of them to be true, then and there accepted said false and bogus check in payment of the purchase price of said _____ and delivered the said _____ to the said _____, and the said _____ presented said false and bogus check at the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of Missouri for collection and payment at the 'Bank of _____', and the payment was refused by said 'Bank of _____', because the said _____ had no funds in said bank, and the said _____ by means of said false pretenses and representations so made to the said _____ as aforesaid, unlawfully, feloniously, knowingly and designedly did then and there obtain from the said _____ the possession of the said _____ of the value of _____ Dollars of the moneys and property of the said _____ with the intent then and there unlawfully and feloniously the said _____ to cheat and defraud of the same. Whereas, in truth and in fact the said _____ did not have any money in the 'Bank of _____', (herein set out other clauses, if any, negativing the truth of the alleged statements and representations charged to have been made by the defendant) all of which he the said _____ then and there well knew the said false representations, statements and pretenses made as aforesaid to be false; against the peace and dignity of the state."

HIGHWAYS: (1) State or County does not hold fee simple title to lands conveyed for highway purposes.

(2) Abandoned highways revert to abutting landowners.

July 9, 1942

7-10

FILED
34

Hon. Arthus U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Goodman:

This is to acknowledge receipt of your letter of July 4, in which you request the opinion of this department. Your letter is as follows:

> "As you may know, the United States Government is now making preparations to take over approximately 3200 acres of land in this county for the purpose of establishing a basic air training school, together with a few other tracts to be used as auxiliary landing fields. It will also be necessary for them to acquire title to certain roads in order that the field may not be crossed by roads or travel.
>
> "The U. S. Engineers have requested that I obtain from you an official opinion relative to the title to the real estate now used as a road. Does the State, or the County, as the case may be, hold fee simple title to this land? Will it revert to the adjoining landowners if and when it ceases to be used for a road? In short, exactly how is the title held?
>
> "They state that it is the practice of the Government to obtain such an opinion in each state where a project of this kind is undertaken. I enclose copies of right of way deeds procured from Messrs. Sayre, Berry and Smith, which I am informed represent all the types of conveyances covering the roads in question."

Attached to your letter of request are three specimen right of way deeds which you state represent all the types of conveyances covering the roads in question. You submit two questions for us to answer. Your first question is: Does the State, or the county, as the case may be, hold fee simple title to this land?

It will be noted that each of the three deeds submitted by you are designated as right of way deeds, and was executed for a consideration of one dollar. Two of the deeds convey the right of way to the County of Dunklin and the other conveys the right of way to the State of Missouri. Each of these definitely say that the lands therein described are conveyed for the purpose of establishing and maintaining a public road or highway.

The general rule with reference to deeds of this kind which convey land for highway purposes is that the grantor does not part with the fee simple title to the land conveyed, but only conveys an easement or right of way over the land. The rule is stated succinctly in 25 Am. Jur., Sec. 132, as follows:

> "In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner." (underscoring ours)

This general rule is sustained by many Missouri cases, among them being the case of Neil v. Independent Realty Company, 317 Mo. 1235, 298 S. W. 363, l. c. 367, wherein the court said:

> "'The right acquired by the public in respect of land devoted to highway purposes is ordinarily a mere easement of passage over it, with the powers and privileges incident thereto, the fee title remaining as it was before the highway was established.'"

Also, in the case of Cartwright v. Liberty Telephone Company, 205 Mo. l. c. 133, in discussing the same question, the court said:

> "According to the laws of this State, the property owners in cities, towns and villages own the land to the center of the adjoining street, subject to the easement of the city. It has the right to subject the street to any and all of the uses or purposes for which the street was acquired; but until it does so subject it to one or more of those uses, or so long as he and the city can jointly occupy and use the street without doing 'violence to the full, free and complete exercise of the public easement,' he is to that extent just as much the owner of the property to the center of the street as he is of the remainder of the lot, and has the same right to use it in any manner for any purpose he may see proper, not inconsistent with the rights of the public."

In the case of Ashurst v. Lohoefner, 170 Mo. App. l. c. 331, the court said:

> "In this State the fee of land over which a highway or street is laid out remains in the owner with an easement to the public. He remains the owner of the product of the land on, under or above the surface, the taking of which would not injure the construction or the public use. (Gamble v. Pettijohn, 116 Mo. 375; Gans & Sons v. Railway Co., 113 Mo. 308; Snoddy v. Bolen, 122 Mo. 479; Walker v. Sedalia, 74 Mo. App. 70; McAntire v. Telephone Co., 75 Mo. App. 535; Pemberton v. Dooley, 43 Mo. App. l. c. 178; Belcher Sugar Co. v. Elevator Co., 82 Mo. l. c. 125; Thomas v. Hunt, 134 Mo. 392.)"

Sustaining the same view is the case of Houch v. Little Run Drainage District, 119 S. W. (2d) 826, wherein the Supreme Court held that where a road was built across a strip of land, there was a reversionary interest in such land upon cessation of public use. From the above it is our opinion that the grantors in the deeds attached to your letter of request did not convey the fee simple title to the lands described therein, and, from the foregoing, it is our further opinion that the conveyances were for right of way purposes and that the public only has an easement of passage therein.

Coming now to your second question, which is: Will the land revert to the adjoining land owners if and when it ceases to be a road?

Since we have answered your first question that the grantors therein did not convey a fee simple title to the land described in such conveyance and that the public only had an easement of passage therein, it is obvious that "upon the vacation or discontinuance of the highway as such restores exclusive possession thereof to such owner or to his successors or his assigns, dependent, in the even of a conveyance upon the effect thereof as carrying title to the portion of the highway in question."

Of course the question may arise after the abandonment or vacation of the public highway and that portion used as roadway reverts to the abutting landowners, whether it reverts to the present owners of the adjoining land or to the owners of the land at the time the right of way deeds were made. This of course depends upon the description in the subsequent deed or deeds, if any, whether the description was up to the boundary of the road or to the center of the highway. The presumption is that the owners intended to convey to the center as the dividing line.

CONCLUSION

It is, therefore, our opinion that (1) the State or County, as the case may be, does not hold the fee simple

title to the land described in the deeds attached to your letter of request, and (2) that the land described therein reverts to the abutting landowners.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRH:NS

RECORDERS OF DEEDS: It is discretionary with recorder whether deputy shall perform his duties in office of recorder to the exclusion of some other designated place in county.

September 10, 1942

9-11

FILED
34

Honorable Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Goodman:

This is to acknowledge receipt of your letter of August 29, in which you request an official opinion from this department. Your letter, omitting caption and signature, is as follows:

> "I have your letter of the 27th inst. with enclosure but neither contains the information desired.
>
> "The question is: Can the Recorder legally appoint a Deputy Recorder who will not reside in or do any work in his office in the county seat and whose sole duty and function as Deputy Recorder would be the issuance of marriage licenses upon proper application being filed therefor?
>
> "As I understand your opinion to Paul E. Bradly, particularly Point 2, the person there insolved was merely designated as deputy recorder, but the present situation anticipates an appointment exactly like the regular deputy who actually works in the recorder's office.
>
> "Will you please give us an opinion on this point?"

By way of reference, we might state that the opinion to the Honorable Paul E. Bradley referred to in the opinion request, our office ruled that a deputy recorder performs

the same duties as the recorder, and further, that the recorder of deeds cannot appoint a person as deputy who is not a deputy recorder to issue marriage licenses. We also note from the opinion request that you state that the recorder of deeds contemplates appointing a legally qualified and acting deputy recorder for the purpose of issuing marriage licenses, and your sole question is whether such person must physically perform his work in the office of the recorder of deeds in the county seat of the county.

Section 13160 provides as follows:

> "In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

It will be noted from the reading of the above section that it is provided that such deputy recorder shall possess the qualifications of clerks of the courts of record, and "may in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. In this connection, we call attention to Section 13183 which reads as follows:

> "If any recorder to whom any deed or other writing, proved or acknowledged according to law, shall be delivered for record: First, neglect or refuse to make an entry thereof, or give a receipt therefor, as required by section 13164; or, second, neglect or refuse to record such deed or other writing within a reasonable time after receiving the same; or; third, record any deed or other instrument in writing before another first brought into his office and entitled to be recorded; or, fourth, record any deed or other instrument of writing untimely or in any other manner than as herein before directed; or, fifth, neglect or refuse to provide and keep in his office such an index as is required by this chapter, he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder."

Section 13184 provides as follows:

> "If any recorder shall wilfully neglect or refuse to perform any of the duties required by him by this chapter, or shall willfully perform them in any other manner than is required by law, he shall be deemed guilty of a misdemeanor in office, and proceeded against accordingly; and shall, moreover, forfeit and pay to the use of the county a sum not exceeding three hundred dollars, to be recovered by civil action."

From the reading of the above sections, we find that the law has thrown a safeguard around the acts and conduct of the recorder as well as his deputy, and we do not find any other section in the statutes which particularly precludes a recorder of deeds from allowing his duly qualified

and acting deputy from being at a place other than the office of the recorder's office at the county seat, and it is our view that in absence of any prohibition, or in the absence of a statute which requires the deputy to be at the office of the recorder of deeds, this is wholly a matter within the discretion of the recorder, bearing in mind the statutory penalties heretofore set forth in this opinion for any dereliction of duty on the part of the recorder or his deputy, and it is our view that this is the sole safeguard provided by statute.

We are enclosing an opinion rendered to the Hon. B. D. Hardesty, Circuit Clerk of Lincoln County, dated February 9, 1940, which opinion quotes several of the other sections of the statutes which we think useful in this opinion by way of reference.

CONCLUSION

It is our opinion that it is discretionary with the recorder of deeds whether or not a duly acting and qualified deputy recorder shall perform his duties in the office of the recorder in the county seat of the county, to the exclusion of some other designated place in the county.

Respectfully submitted,

B. RICHARDS CRESCH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

CORONERS: Powers and duties of coroners and other officers in relation to inquests.

INQUESTS:

- -

October 21, 1942

FILED
34

Forrest B. Goodrich, Coroner
St. Clair County
Osceola, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following questions:

"I. When a wreck occurs on the Highway and some of the occupants of the car are killed, does the Prosecuting Attorney have the right to authorize the disposition of the dead body.

"2. When the above occurs does the Prosecuting Attorney or the Sheriff have the power to investigate, release the dead body without consulting the Coroner of that County.

"3. Is the power invested in the Prosecuting Attorney, Sheriff or the Coroner as to decide whether there shall be an inquest held.

"4. When a dead body is released in the above manner without the knowledge of the Coroner, who shall sign the death certificate.

"5. Should the Sheriff and the Prosecuting Attorney investigate, release a dead body, without the knowledge of the Coroner are they liable to a penalty."

The offices of coroner and sheriff are provided for by the Missouri Constitution, Article IX, Section 10.

Section 13227, R. S. Mo. 1939, provides as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

Section 13231, R. S. Mo. 1939, provides as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 13242, R. S. Mo. 1939, provides as follows:

"The coroner, upon an inquisition found before him of the death of any person by the felony of another, shall speedily inform one or more justices of the peace of the proper county, or some judge or justice of some court of record, and it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person."

While a coroner is a constitutional officer, yet his powers and duties are provided for by the foregoing statutes. In searching through the statutes we find another section pertinent to this question, it is Section 9767, R. S. Mo. 1939, which is as follows:

> "In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the registrar of such death, and when so notified, the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit: Provided, that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts: Provided further, that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or the means of death; causes or violence, and whether (probably) accidental, suicidal, or homicidal, as determined by the inquest; and shall, in either case, furnish such information as may be required by the state registrar properly to classify the death."

By this section it seems that in case of a death occurring without medical attention the death certificate may be signed by the local health officer. If the local health officer is not a qualified physician, or, if there is not a local health

officer, the registrar may make the certificate of death described in Section 9766, R. S. Mo. 1939.

Under Section 9767, and Section 13231, R. S. Mo. 1939, supra, in cases where it is probable that the death was caused by unlawful or suspicious means, or where the coroner is notified of the dead body of a person who is supposed to have come to his death by violence or casualty, the coroner has jurisdiction to hold an inquest. From a reading of these sections it will be seen that the principal reasons for notifying the coroner are to determine by an inquest whether or not such person has come to his death by unlawful or suspicious means, and not necessarily for the purpose of having the coroner sign the death certificate.

On the question of the necessity of holding an inquest by a coroner, we find that this department has, by two former opinions, ruled on this. We are enclosing copies of these opinions, which are as follows: An opinion dated November 15, 1935, to Dr. E. T. McGaugh, State Health Commissioner, Jefferson City, Missouri, and an opinion dated March 8, 1933 to Mr. L. D. Rice, Prosecuting Attorney, Neosho, Missouri.

In speaking of the duties of the coroner with reference to signing the death certificate under Section 9767, supra, the Supreme Court in O'Donnell v. Wells, 21 S. W. (2d) 762, 765, said:

> "* * * Said section does authorize the coroner to make the medical certificate when the case is referred to him by the registrar as a case without an attending physician and a case where death may have been caused by unlawful and suspicious means. When the coroner is so authorized, he must make the certificate as directed in said section. This duty is incidental to the duties of a coroner under chapter 48 (sections 5916-5957), Rev. St. 1919, which provides for taking inquests of violent and casual deaths. * * * But the holding of an inquest does not authorize the coroner to make and sign the medical certificate unless the

> case was referred to him by the registrar as provided in section 5803. If there is an attending physician, the medical certificate must be made and signed by him. * * * * * * * * * * * * * * *"

In our said opinion dated March 8, 1933, at page 4 thereof, we stated:

> "Answering the first paragraph of the inquiry in your letter we are of the opinion that in every case where death has been occasioned by violence or casualty, as those terms are above defined, the Coroner is required to hold an inquest and that without regard to any criminality or negligence that might be involved in or grow out of the death."

CONCLUSION

From the foregoing, it is the opinion of this department that where a person comes to his death by violence or casualty the coroner is required to hold an inquest, regardless of any acts of the prosecuting attorney or sheriff.

We are further of the opinion that in cases of violent or casual death, the death certificate could be signed by the local health officer, if he is a qualified physician, or, if there is no local health officer, then the registrar is authorized to make the certificate. But, if it is a case where it appears probable that the death was caused by unlawful or suspicious means, then the registrar refers the case to the coroner for his investigation and certificate.

* * * * * * * * * * * * * * *

On the question of the criminal liability of the sheriff and prosecuting attorney for releasing a dead body without the knowledge of the coroner, we find that the Kansas City Court of Appeals in the case of Hagener v. Pulitzer Pub. Co., 172 Mo. App. 436, 158 S. W. 54, held that the sheriff has no official duties to perform in connection with a coroner's inquest.

Section 13240, R. S. Mo. 1939, provides as follows:

> "The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the coroner shall bind such witnesses, by recognizance, in a reasonable sum for their appearance before the court having criminal jurisdiction of the county where the felony appears to have been committed, at the next term thereof, there to give evidence; and he shall return to the same court the inquisition, written evidence and recognizance by him taken."

And, Section 13242, R. S. Mo. 1939 provides as heretofore set forth in this opinion.

By these sections it will be seen that the criminal code is set in motion if it appear at the inquest that a felony has been committed in connection with the death, but we find no statutes which authorize the prosecuting attorney, or the sheriff, to interfere with the coroner in the performance of his statutory duties. However, Section 12984, R. S. Mo. 1939, provides as follows:

> "That the prosecuting or circuit attorney of cities that now have or may hereafter have 500,000 inhabitants or more is hereby required to attend inquests held by coroners in cases of deaths occurring by violence, and which may result in a charge

> of felony; and said prosecuting or circuit attorney shall make an investigation concerning said death and cause to be brought before the coroner any witnesses he may desire, and shall be permitted by the coroner to assist in the interrogation of witnesses for the full development of the circumstances leading up to and resulting in said death, and for his information concerning any possible criminal charge that may grow out of the same, and for the aforesaid services there shall be taxed as costs a fee in favor of said prosecuting or circuit attorney of ten dollars for each aforesaid inquest, to be paid as other costs by the respective counties. It shall be the duty of each coroner to promptly notify the prosecuting attorney of his county or city of the time and place of inquisition concerning any death of the aforesaid character."

In cities of 500,000 or over it is the duty of the prosecuting attorney or circuit attorney, to attend inquests held by coroners in cases of death occurring by violence, but this statute no where indicates that the powers and duties of the coroner in reference to holding an inquest are changed.

In searching through the statutes relating to crimes and punishment we fail to find any statute which imposes a penalty in a case where the prosecuting attorney and sheriff assume jurisdiction over the matter of holding inquests. In the absence of such a statute no penalty could be imposed; however, this does not prevent the coroner from holding an inquest when required under the statute so to do.

CONCLUSION

It is, therefore, the opinion of this department that if the sheriff and prosecuting attorney should release a body

over which an inquest should be held, there is no criminal liability therefor. However, such act does not prevent the coroner from holding an inquest under the conditions hereinbefore set out.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

ROY McKITTRICK
Attorney-General of
Missouri.

NEWSPAPERS: Weekly publications of legals should be published on the same day of each week
PUBLICATIONS: during the period of publication.

- -

December 30, 1942

12-31

FILED
34

Hon. Arthur U. Goodman, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

> "If a notice is published twice in the Friday issue of a twice-a-week newspaper, can legal publication for three issues be had by publishing the third time in an issue of the same newspaper actually published on Tuesday, the other regular publication day, and which issue is by the publisher designated as the issue for Tuesday and Friday?"

Since this is a matter controlled entirely by the statutes we refer to them for the answer to your inquiry. We think Section 14968, R. S. Mo. 1939 contains the answer to your question. The portion of the section which pertains to the subject of your inquiry reads as follows:

> "* * * Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly,

> semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section: *"

This particular amendment was inserted into the statutes in 1937. Evidently it was for the purpose of taking care of questions such as you have propounded. It is clear and does not need any statutory construction.

From your inquiry it seems that the publisher was of the opinion that if he designates the issue to have been made on the day of the week on which legally it should have been published, that would be sufficient. However, since this statute requires the notice to appear on the same day of each week, we think that if it appears on a day other than the day designated as the date of the publication of such newspaper that it would not comply with the foregoing proviso clause of Section 14968.

CONCLUSION

From the foregoing it is the opinion of this department that a notice of publication must be published on the same day of each week during the period of such publication and that a publication published on any day other than the day designated would invalidate the publication.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

DEAD ANIMAL DISPOSAL

January 5, 1942

1-9

FILE
35

Hon. Jos. L. Gutting
Prosecuting Attorney
Hiller Building
Kahoka, Missouri

Dear Mr. Gutting:

Under date of January 2, 1942, you wrote this office requesting an opinion as follows:

> "It has been called to the attention of this office that the last legislature passed a bill requiring Trucks which haul dead animals to be equipped specially and the persons picking up dead animals must comply with certain new regulations.
>
> "I find that the legislature repealed the 'dead animal' law page 344 1941 Session Acts, but I cannot find any new legislation passed in this connection.
>
> "Please inform me if there any new regulations passed by the legislature or rules made by the Health Department or any other department that are binding on such persons."

The 61st General Assembly, by Senate Bill 94, approved July 3, 1941, shown at pages 290 and following, Laws of Missouri, 1941, repealed Article 9, Chapter 103, R. S. Missouri, 1939, relating to diseased animals or carcasses of diseased animals. This Act, in addition to repealing Article 9, Chapter 103, enacted a new law containing twenty-five sections which deal with disposal plants for the bodies of dead animals, and the transportation

of dead animal bodies over the highways.

The above act of the 61st General Assembly is the only one pertaining to the disposal of dead animals of which this office has any information. If the Health Department or any other State Department has made any rules concerning disposal of dead animals, this office does not have copies of their rules.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:NS

ROADS AND BRIDGES:
TOWNSHIP ORGANIZATION:
TAXATION:
SPECIAL ROAD DISTRICTS:

Properties in special road districts in counties under township organization are liable for taxes assessed and levied to pay such bonds, provided such special road districts did not have bond obligations at the time the Township bond obligation is incurred.

January 16, 1942

FILE
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Chillicothe, Missouri

Dear Mr. Greenwood:

This is in reply to your letter of recent date wherein you request from this department an opinion on whether or not the properties in special road districts, which are within bounds of a township in a county under township organization, are liable for taxes for the payment of such bonds.

The authority by which township road bonds are issued is derived from Section 8609 and 8610, R. S. Mo. 1939. These sections provide in part as follows:

> "Sec. 8609. The board of commissioners of any special road district organized and incorporated under the laws of this state, for and on behalf of such district, and the county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such special road district or township, as the case may be, * * * * * * *."

> "Sec. 8610. * * * * and whenever twenty legal voters of any township shall file with the clerk of the county court wherein the township is located a petition in writing asking that bonds for road purposes be issued for and on behalf of such township, it shall be the duty of the court to order an election to be held in such township upon the question of issuing bonds. * * * * * * * * * * If it shall appear that two-thirds of the voters voting at such election on said question

> shall have voted in favor of the issuance of said bonds, the board of commissioners of the special road district, or the county court, as the case may be, shall order and direct the execution of the bonds for and on behalf of such special road district or township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said district or township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. * * *

> township, at its behest, and for its benefit. They are to all intents and purposes township bonds, township obligations, and the county court, in issuing them, was merely the agency used to affectuate the objects of the law and the purpose of the township in borrowing the money. * * * * * * * *"

So, it will be seen from this opinion that the bonds issued by the county court for the township, under the authority of said Sections 8609 and 8610, were obligations of the townships.

From your request, it appears that some of the residents of the special road districts which are within the township that issued the bonds do not think that they are liable for these taxes, because none of the proceeds from the sale of the bonds are spent on the roads within the special road districts, wherein they reside. Under Section 8613, R. S. Missouri 1939, if a special road district is within a township and has outstanding bonds at the time the township incurs the bond obligation, then the county court would not be authorized to issue such bonds. Section 8613 reads in part as follows:

> "The four next preceding sections, to wit: sections 8609, 8610, 8611 and 8612, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; * * * * * * *"

The fact that none of the proceeds from the sale of the bonds were spent in the special road district would not be determinative of this question. You will find many instances in which road bonds are issued and the proceeds therefrom are not spent in every district obligated to pay the same. The place where public funds of a political sub-division are to be spent is generally within the discretion of the administrative board of such sub-division.

Under Section 8841, as amended in Laws of Missouri, 1941, page 528, the special road districts in townships in counties under township organization, are entitled to the taxes which are imposed on all the property in such district, by virtue of the road and bridge levy, as authorized by Section 8526, R. S. Mo. 1939. However, referring to Section 8621, it will be seen that the lawmakers have not permitted the special road and bridge taxes on such properties to be paid to the commissioners of the special road districts. We call your attention to Section 8527, R. S. Missouri 1939, which provides that the special road and bridge taxes in counties not under township organization, shall be paid to the special road district which contains the properties upon which the tax is imposed. We refer to these two sections in support of our view that it is entirely up to the lawmakers to determine where, and by whom, tax funds may be spent.

CONCLUSION

From the foregoing, it is the opinion of this department that taxes for the purpose of paying road and bridge bonds of a township in counties under township organization may be levied and collected on all properties in such township, including special road districts therein, providing such special road district did not, at the time of the issuance of said township bonds, have any outstanding bond obligations.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

CORPORATIONS:
FOREIGN INSURANCE - Upon statutory conformance, a foreign insurance company becomes an inhabitant of the state of Missouri and may invoke the use of Sec. 8488 R. S. Mo., '39.

January 22, 1942

F 23

FILE
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

We are in receipt of your request for an opinion as of January 20, 1942, which request reads as follows:

> "A foreign insurance company, licensed to do business in this state, took some land by foreclosure of a mortgage. This land is land locked and has no outlet or or way to a public road. It has filed a petition with the County Court asking for a way of necessity under Section 8488 Revised Statutes, 1939. This Section provides that any 'inhabitant' of the state who is the owner of land, may present his petition setting forth that he has no outlet to the public road and ask for the establishment of a private road from his premises to connect with the public road.
>
> "I would like to have an opinion as to whether or not this insurance company is an 'inhabitant' within the meaning of this section."

We note from reading the above request that the foreign insurance company to which you refer, has fully complied with the laws of Missouri and has received its license to

do business in this State. We presume that the company is the purchaser of a tract of land which it procured from the force of subdivision 4, of Section 6029 R. S. Mo., 1939, which subdivision provides:

> "No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to-wit: * * fourth, such as shall have been purchased at sales upon the judgments, decrees or mortgages obtained or made for such debts. * * * "

Upon becoming the record title owner to the tract of land in question, and finding that it did not have a way of ingress and egress to said tract of land it endeavored to invoke the use of Section 8488 R. S. Missouri, 1939, which provides as follows:

> "If any inhabitant of this state shall present a petition to the county court of the proper county, setting forth that he or she is the owner of a tract or lot of land in such county, or in an adjoining county, and that no public road passes through or alongside said tract or lot of land, and asking for the establishment of a private road from his or her premises, to connect at some convenient point with some public road of the county, or with any road of the state highway system within the county, in which the proceedings are had, and shall describe the place where said road is desired, and the width desired, not exceeding forty feet, the court shall appoint three disinterested commissioners to view the premises and to mark out the road, and to assess the damages

> to the owner or owners of the land through which it will pass. Any number of persons may join in such petition: Provided, however, that the proceedings shall always be had in the county in which the premises are situated over which said proposed road is to pass."

We have taken occasion to trace the history of Section 8488, supra, and find that in 1845 there existed a statute which provided, in substance, that if a person owned land totally surrounded by other lands without any way of ingress or egress, that he, or she, could petition the county court and a method of procedure was set up similar to that provided for in Section 8488, supra. In the year 1846 the legislature enacted a new section which also was in substance similar to the present Section 8488, supra. It will be particularly noted that in the section that was enacted in 1846, as well as the present section, the legislature used the word "inhabitant". Therefore, we take up the question of whether or not a foreign insurance company which has conformed to the laws of the state of Missouri does through the compliance with the statutes immediately become an inhabitant of the state of Missouri. 31 C. J. p. 1194, defines the word "inhabitant" as follows:

> "A. In General. The term 'inhabitant' is derived from the Latin word 'habito' or 'habitare.' No exact definition can be given of the word 'inhabitant' as applicable to all cases. It has many meanings, being a word of great variation of meaning. Its construction has generally been governed by the connection in which it is used; for, by itself, it has no definite meaning.
> * * * "

In the case of The Bank of the United States v. Deveaux et al., 3 U. S.,(L. Ed., 5-9 Cranch) 61, l. c. 87, the court had this to say:

> "The statute of Henry VIII. concerning bridges and highways, enacts, that bridges and highways shall be made and repaired by the 'inhabitants of the city, shire, or riding,' and that the justices shall have power to tax every 'inhabitant of such city,' &c., and that the collectors may 'distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels.'
>
> "Under this statute those have been construed inhabitants who hold lands within the city where the *bridge to be repaired lies, although they reside elsewhere.
>
> "Lord Coke says, 'every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, quae propriis manibus et sumptibus possident et habent, are said to be inhabitants there, within the purview of this statute.' * * "

In the case of the Home Insurance Company v. The City Council v. Augusta, 50 Ga. 530, l. c. 541, followed the reasoning of the Bank of the United States case, supra.

Again, in the case of Shainwald v. Davids et al., 69 F. 704, l. c. 706, the court had this to say:

> "The real proposition was that the corporation, by complying with a state

> statute requiring the appointment of an agent within the state upon whom process might be served, thereby submitted itself to the jurisdiction of the courts held within that state. In this respect, the corporation became as much an 'inhabitant' of the state as it did a person 'found' within the state, because it had agreed to be sued there. By the appointment of an agent in this state under the provisions of section 616 of the Political Code, the Home Insurance Company has distinctly agreed with the people of this state that summons and other process may be served upon it in all actions or legal proceedings against the company, and that all process so served gives jurisdiction over the person of such company. For all purposes of legal proceedings, the company is, therefore, an 'inhabitant' of this state. * * * "

Again, we wish to call attention to the case of Southern Illinois & M. Bridge Co., v. Stone, 73 S. W. 453, l. c. 457, 459, 461, where the court said:

> "* * * It is unquestionably true that when a private corporation, whether foreign or domestic, asserts the right to exercise the power of eminent domain, it must show that the right has been given it in express terms or by necessary implication. * * * * *
>
> "The language of section 1024, Rev. St. 1899, is explicit that it 'shall be subjected to all the liabilities and restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this state,' and 'shall have no other or

greater powers'; i. e., it shall have those of corporations of like character in this state. * * * ' * * * "The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." From this it would seem that a foreign corporation doing business in this state possesses the same but no greater powers than a corporation organized under our statute. * * * * * .' * * * * * *

"So in this case the plaintiff produced a charter to build a bridge over the Mississippi river, one end of which was to be in this state. Here is the general authority to build a bridge. It is at once obvious that under this Illinois charter, as such, no power was conferred to either purchase or condemn or hold real estate in this state, unless our laws should permit it to do so; but, having the right to construct the bridge so far as Illinois could give it, it must depend upon our laws to acquire its abutment, approaches, and roadways in this state, and we have given it exactly the same power to acquire the necessary land for that purpose which our bridge companies have. * * * * *. It follows that in our opinion the plaintiff was entitled to condemn the lands described in its petition for its approaches and necessary roadway, and that the circuit court erred in dismissing its petition."

From the reading of the latter case it will be observed that a foreign insurance corporation which has complied with the laws of the state of Missouri, and procured a license to do business in this state stands on an equal footing with domestic corporations of the same kind, and as we have shown such foreign corporation is also to be considered as an "inhabitant" of the state of Missouri, upon procuring the license to do business. See State ex rel Hennings v. Williams, 131 S. W. (2d) 561, l. c. 564.

CONCLUSION

We are of the opinion that upon compliance with the Missouri Statutes a foreign insurance corporation becomes an inhabitant of the state of Missouri, and may invoke the use of Section 8488 R. S. Missouri, 1939.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

COUNTY SURVEYOR: Should budget his compensation and expenses as ex-officio county highway engineer under Class 4 - to be paid out of the general revenue.

February 5, 1942

2-16

FILE 35

Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "I have been advised that years ago Clark County voted under section 8668 R. S. Mo 1939 (County Highway Engineer) to suspend the provisions of the law relating to the appointment and duties of a county highway engineer. This county has a population of about 12000.
>
> "This being true by the next section (8669) I find that the County surveyor shall be ex-officio county highway engineer and perform the duties to be done and performed by the county highway engineer; ' and for his services as ex-officio county highway engineer he shall receive such compensation as may be allowed by the County Court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The County court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to em-

ploy such assistants as may be deemed necessary to carry out the Court's orders and at such compensation as may be fixed by the Court-----'.

"I construe the above section to mean that the county surveyor is ex-officio county highway engineer if Clark County has voted to suspend the operation of the county highway engineer law as set forth in said section 8668 and the County Court cannot prohibit him from acting as such and he shall perform the duties as county highway engineer 'or as may be ordered by the county court; ---' and shall get not less than three nor more than five dollars per day at the discretion of the said Court. Also the Court may appoint assistants.

"Question: Should the county surveyor as said county highway engineer make a budget as other county officials and should he and any assistants be paid out of class four (the salary fund) or should they be paid out of the road fund?

"Also can the collector or the assessor call on the County surveyor to do work in straightening out land surveys or descriptions and the surveyor get his pay from the County (he gets no salary in this county)?"

In your first question you inquire if the county surveyor and his assistants receive their salary out of the general fund or the road fund, and should they present a budget to the county, the same as other county officials.

We are presuming that the payment to which you refer is the payment of a county surveyor, as ex-officio engineer. The county surveyor himself only receives fees and is not on a salary, but, after the suspension of the office of county highway engineer, the county surveyor becomes the ex-officio county highway engineer and is entitled to a certain amount per day while actually employed. He is entitled to this compensation under Section 8669 R. S. Missouri, 1939, which partially reads as follows:

> " * * * In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8668 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

The county surveyor acting as ex-officio county highway engineer is a county officer, and his compensation must be budgeted under Class 4, as set out in the Session Laws of 1941, page 650,- which reads as follows: (l.c.651)

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

It will be noted, in reading Section 8669, supra, that it is specifically stated:

> "* * * and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. * * * ."

This portion of the section also empowers the county surveyor, when acting as county highway engineer, to employ necessary assistants who shall receive compensation fixed by the court not to exceed the sum of four dollars a day for the deputy county highway engineer nor more than three dollars per day, for each other assistant, for each day they may be actually employed.

The compensation for the surveyor acting as county highway engineer, and his assistants, is specifically set out but does not state out of which fund the salary must be paid.

In the case of State v. McElroy, 274 S. W. 753, l.c. 754, the Supreme Court, in passing upon a similar situation said:

> " * * * The law, after creating the office and prescribing the duties, fixes a salary of $125 per month for the performance of those duties. The law does not say from what fund this salary shall be paid. We realize that in the creation of an office, the law-makers might designate a fund out of which the salary shall be paid, and this fund may be other than the salary fund of the county. But such was not done in this case. In such situation it will be presumed that the Legislature intended the salary to be paid as other official salaries are paid, i. e., out of the salary fund of the county. We think this to be clear and without doubt. It is urged however that a parole board for St. Louis was enacted at the same time, and that such law, in terms, designated the salary fund. We do not think that this fact changes the presumptive intent of the Legislature in the act before us, discussed above."

It is therefore the conclusion of this Department that since the county surveyor, acting as county highway engineer, receives compensation in the nature of a salary, it is necessary that he have this compensation presented in the budget to the county court.

It is further the opinion of this Department that this compensation should be placed in Class 4, the same

as salaries for other county officers.

We are also of the opinion that the salary can only be paid out of the general revenue, and not out of the road fund.

Your next question inquires: Who can order the county surveyor to perform work? You specifically ask: " * * can the collector or the assessor call on the County surveyor to do work in straightening out land surveys or descriptions and the surveyor get his pay from the County * * * ?"

We are assuming that the work performed, about which you inquire in your second question, is that of county surveyor, and not that of ex-officio county highway engineer.

The county surveyor of Clark County is only on a fee basis, for the reason that the population of Clark County, according to the 1940 census, is only 10166.

Section 13425 R. S. Missouri, 1939, sets out the specific fees which are allowed the county surveyor. The duties of the county surveyor to make surveys are set out in Sections 13198, 13199, 13202, 13203 and 13204, R. S. Missouri, 1939. After a careful search of Chapter 90, R. S. Missouri, 1939, which refers to the duties of the county surveyor, we find no authority granted the county collector or the county assessor to demand the county surveyor to do any work in reference to their official office. However, under Section 13198, supra, the county court, which is a court of record, may demand a survey of certain land to which the title is in dispute before such court. This may happen in case of a dispute over real estate taxes which may be before the court on account of the error, or mistake, of the assessor or collector. If he is ordered by the proper authorities of the county to make such survey he is entitled to his fees, as set out under Section 13425, supra, which must be paid by the county.

It is therefore, the conclusion of this Department that the county collector and county assessor cannot demand the county surveyor to do work in straightening out land surveys or descriptions, but, if he is ordered by the county court to make such a survey he is authorized to collect from the county the fees allowed him under Section 13425 R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant ttorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:RW

MOTOR VEHICLES: (1) Nonresident operator must secure registered
OPERATORS:
LICENSING: operator's license when operating car belonging to some other person in the course of or incidental to his employment, but does not have to secure driver's license.

(2) Nonresident who merely operates motor vehicle and who possesses driver's license in home state does not have to secure driver's license to operate in Missouri.

May 1, 1942

FILE
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Chillicothe, Missouri

Dear Mr. Greenwood:

We are in receipt of your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

> "One of the insurance companies has their mortgage loan department here and they have a number of field men who drive company cars. Should these operators or drivers register under No. 8373, Revised Statutes, 1929; and if so, do they have to obtain also a driver's license under No. 8443, et seq, Revised Statutes 1929."

Section 8367, R. S. Mo. 1939, defines "registered operator" as follows:

> "* * * * An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle. * * * * * * * * "

It will be noted from the reading of Article 1, Chapter 45, R. S. Mo. 1939, that there does not appear any section or portion of a section which allows a nonresident to operate a motor vehicle in the State of Missouri, where such person comes within the definition of a registered operator on a registered operator's license procured in another state. We are mindful of Section 8375, R. S. Mo. 1939, which has to do with reciprocity, but it is our view that this section only has to

charges that may be placed by the State of Missouri against the motor vehicle and does not extend to the person. Therefore, it is incumbent upon every person desiring to operate a motor vehicle in the State of Missouri, to procure a registered operator's license which is provided for in Section 8373, R. S. Mo. 1939.

Now turning to the question of whether or not such person shall first procure a driver's license, as is provided for under Article 3, R. S. Mo. 1939, Subdivision B of Section 8444, R. S. Mo. 1939, provides:

> "(b) Any person holding a valid chauffeur's license or registered operator's license, as provided in Sections 8372 and 8373, need not procure an operator's license."

The words "operator's license" in the above subdivision are synonymous with driver's license.

We condlude, therefore, that a nonresident who comes within the definition of registered operator, as given in Section 8367, supra, must in all instances procure a registered operator's license, if he is to operate on said license in the State of Missouri, without further procuring an operator's or driver's license. On the other hand, a nonresident of the State of Missouri, operating a motor vehicle within the state, who does <u>not</u> come within the definition set forth in Section 8367, supra, and who possesses an operator's or driver's license which is in force in the state of his residence, may operate a motor vehicle in the State of Missouri, without first procuring an operator's or driver's license, for Subdivision (2) of Section 8445, R. S. Mo. 1939, provides as follows:

> "2. A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State only as an operator."

The term "operator" is defined in Section 8367, supra, as follows:

> "Any person who operates or drives a motor vehicle."

CONCLUSION

We are of the opinion, therefore, that if a person regularly operates a motor vehicle belonging to another person in the course of, or as an incident to, his employment, but whose principal occupation is not the operating of such motor vehicle, such person must first procure a registered operator's license in the State of Missouri, whether he be a resident or a nonresident. Having procured such registered operator's license, he is privileged to operate without procuring an operator's or driver's license. Secondly, a nonresident who is merely an operator of a motor vehicle may operate his car without first procuring an operator's or driver's license, if he possesses an operator's or driver's license in his home state or country, if such license is in full effect.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

SOLDIERS' BONUS ACT: Interpretation of Sec. 9012c, of Chapter 51, Article 9, Missouri Statutes Annotated, page 6313

August 12, 1942

8-18

FILED
35

Maj. Kyle T. Graham
State Staff, Hq MoNG
Office of the Adjutant General
Jefferson City, Missouri

Dear Major Graham:

This is to acknowledge receipt of your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

"In the adjudication of a claim for Missouri Soldiers' Bonus of one Florine Dawson, widow of Floyd N. Dawson, deceased, World War veteran, a certain technicality has developed and this office wishes an opinion before proceeding further with the claim.

"A resume of the case, as outlined in the application, is as follows:

"Floyd N. Dawson, Army Serial Number 5-319,792, was inducted into Federal Service on November 5, 1918, and served honorably therein until his discharge, April 18, 1919. At the time of his entrance into service, he was married to one Adeline H. Dawson. To this union was born one (only) child, Velda Dawson, still living, date of birth unknown. During the year 1930, Mr. Dawson's wife, the above mentioned Adeline H. Dawson, died, and subsequent thereto, said Floyd N. Dawson married one Florine McChesney, above referred to as Florine Dawson. On September 7, 1941, said Floyd N. Dawson died, without having made claim for his Missouri Soldiers' Bonus.

"Under the Missouri Soldiers' Bonus Act, which states in part 'in case of the death of any person who would, if living, be entitled to the bonus under this act, the same shall be paid to the following

> persons, in the order named, and none other; first, surviving wife or husband; second, surviving child, and if there be more than one child surviving, then equally among such children; third, surviving mother; fourth, surviving father.'
>
> "It is not clear to this office which is the legal claimant, the daughter from the first marriage, Velda Dawson, or the present widow, Florine Dawson."

In reviewing the Revised Statutes of Missouri, 1929, we find that Section 9012c of Chapter 51, Article 9, Missouri Statutes Annotated, page 6313, was not carried over into the Revisions of 1939. However, said section was not repealed and is, therefore, in full force and effect. In the case of State ex rel Asotsky v. Hicks, 472 S. W. (2d) l. c. 473, the court said:

> "The above sections are Secs. 101, 102 and 103 of Chapter 51, General Laws of Mo. 1877, supplement to the Wagner statutes of 1872. They do not appear in the revisions of 1879 and succeeding revisions. Even so, the omission from the revisions does not operate to repeal said sections. Meriweather v. Overly, 228 Mo. 218, 129 S. W. 1, Bird v. Sellers, 122 Mo. 23, 26 S. W. 668."

Section 9012c, Mo. Stat. Ann. Chap. 51, Art. 9, p. 6313, provides as follows:

> "In case of the death of any person who would, if living, be entitled to the bonus under this act, the same shall be paid to the following persons, in the order named, and none other: First, surviving wife or husband; second, surviving child, and if there be more than one child surviving then equally among such children; third, surviving mother; fourth, surviving father. Every person making application for a

> bonus, as hereinafter provided, shall set forth in his application the names and addresses of all persons who would be entitled to receive the same in the event of the death of the applicant, and if sich applicant shall die before the payment of such bonus, then such application shall be deemed to inure to the benefit of the person or persons next entitled thereto, and payment shall be made to such person or persons upon proof of identity satisfactory to the commission hereinafter provided for. If all persons designated herein as entitled to the bonus shall die before the payment thereof, the right to the bonus shall cease and determine. Application for bonus made in behalf of minor children shall be made by the duly appointed guardian or curator of such children, or by any person who stands in loco parentis to such minor children. (Laws 1921, 2nd Ex. Sess. p. 6, Sec. 3.)"

It will be noted from the reading of the first part of said section that it provides "In case of death of any person who would, if living, be entitled to the bonus under this act, the same shall be paid to the following persons, in the order named, and none other: First, surviving wife or husband; second, surviving child, and if there be more than one child surviving, then equally among such children; third, surviving mother; fourth, surviving father.* * *"

It may be pointed out that the statute under clause (1) supra, used the words "surviving wife or husband" and at no place in the section is there any attempt on the part of the Legislature to distinguish between the wife of the veteran at the time the statute was passed and a future wife of a claimant. Under the section, supra, it is clearly the intent that the veteran shall have the absolute right, to the exclusion of all other named classed of claimants, to receive the benefits of the Missouri Soldier's Bonus.

We note from the opinion request that the veteran did not see fit to claim any benefits under this act during his lifetime, and now that he is deceased, it is our view that clause (1) of said section is controlling, for the reason that said clause provides "first, surviving wife or husband;* * *". Certainly, the lawful wife of claimant, though she be the second wife of claimant, would be his surviving wife, and absent any wording in said section which would preclude a wife other than the one at the time the act was passed, would in our opinion prevent any other interpretation, and that the woman who survived the veteran would be the lawful claimant. This is further true for the reason that claimant did not seek to receive the benefits of this act during his lifetime.

CONCLUSION

It is the opinion of this department that the lawful living wife of a veteran is entitled to the benefits under the soldiers' bonus act, upon the death of the veteran, who has failed to claim his benefits under said act during his lifetime, even though she not be the wife of said claimant at the time said act was passed.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

TAXATION AND REVENUE: Collector must advertise and sell realty for all unpaid delinquent taxes due thereon for all years prior and subsequent to the years for which a certificate of sale was issued and which are not barred by the statute of limitations.

September 18, 1942

FILED
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

Your request of September 15, 1942, for an opinion relating to the Jones-Munger Law is as follows:

"The County Treasurer of this county is confronted with a situation as follows:

"Certain property in this county was sold for taxes a number of years ago and the County Treasurer permitted the owner to redeem the property upon payment of a part of the back taxes. Some of this back taxes has been paid, but in other cases not. The question is, 'has the Treasurer the right to advertize the property for sale for the taxes that were delinquent at the time of the original sale and not paid to date?'"

The County Collector is the proper officer to sell lands for general delinquent taxes on real estate. (Section 11108 R. S. Mo. 1939).

Section 11125 R. S. Mo. 1939, is in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, * * * * " (Underscoring ours).

Therefore, it becomes the duty of the Collector to submit for sale each November all taxes due and delinquent at such time.

Section 11165 thereof is in part as follows:

> "No proceedings for the sale of land and lots for delinquent taxes under the provisions of chapter 74, Revised Statutes of Missouri, 1939, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said law in so far as the time at which such sales are to be had is specified therein: * * *"

Under the above section no sales may be had for the enforcement of the states lien for such delinquent taxes unless such initial proceedings shall be commenced within five (5) years after such delinquency.

Under Section 11127 thereof providing for a first offering or sale and Section 11129 providing for a second offering or sale, realty may be sold only on condition that the bid is for a sum equal to the delinquent taxes together with interest, penalty and costs.

Thus when a sale is made under such offerings the State and County receive the full amount of taxes due under the lien for the particular years involved and the lien is thereby foreclosed. The above offerings and sales thereunder are evidenced by a certificate of purchase from which the right of redemption exists.

The third sale - to the highest bidder - was also subject to redemption (Laws 1933 p. 425). However, under the provisions of Section 11130 thereof (Re-enacted Laws of 1939 p. 850, Sec. 9953-a) the right of redemption was withdrawn from such sale. It was, therefore, to be evidenced by the execution and delivery of a deed.

By Section 11131 thereof it was provided that the County can protect itself by bidding in the property, on the third sale.

Section 11145 thereof is in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption."

The above statute is explicit in fixing the duties of the Collector with reference to redemption.

In event the certificate holder paid subsequent taxes it became the duty of the Collector to require repayment as a prerequisite to redemption. If such subsequent taxes were not paid by any person, it became the duty of the Collector to advertise and sell when they became delinquent.

Section 11152 thereof is as follows:

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding, by depositing with the county collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten per cent per annum from the date of payment. Said holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser."

Therefore, the question of redemption does not control the Collector in collecting taxes. If the owners or other parties in interest, including the certificate holder, fail to pay general delinquent taxes on real estate the Collector should sell for such unpaid delinquent taxes for years prior to those years included in the certificate as well as for subsequent years.

No priority exists in favor of the certificate holder for taxes accruing after the date of the certificate. Also the same is true as to prior unpaid taxes which are not inferior to the taxes for which the sale was had.

Therefore, the only general taxes foreclosed by the sale are those for which the sale is had. The fact that the collector omitted from the advertisement older general taxes than those included, a sale under such advertisement would not foreclose the lien of the State on such older taxes. Such in effect is the holding in the case of State ex rel. v. Baumann 160 S. W. (2d) 697, 700:

> "Even as to taxes becoming delinquent after the effective date of the new law, we think the legislature contemplated that some such taxes might be omitted from a tax sale and, if so, the purchaser must pay them before receiving a deed. Surely the language in Section 11152 requiring the purchaser to pay 'any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed' by the sale, means something. It means that some general taxes, which had become due prior to the issuance of the certificate of sale, might be omitted from the advertisement. We think, the Jones-Munger Act does contemplate that the collector shall include all delinquent taxes in the sale, but we also think if he fails to do so the State's lien is not lost, at least up to the time he delivers his tax deed. The Kansas Supreme Court, under a tax law somewhat similar to our Jones-Munger law, has held that a tax sale for a given year does not preclude the State from later selling for the delinquent taxes of a previous year. Board of Com'rs v. Conners, 121 Kan. 105, 245 P. 1030."

CONCLUSION

Therefore, it is the opinion of this Department that although lands are sold and redeemed under the Jones-Munger Law such actions do not control the Collector in collecting delinquent taxes on real estate for those years not included in said action. If the owners or other parties in interest, including the certificate holder, fail to pay such delinquent taxes the collector should sell - absent application of said statutes of limitation - for years prior to those included in the certificate of sale as well as for subsequent years.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

SVM/mc

ESCHEAT FUND: Appropriation bill not necessary to allow moneys in hands of State Treasurer, to the credit of "escheat fund", to be withdrawn for the purpose of investment.

November 6, 1942

11-9

FILED
35

Mr. John L. Graves
Bond Attorney
State Auditor's Department
Jefferson City, Missouri

Dear Mr. Graves:

The Attorney-General wishes to acknowledge your letter of October 22, in which you ask that a memorandum be prepared by this office on a matter set out in your letter. This request has been referred to me and I deem it advisable to copy same, which, omitting caption and signature, is as follows:

> "Governor Donnell has requested the undersigned to investigate the law relative to the question of whether or not it is necessary to have an appropriation act to support the investment of monies in the escheat fund.
>
> "The 61st General Assembly enacted a law appearing in Laws of Missouri 1941 page 366, authorizing the Board of Fund Commissioners to invest all monies paid into the State Treasury under the provisions of Article 1 Chapter 3 Revised Statutes of Missouri, 1939 entitled 'Escheats' in registered bonds of the United States Government and State of Missouri and providing for the disposal of the interest from said investments to the Public School Fund.
>
> "The 61st General Assembly did not make an appropriation for the investment of the Escheat Fund.

> "Pursuant to the above statute the State Board of Fund Commissioners, as you recall, has adopted several resolutions authorizing and directing the investment of the escheat fund into United States Defense Bonds Series 'F' and United States Treasury Bonds. The aggregate of the investments made to date from the Escheat Fund amount to the sum of $300,884.13, and the cash balance in said fund as of this date amounts to the sum of $28,101.82.
>
> "The purpose of this letter is to obtain your permission to have Mr. Bradley of your office prepare a memoranda opinion on the questions involved for consideration at the November meeting of the State Board of Fund Commissioners."

My understanding of the question involved is whether or not money which is in the hands of the State Treasurer of the State of Missouri can be withdrawn for the purpose of purchasing United States Bonds without an appropriation duly passed by the Legislature of the State of Missouri.

Section 19, of Article X, of the Constitution of the State of Missouri, provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account

> of the receipts and expenditures of all public money shall be published from time to time."

As can be noted from this provision of the Constitution, the following words are used:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * *"

This brings us to the definition of the term "paid out." Webster's New International Dictionary, Second Edition, defines the word "paid" as, "given or handed over to discharge an obligation." This clearly was the intention of the framers of the Constitution when they made the provision set out above. In our particular case the money to be used for the purchase of the government securities, of course, will be withdrawn from the State Treasury in the usual and customary manner. This withdrawal, however, will not be in the payment or discharge of any obligation on the part of the State, but will be merely a withdrawal for the purpose of purchasing government bonds.

Under Senate Bill 224, set out in the Laws of Missouri for 1941, at page 366, the Board of Fund Commissioners is empowered to invest all moneys paid into the State Treasury under the provisions of Article 1, Chapter 3, R. S. Mo. 1939, that have accumulated in the State Treasury through the escheats statutes. It is further provided that if the said bonds are purchased by the Fund Commissioners that the State Treasurer shall then be the custodian of the bonds purchased and shall deposit all interest received from such bonds into the escheat fund, which interest shall be subject to investment and may be transferred to the public school fund upon the order of the Board of Fund Commissioners. In other words, it appears that the money shall be withdrawn from the State Treasury only for the purpose of purchasing bonds;immediately upon which purchase the bonds are deposited with the State Treasurer as custodian. It does not appear to this Department that a procedure of this kind would be in violation of Section 19, of Article X, of the Constitution of Missouri, since this money is not paid out of the

Treasury of the State for any obligation but is merely used for the purpose of purchasing United States Treasury Bonds which are immediately deposited with the Treasurer of the State.

Under such circumstances it is the opinion of this Department that it will not be necessary that the Legislature pass an appropriation bill for the purpose of withdrawing such moneys from the escheat fund to purchase Registered Bonds of the United States Government. The State does not relinquish its property or funds but merely invests them.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

NEPOTISM: Great nephew is within fourth degree.

December 8, 1942



Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

FILED 35

Dear Sir:

Receipt is acknowledged of your letter of December 2, 1942, requesting an opinion as follows:

> "The Circuit Clerk elect has asked me to write in regard to his using his great nephew by marriage, as his deputy in the office.
>
> "The Circuit Clerk's wife is the boy's great aunt, and he wants to know whether he would be in violation of Nepotism Law, by using him as deputy."

The portion of our law generally referred to as the "nepotism law" is Section 13 of Article 14 of the Constitution, which is as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In the case of State ex inf. Norman v. Ellis, 325 Mo. 154, this section was held to be self-enforcing. In the case of State ex inf. Ellis v. Ferguson, 333 Mo. 1177, is found the following definition of a public officer at page 1181:

> "'The first question in this connection is: Is the mayor of a city of the third class a public officer? The answer must be yes. A public office is well defined to be:
>
> "'"The right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law, . . . an individual is invested with some portion of the sovereign functions of government, to be exercised by him, for the benefit of the public;"' and a public officer is one who receives his authority from the law and discharges some of the functions of government.* * * * "

The case of State ex inf. McKittrick v. Whittle, 63 S.W.(2d) 100, contains an interesting discussion of the reason for the adoption of this amendment to the Constitution. It is found on page 101:

> "It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state

and its political subdivisions.

"It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. * * * *"

The definition of "consanguinity" is found in volume 12 C.J. page 510, and is as follows:

"Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor, vinculum personarum ab eodem stipite descendentiem, as distinguished from affinity, or relationship by marriage; the being of the same family and stock; the having the blood of some common ancestor; blood relationship; relationship by blood; the actual relationship of blood. * * * *"

and in volume 2 C.J. page 378 is the following definition of affinity:

" * * * * * The term has been variously defined as the connection existing in consequence of marriage between each of the married persons and the kindred of the other; the connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connection with the relations of the husband. * * * * *"

Applying this definition of affinity, it will

be noted that the Clerk of the Circuit Court would be related to his wife's blood relatives by affinity.

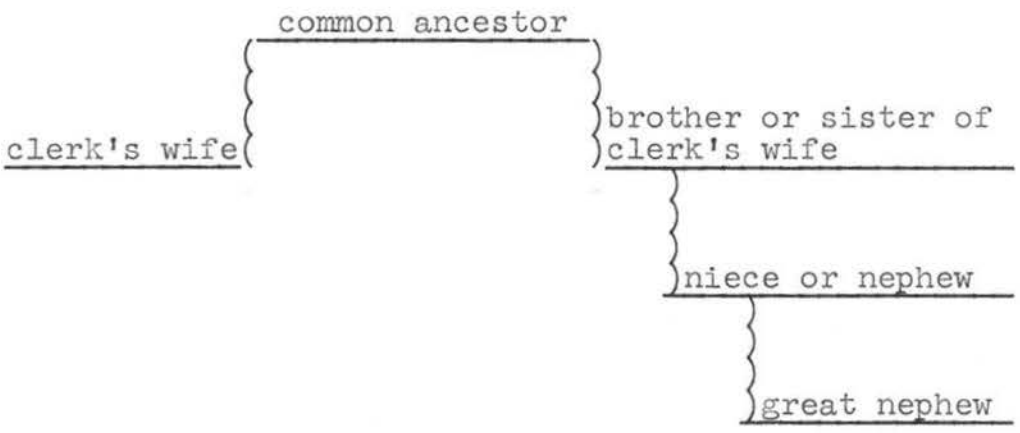
There have been several cases before the appellate courts in which the question of the enforcement of Section 13 of Article 14 of the Constitution, supra, was passed upon. None of these cases has laid down a rule to be followed in determining whether or not a person comes within the prohibited degree of relationship. Two methods of determining relationship have been used: the canon law and the civil law. These rules for determining relationship are set out in vol. 12 of C. J. at page 511:

> "'There are two methods of computing the degrees of consanguinity: One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law . . . is as follows: "We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending. By this mode the intestate is taken as the terminus a quo, and the propinquity to him of any collateral relative is determined by the sum of the degrees in both lines to the common ancestor." The clearest and most comprehensive exposition of

the subject . . . is in 2 Coke Lit *p. 158 (Thomas Ed., p. 129), as follows: "It is to be noted that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line, but in the collateral line there is. Therefore, if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example, in brothers' and sisters' sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree: then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. But the canonists do ever begin from the stock, namely, from the person from whom they do descend, of whose distance the question is. For example, if the question be, in what degree the sons of two brothers stand by the canon law, we must begin from the grandfather and descend to one son, that is one degree; then descend to his son, that is another degree: then descend from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree: so in what degree either of them are distinct from the common stock, in the same degree they are distant between themselves; and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stock, in the same degree they are distant between themselves: and so the most remote maketh the degree."' McDowell v. Addams, 45 Pa. 430, 432. (2) 'In determining degrees

> of relationship by consanguinity or affinity, like in determining the descent of property, we must proceed from a single, definite propositus. In the descent of property the propositus is the ancestor or person from whom the descent is reckoned. In consanguinity it is a single, definite person; and in affinity it is a single, definite marriage.'
> * * * * *"

In an opinion dated October 31, 1933, written by the honorable Frank W. Hayes, assistant Attorney General, to Miss Marjorie Neff, County Superintendent of Schools, Saline County, it was held by this office that the civil law method should be followed in determining a relationship for the purpose of enforcing the nepotism law. Applying the rule as it is set out above to determine whether or not the circuit clerk elect is related to his wife's great nephew within the fourth degree by affinity we would ascend to the father or mother of the clerk's wife, the common ancestor, then descend to the brother or sister of the clerk's wife, to the niece or nephew of the clerk's wife, then to the great nephew. This clearly places the great nephew within the fourth degree, as will appear by the diagram below.



CONCLUSION

It follows that if the circuit clerk elect of Oregon County would appoint as his deputy the great nephew of his wife he would be violating the provisions of Section 13 of Article 14 of the Constitution and would forfeit his office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

TAXATION:
COLLECTING MERCHANTS
AND MANUFACTURING
TAX:

Collector must bring suit on merchants and manufacturing bond before he can obtain credit for tax.

February 10,1942

FILE
37

Hon. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Harned:

This is in reply to your letter of recent date wherein you request an opinion from this department upon the following statement of facts and questions:

"I am writing you to request your opinion on Section 11322 R. S. Mo., 1939

"Is it necessary that the Collector of Revenue file suit and take judgment against the defendant before he has exercised due diligence?

"In other words, how far does the collector have to proceed to exercise due diligence?

Section 11322 R. S. Mo., 1939 is as follows:

"The County Court, at each regular term thereof, shall settle and adjust the accounts of the collector for licenses delivered to him, giving him credit for all blank licenses returned, and charging him for all licenses not returned, according to the statement required to be filed by the person having license, and the statement of the bonds required to be returned: Provided however, that when the collector shows that he has exercised due diligence to collect outstanding merchants taxes

> against the merchant and upon his bond or bondsmen and that the same is uncollectible, the county court, upon a showing of said facts may allow the collector credit for the amount thereof."

Section 11306 R. S. Mo. 1939 requires each merchant to execute a bond for the payment of his merchant's tax before such person may receive a license to do business.

Under section 11315 if such merchant fails to pay to the collector the amount of his merchant's tax due, then such bond is deemed forfeited and judgment shall be rendered for the collector in double the amount of the tax and costs.

If the merchant fails to file a statement of his goods as is required by Sec.11309 then the bond is deemed to be forfeited and judgment shall be rendered for triple the amount of such revenue and costs.

If such merchant files a false statement then under Section 11317, his bond is forfeited and judgment shall be rendered for four times the amount of revenue due.

Section 11318 R.S. Mo., 1939 reads as follows:

> "Upon the forfeiture of any bond as provided, it shall be the duty of the collector of the proper county to institute suit without delay, by some attorney to be selected by him, upon the bond forfeited, against the principal and all sureties, jointly or severally, as may be deemed advisable; and the court in which the judgment shall be rendered shall, if judgment shall be for the plaintiff, tax as costs in the case to be collected and paid as other costs, a reasonable,fee in favor of the attorney prosecuting the action."

This section requires the collector to proceed <u>without delay</u> to institute suit on the merchant's bond which has been forfeited for any of the reasons hereinabove set out.

Said section 11322 R.S. Mo., 1939, authorizes the county court to give the collector credit for merchant's taxes

which he has been unable to collect, provided he can show that he has exercised due diligence in trying to collect such tax.

Just what is "due diligence", is the question here.

"Due diligence" in collecting a note has been defined in Words and Phrases, Permanent Edition Volume 13, as follows:

> "'Due diligence,' within the principle that the blank indorsement of a note implies that the same shall be collectible by due diligence, imports not only a demand, but an attempt to collect by legal process."
>
> "'Due diligence' by assignee of note in attempting to collect from original maker does not consist in merely constituting suit against maker and prosecuting it to judgment, but execution must be obtained and regularly returned."
>
> "Under a statute providing that the assignee of a note, having used due diligence, shall have an action against his immediate indorser, it is held that the phrase "due diligence" must be taken to mean prompt employment of the means which the law affords for the enforcement and collection of debts due and payable."

Since the law contemplates that every person shall bear his share of the tax burden, and since our lawmakers have set up a system for the collector, to follow in collecting merchant's taxes, and since it requires the officer to proceed without delay to obtain a judgment of forfeiture of the bond, then it would seem that "due diligence" would require the collector to proceed by suit in accordance with the foregoing statutes, before the county court would be authorized to give him credit for a merchant's tax, which he reports uncollectible.

CONCLUSION

It is therefore the opinion of this department that

the collector, in order that he may show that he has exercised due diligence to collect outstanding merchant's taxes, for the purpose of being allowed credit for such taxes that he has been unable to collect, he must show that he has filed suit for the forfeiture of such merchant's bond, obtained judgment thereon, requested execution be issued thereon and that execution has been returned nulla bona.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

COUNTY COURTS: County court does not have authority to expend money out of Class 6 for road and bridges in a special road district.

February 13, 1942

Mr. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

FILE
37

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "I am writing you requesting an opinion on the following:
>
> "'Where a special road district has insufficient funds to properly maintain the roads in its district, can the County Court set up a fund in Class No. 6 in the profit from general revenue funds to be used under the supervision of the Court in said district where it is most needed for the maintenance of said roads?'"

We point out that this opinion applies only to counties not under township organization and to special road districts organized under Article 10, Chapter 46, R. S. Mo. 1939.

In attempting to throw light on the above perplexing problem, we have read more than a score of decisions of our Supreme Court. The only comfort derived from the authorities is found in the quotation of Judge Brown in the case of Road District v. Ross, 270 Mo. 76, and of Judge Lamm in the case of Holloway to use v. Howell County, 240 Mo. 601. Judge Brown, in the Ross case, at l. c. 80, said:

> "Our road laws remind us of the famous comment of Peter on the epistles of his Beloved Brother Paul: 'In which are some things hard to be understood.' We have been compelled to approach them frequently during the last few years, and do so with the feeling that we are taking up a bundle of plugs, whittled to suit well enough the local uses that suggested them, but far too small for the apertures into which we are called upon to fit them."

In the Howell County case, Judge Lamm expressed his views at l. c. 609, as follows:

> "We pause long enough to remark there is a precept that every man is presumed to know the law. But should not that precept be amended so as to read, every man is presumed to know the law, except the road law? Certain it is that in some of its features it is a tangled skein of incongruities and ambiguities, if not absurdities. Some of its provisions overlap, they do not make a neat joint with cognate sections and the law needs scientific revision. It would be a bold court that did not approach the road laws of Missouri with a questioning eye and a modest degree of doubt."

Since these famous jurists penned the above in 1912 and 1917, respectively, the road laws and kindred statutes have been amended and patched as regularly as the General Assembly has met. We should be pardoned, therefore, from expressing an honest doubt as to our ability to correctly determine the question here presented, or to satisfy the large number of officials who seem to be wrestling with the same vexing problem.

In order to arrive at a correct solution, it is necessary to consider a number of fundamental principles of law which are well known but ofttimes forgotten in the

desire of public officials to follow the dictates of their own judgment rather than the law. It is well to remember that a county court is merely the agent of the county with no powers except those granted by law. As said in the case of Jensen v. Wilson Township, 145 S. W. (2d) 372, l. c. 374:

> "A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. * * * In auditing claims a county court acts merely as the fiscal or administrative agent of the county."

It also should be borne in mind that the construction and repair of highways and roads is purely a matter of statutory regulation subject to constitutional limitations (29 C. J., p. 585, par. 508), and that county courts or commissioners of special road districts, in constructing or improving public roads, act as agents of the state subject to and limited by the state law. In Lamar v. Bolivar Special Road District, 201 S. W. 890, the court at l. c. 893 said:

> "Having held that the county courts, in looking after the public roads within their jurisdiction, are acting as political subdivisions of the state and as agents of the latter, we see no reason for assigning the commissioners of special road districts to a different class, while performing the same general service in behalf of the state."

It is also a fundamental principle of law that the power to tax and the power to provide for the disposition of taxes are identical and inseparable, and accordingly the legislature has full power and control over the disposition of revenues derived from taxation, including the right to name the agency to disburse such revenue, subject, of course, to constitutional restrictions. 61 C. J., p. 1520, par. 2234. In the case of Billings Special Road District v. Christian

County, 5 S. W. (2d) 378, the court quoted with approval from 15 C. J., p. 581, par. 283, as follows:

> "The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. A county being a public corporation existing only for public purposes connected with the administration of a state government, its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the county."

In the case of State v. Burton, 182 S. W. 746, the court at l. c. 748-749 said:

> "The legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection, and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating in this case the disbursement of the taxes collected to a board of commissioners of a special road district is not an improper exercise of such power."

From the above it would seem that the question here presented could be determined by merely turning to the statutes, but, as pointed out by Judge Lamm in the Howell County case, these statutes are "a tangled skein of incongruities and ambiguities, if not absurdities. Some of its provisions overlap, they do not make a neat joint with cognate sections." It is plain, however, from a reading of Section 8682 of Article 10, Chapter 46, R. S. Mo. 1939, that the board of commissioners of a special road district organized under said article has the sole and exclusive control and jurisdiction over all public highways within its district, outside the

corporate limits of any city or village. Said section reads as follows:

> "Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease, or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8687 of said Article reads:

> "Such board may buy all material which may be used, directly or indirectly, in constructing, improving or repairing any public highway or bridge in its district, and is authorized to do and perform all acts within its district for which any authority is given to road overseers under the general road law of this state."

Section 8688 provides:

> "Said board may, by contract or otherwise, under such regulations as the board

> shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

From the above statutes it is certain that the board of commissioners of a special road district has the exclusive control and jurisdiction over all public highways within its district, and has the authority to employ hands, rent or buy the necessary implements, machinery and material to construct or repair all roads or bridges in its district, and also has the specific authority, by contract or otherwise, to build, repair and maintain all bridges needed within the district. The only authority given a county court is a discretionary one to construct, maintain or repair bridges or culverts in such road districts out of money available for that purpose, or it may appropriate out of funds available for that purpose money to aid and assist the commissioners to build or repair such bridges or culverts.

Under the provisions of Section 8526, R. S. Mo. 1939, the county courts are required to levy upon all property made taxable by law a tax of not more than 20¢ on the one hundred dollars valuation as a road tax, which tax is placed to the credit of the county road and bridge fund.

Under the provisions of Section 8527, R. S. Mo. 1939, the county courts may levy a special tax not exceeding 25¢ on the one hundred dollars valuation to be used for road and bridge purposes and for no other purpose whatever. This sec-

tion specifically provides that that part of said tax which is collected upon any property lying within any road district shall be paid into the county treasury and placed to the credit of the special road district or other road district from which it arose, and shall be paid out to the respective road districts upon warrants of the county court in favor of the commissioners, treasurer or overseer of the district, as the case may be.

Under the provisions of Section 8513, R. S. Mo. 1939, taxes derived from the levy authorized by Section 8526, supra, are appropriated to the use of the county court to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system as well as all other roads and bridges in such county. But under the provisions of Section 8691, R. S. Mo. 1939, special road districts are entitled to all money collected as county taxes for road or bridge purposes, by virtue of any law, upon property within such special road district. Said section reads as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the

> amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

There can no longer be any doubt that a special road district is entitled, upon timely demand, to all taxes collected for road and bridge purposes upon property within its district, under the provisions of Sections 8526 and 8527, supra. State v. Barry County, 258 S. W. 710; Billings Special Road District v. Christian County, 5 S. W. (2d) 378.

From the above, we think it plain, and have no hesitation in holding, that the construction, improvement and repair of all roads in special road districts is under the exclusive control and jurisdiction of the commissioners of such special road district, and the funds for carrying out such duties are provided by the above statutes. We think it is equally clear that the county courts have no authority to construct, repair or improve roads in special road districts or to expend any money for that purpose. However, the county courts do have the discretionary authority to construct, maintain or repair bridges or culverts in a special road district, or to appropriate money to aid and assist the commissioners of such a district in building or maintaining bridges or culverts <u>out of money available for that purpose</u>.

The question necessarily arises as to what funds a county court has available for such purposes. As pointed out above, a conglomeration of statutes has been passed to govern the construction, maintenance and repair of our road and bridge systems in the various counties, and under the provisions of Section 8526, supra, the county courts have the mandatory duty of levying a road and bridge tax of not to exceed 20¢ on the one hundred dollars valuation, and under the provisions of Section 8527, supra, may levy an additional tax not to exceed 25¢ on the one hundred dollars valuation to be used for road and bridge purposes exclusively.

Having provided a complete scheme for the construction, maintenance and repair of our roads and bridges, and having provided special taxes for the purpose of carrying out such scheme, the question arises as to whether or not any other taxes can be used for the purpose of maintaining our road and bridge system. 15 C. J., p. 581, par. 283, provides:

> "The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. A county being a public corporation existing only for public purposes connected with the administration of a state government, its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the county. So too, where the legislature expressly designates a particular mode of raising funds for a certain purpose, all other modes are excluded."

A review of our statutes leads to the conclusion, we think, that since special taxes are provided for road and bridge purposes, other taxes, including the ordinary or general revenue of the county, cannot be used for such purposes. Section 11219, R. S. Mo. 1939, makes it the duty of the

county treasurer to separate and divide the revenues of such county in his hands in compliance with the law, and makes it his duty to pay out the revenues so subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise. Said section also requires him to keep a separate account with the county court of each fund, which funds shall be known and designated as provided by law, and provides that no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court.

Section 13825, R. S. Mo. 1939, provides as follows:

> "When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus:
>
> > A B v. ____ county. The account of A B for the sum of ____ dollars being presented and inquired into, it is found by the court that the sum of ____ dollars is due him from the county, payable out of (express the particular fund, as the case may require), and for which the clerk is ordered to issue a warrant.
>
> When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form:
>
> > Treasurer of the county of ____, pay to ____ dollars out of any money in the treasury appropriated for (express the particular fund, as the case may require). Given at the courthouse, this ___ day of ___, 19 __. By order of the county court.
>
> Attest: C D, clerk. A B, president."

From the above, it will be seen that the order of the court requires the clerk to issue a warrant out of the particular fund from which the claim is due.

Section 9874, R. S. Mo. 1929, requiring the county court to appropriate, apportion and subdivide the revenue into certain funds has been repealed, but Sections 11219 and 13825, supra, are still in force and effect and should be read and construed with the Budget Act.

It is, therefore, our opinion that the only money available to the county court for the construction, maintenance or repair of bridges in special road districts is that levied for road and bridge purposes, and that the ordinary or general revenue of the county cannot be used for such purposes. We realize that the special tax levied under the provisions of Section 8527 must be returned to the special or other road district from which it is collected, and that the county is only entitled to such money levied upon property not situated in any road district, special or otherwise. We further realize that the money levied under the provisions of Section 8526 must be returned to the special road districts from which it is collected, and the balance, if any, is all that the county court has for road and bridge purposes under this section.

In the case of State v. Barry County, 258 S. W. 710, the county claimed the funds levied and collected under the provisions of what is now Section 8526, and advanced as one of the reasons why it should be entitled to the fund that the legislature had imposed upon the counties certain duties with respect to the upkeep and maintenance of roads and bridges in special road districts, and that the moneys levied under Sections 8526 and 8527 were practically the only sources of revenue for road and bridge purposes, and that it must have been intended that the proceeds of one or the other should be retained by the counties. The court, in answer to this argument, at l. c. 711, said:

> "If they plainly provide that the proceeds of both levies, so far as it arises from property in special road districts, be paid to such districts, then it is for the Legislature

> to extricate the counties from the dilemma in which it has placed them, if it has done so."

The question of the county paying for the construction, maintenance or repair of bridges or culverts in special road districts, or assisting the commissioners of said special road district in such construction, repair or maintenance, is further complicated by the amendment of the County Budget Law by the 1941 General Assembly. Formerly, Class 3 of the County Budget Law, Section 10911, R. S. Mo. 1939, read as follows:

> "Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

The above provision required the county court to apportion the amount required for the upkeep, repair or replacement of bridges on other than state highways and not in any special road district, but the Budget Act does not mention the appropriation or apportioning of moneys for road purposes or for bridges in special road districts. In other words, the road and bridge fund was separate and distinct from the rest of the county revenues and did not come within the County Budget Law. This, no doubt, by reason of the fact that the special and ordinary road districts are entitled to the moneys levied on property in their districts under the provisions of Section 8527, and that special road districts are entitled to the funds levied on property in their districts under the provisions of Section 8526, and that the balance of said road and bridge fund was already appropriated under the provisions of Section 8513, supra, to the county courts for the construction and maintenance of roads and bridges in the county highway system and on all other roads and bridges in the county. Now, however, Class 3 of the County Budget Law, Section 10911, Laws of Missouri, 1941, page 650, reads as follows:

> "Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county."

The funds apportioned in Class 3 must now be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527, supra, and this money cannot be used for roads and bridges in any special road district. The only purpose we can imagine for this amendment was that the legislature, realizing that special road districts were entitled to all money collected from levies on property within their districts, desired that the balance of such road and bridge funds be expended upon roads not located in such a district. The above provision, however, does not require that all moneys derived from the levies under Sections 8526 and 8527 to which the county is entitled shall be budgeted for the upkeep, repair and construction of bridges and roads other than on state highways and not in any special road district. It merely requires that appropriations for such purpose must be made from revenue derived from levies made under the above sections. In other words, it must have been the legislature's intention that the county court should take care of roads and bridges other than in special road districts before expending any money out of the road and bridge funds for bridges in special districts.

We wish it understood that this opinion does not apply to county highways under the jurisdiction of the county highway commission, nor is this opinion concerned with the transfer or expenditure of surplus funds after the ordinary and general expenses of the current year have been taken care of.

CONCLUSION

In view of all the above, it is the opinion of this department that the county court does not have the authority to construct, repair or maintain roads in special road districts or to expend any money out of Class 6, or any other fund, for such purposes.

It is our further opinion that the county court does not have authority to expend any money out of Class 6, or out of the ordinary or general revenue of the county, for the construction, repair or maintenance of bridges or culverts in special road districts, but that it may expend money for the construction and repair of such bridges out of any balance of the road and bridge funds remaining, if any, after the amount required for the upkeep, repair and construction of bridges and roads on other than state highways and not in any special road district is provided for, as required by Class 5, Section 10911, of the County Budget Law.

Respectfully submitted

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:HR

PROBATE JUDGE: FEES: May charge 10¢ for each one hundred words or figures in furnishing copies of order granting letters or refusing to grant letters, and 50¢ for certificate and seal.

February 20, 1942

Mrs. Jessie B. Harrison
Acting Probate Judge
Dunklin County
Kennett, Missouri

FILE 37

Dear Mrs. Harrison:

This will acknowledge receipt of your letter of February 6, 1942, which is as follows:

> "Please find inclosed two Fee Bills, one used in case of a minor or an insane person, the other in the estate of a deceased person.
>
> "These bills were recommended to me by one of your auditors, Mr. Earl Hulse who happened to be in Kennett at the time of my appointment to the Probate office.
>
> "I have followed these consistently, adding only recording at the rate of about fifty cents per page. I was informed during the year that the $3.10 charged for Letters Refusing Administration should be increased to $4.10 when the applicant desired a copy for their own use. Is that correct? If so, when Letters of Administration are issued should I charge $1.00 for the copy usually furnished the Administrator."

It appears th t the two questions upon which you desire our opinion are:

(1) What fee is the Probate Judge entitled to for furnishing a certified copy of the order granting Letters of Administration;

(2) What fee is the Probate Judge entitled to for furnishing a certified copy of the order refusing to grant Letters of Administration.

Section 13404, R. S. Missouri, 1939, fixes the fees of the Probate Court as follows:

"The judges of probate courts, respectively, shall be allowed fees for their services as follows:

"* * * * * * * * * * * * * * * * * * * *

"For copying any order, or record or paper, not herein provided for, for every hundred words and figures. 10

"* * * * * * * * * * * * * * * * * * * *

"For every certificate and seal 50

"* * * * * * * * * * * * * * * * * * * *."

Under this section it seems clear that, for furnishing a certified copy of either of the above orders mentioned in the questions, the probate court would be entitled to charge a fee of ten cents (10¢) for every one hundred (100) words or figures in the order copied and fifty cents (50¢) for the certificate and seal.

With your opinion request you enclosed certain fee bills, calling to our attention specific enumeration of fees therein as follows:

"FLG. APPLIN. for Letters 05, Oath 05, Ctr. 50, Hg. & Dtg. 50, Ord. as to Bd. 15, Ord. Gr. Letters 15, Letters & Recdg. $1.00, Cf. & Seal 50, Ord. Notices 15, Doc. Sett. 10, Oath of Excr. or Admr. & Filg. 55 . . . . . 3.70

"* * * * * * * * * * * * * * * * * * *

"REFUSAL OF ADMINISTRATION; Flg. Applen. 05, Cer. & Seal 50, Dtg. 05, Hg. & Detg. 50, Ord. Ref. 15, Rec. Ord. 60, Judgt. 25, Copy of Ord. 50, Certf. & Seal 50. . . . . 3.10"

Since we are able to answer your specific question without undertaking to go into and approve or disapprove the various charges listed above, we will not undertake to do so in this opinion.

CONCLUSION.

Therefore, it is the opinion of this Department that a Probate Judge is entitled to charge, for furnishing a certified copy of an order granting or refusing to grant Letters of Administration, the sum of ten cents (10¢) for each one hundred (100) words or figures in said copy and fifty cents (50¢) for the certificate and seal.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney-General

ROY McKITTRICK
(Attorney-General)

LLb/rv

BANKS AND BANKING: LOANS: Interpretation of term "actual market value" in Subsection (c), Paragraph 4, Section 7952, R. S. Mo. 1939, as amended by Laws of Missouri, 1941, page 679.

March 18, 1942

3-77

Honorable D. R. Harrison
Commissioner
Department of Finance
Jefferson City, Missouri

FILE
37

Dear Sir:

This department is in receipt of your letter of recent date wherein you request our opinion based upon a question submitted to you by the president of a state bank in Kansas City, Missouri. For the reason that the letter of request and the accompanying documents are very long, we are not setting forth same in full, and, in writing this opinion, we are assuming that the facts are true. The question, as we understand it, is, What is the interpretation of the term "actual market value of the property held in store" as used in Section 7952, R. S. Mo. 1939, as amended by Laws of Missouri, 1941, page 679, which section has to do with the restrictions on loans, purchase of securities and total liabilities to banks of any one person.

The bank in question has loaned to a company in Kansas City a sum of money in excess of fifteen per centum, as provided by Paragraph 1, Section 7952, hereinafter set out, and said loan has been criticized by the federal examiners. The bank contends that the loan comes within the provisions of Subsection (c), Paragraph 4, of Section 7952; that is, the loan is secured "upon paper based upon the collateral security of warehouse receipts covering agricultural products or the manufactured or processed derivatives of products in public elevators or public warehouses." The loan is made on canned vegetables, soups and other grocery items of standard make and packing.

The only criticism made of this loan, as set forth in the various documents accompanying your request, is that the commodities, in the opinion of the federal examiners, did not have "actual market value" in Kansas City, Missouri, for the reason that the collateral held is not traded in an open and competitive market at

established value and that there is no public market sheet of any kind quoting the market of this class of goods daily. We understand that the loan of $58,187.20, made to the company by the bank qualifies in every respect except for the above assigned reasons.

Section 7952, R. S. Mo. 1939, as amended by Laws of Missouri, 1941, at page 679, provides in part as follows:

> "A bank subject to the provisions of this article:
>
> "1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letters of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual, partnership, corporation or body politic an amount or amounts in the aggregate which will exceed fifteen (15) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over * * * :

Subsection (a) provides that the restrictions in this subdivision shall not apply to United States bonds, state bonds and other securities which are not relevant to this opinion.

Your question pertains more particularly to Paragraph 4, Subsection (c) of Section 7952, supra, which provides in part as follows:

> "(c) The total liabilities to such bank of any individual, partner-ship or corporation may equal but not exceed thirty-five (35) per centum of the capital stock actually paid in and surplus fund of such bank:

Provided that all of such total liabilities in excess of the legal loan limit of such bank as defined in subsection (b) of this subdivision is upon paper based upon the collateral security of warehouse receipts covering agricultural products or the manufactured or processed derivatives of agricultural products in public elevators and public warehouses subject to state supervision and regulation in this state or in any other state of the United States, under the following conditions: First, that the actual market value of the property held in store and covered by such receipt shall at all times exceed by at least fifteen (15) per centum the amount loaned upon the same; and second, that the property covered by such receipts shall be insured to the full market value thereof against loss by fire and lightning, the insurance policies to be issued by corporations or individuals licensed to do business by the state in which the property is located, and when such insurance has been used to the limit that it can be secured, then in corporations or with individuals licensed to do an insurance business by the state or country of their incorporation or residence; and all policies covering property on which the loan is made shall have indorsed thereon, loss, if any, payable to the holder of such warehouse receipts; and provided further, that in arriving at the amount that may be loaned by any bank to any individual, partnership or corporation on such elevator or warehouses (warehouse) receipts there shall be deducted from said 35 per centum of its capital and surplus fund the total of all other liabilities of such individual, partnership or corporation to such bank."

We are inclined to take the view that the commodities do have an "actual market value" in Kansas City, and we

cannot agree with the construction given this statute by the federal examiners. We have some knowledge of the markets in Kansas City and the extensive dealings in the above commodities in that market. If these commodities do not have a market value in Kansas City, we do not know where else one could go in the State of Missouri to find such a market, and, in effect, it would be holding that these commodities do not come within the terms of Subsection (c) of Paragraph 4 because they have no actual market value for the reason that there is no competitive market which establishes values daily and no published quotations of those articles in the state. It would seem that in a great trading center like Kansas City these articles would have an actual market value, and we so find. If the Legislature had intended to give the term "actual market value" such a restricted meaning, it would have done so. We must interpret same as it is written.

What does the term "actual market value" mean, as used in this statute? We have assembled a few of the definitions of the words "market value" as used in the various texts. In Cyclopedic Law Dictionary, 3rd Edition, the following definition is given:

> "The price established by public sales, or sales in the way of ordinary business, 99 Mass. 345; what the property will sell for as between one who wants to purchase and one who wants to sell. 151 Wis. 224."

In Words and Phrases, Permanent Edition, Volume 26, we find the following definition:

> "'Market value' is frequently stated to be such a price as dealers in goods are willing to receive and the purchasers are made to pay when the goods are bought and sold in the ordinary course of trade. Albrecht & Son v. Landy, D. C. Minn., 27 F. Supp. 65, 72."

In Bouvier's Law Dictionary, Baldwin's Edition 1934, this definition is given:

> "A price established by public sales, or sales in the way of ordinary business, as of merchandise. 99 Mass. 348; 69 N. Y. 448."

In Black's Law Dictionary, Second Edition, "market value" is defined as follows:

> "The market value of an article or piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property."

The lawmakers, when they used the term "actual market value" in the above statute, intended that same be given its usual and customary meaning.

CONCLUSION

From the foregoing, it is our opinion that the commodities mentioned in your request do have an actual market value in Kansas City, Missouri, which is available and readily ascertainable, and that a loan may be made upon them by a state bank not to exceed thirty-five per cent of the capital stock actually paid in and surplus fund of

of such bank, as provided in Paragraph 4, Subsection (c), Section 7952, supra, notwithstanding the fact that there may not be published quotations daily on them, and even though they not be traded in an open and competitive market.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:VC

BANKS & BANKING: Whiskey is a manufactured or processed
LOANS: derivative of agricultural products within
TRUST COMPANIES: the meaning of paragraph (4), subsection (c),
Section 8032, Laws of Mo. 1941.

March 24, 1942

FILE
37

Mr. D. R. Harrison, Commissioner
Department of Finance
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. We herewith set forth in full your letter which is as follows:

> "During the course of an examination of a trust company attention was directed to a loan in excess of the statutory twenty percent limitation provided in Paragraph 1 of Section 8032, page 684, of the Missouri Session Acts of 1941.
>
> "The management of the trust company and its counsel contend that the amount of credit extended is not in excess of the statutory limitations, for the reason that it is almost entirely secured by bottled liquor in a local warehouse and, therefore, the indebtedness may equal but not exceed the thirty-five percent limitation provided in subparagraph (c) of Paragraph 1 of Section 8032.
>
> "Will you please let us have an opinion as to whether whiskey is a manufactured or processed derivative of an agricultural product and also whether it has an actual market value. In other words, we should like to have an opinion as to whether a trust company may legally lend up to thirty-five percent of its capital and surplus to an individual, partnership or corporation on the security of warehouse receipts representing whiskey stored in bonded public warehouses."

We have heretofore rendered an opinion dated March 18, 1942, to you on the question as to what the term "actual market value" means in Section 7952, R. S. Missouri 1939, as amended by Laws of Missouri, 1941 at page 679. That opinion would apply equally as well to Section 8032, R. S. Missouri 1939, as amended by Laws of Missouri, 1941 at page 684.

Section 7952, supra, applies to banks organized under the laws of the State of Missouri, and Section 8032, supra, applies to trust companies and said sections are almost identical in their wording.

Section 8032, paragraph (4), subsection (c), pages 685-686, Laws of Missouri 1941, provides as follows:

> "(c) The total liabilities to such trust company of any individual, partnership or corporation may equal but not exceed thirty-five (35) per centum of the capital stock actually paid in and surplus fund of such trust company: Provided, that all of such total liabilities in excess of the legal loan limit of such trust company as defined in subsection (b) of this subdivision, is upon paper based upon the collateral security of warehouses (warehouse) receipts covering agricultural products or the manufactured or processed derivatives of agricultural products in public elevators and public warehouses subject to state supervision and regulation in this state or in any other state of the United States, under the following conditions: First, that the actual market value of the property held in store and covered by such receipts shall at all times exceed by at least fifteen (15) per centum the amount loaned upon same and second, that the property covered by such receipts shall be insured to the full market value thereof against loss by fire and lightning, the insurance policies to be issued by corporations or individuals licensed to do business by the state in which the property is

> secured, then in corporations or with individuals licensed to do an insurance business by the state or county of their incorporation or residence and all policies covering property on which the loan is made shall have indorsed thereon, loss, if any, payable to the holder of such warehouse receipts; and provided further, that in arriving at the amount that may be loaned by any trust company to any individual, partnership or corporation on such elevator or warehouse receipts there shall be deducted from such thirty-five (35) per centum of its capital and surplus fund the total of all other liabilities of such individual, partnership or corporation to such trust company." (Italics ours)

We will now direct our attention to your first question, that is, whether whiskey is a manufactured or processed derivative of agricultural products. If whiskey is such a derivative of agricultural products, trust companies may loan not to exceed thirty-five per cent of the capital stock actually paid in and surplus fund of such trust companies as provided in Section 8032, supra, upon paper based upon the collateral security of warehouse receipts, as provided in subdivision (c), supra.

We have found no cases that throw any light on this question and we must look to the definition of the terms used in this statute. In 1939 that part of the section with which we are concerned contained the term "covering agricultural products in public elevators and public warehouses," and in 1941 it was amended to read "covering agricultural products or the manufactured or processed derivatives of agricultural products in public elevators and public warehouses * * * * * " The Legislature, therefore, intended to broaden the collateral that was eligible for security to include the manufactured or processed derivatives of agricultural products. The question then to be determined is whether whiskey comes within the terms added by the 1941 Legislature.

Encyclopedia Britannica, 14th Edition, defines whiskey as follows:

> "A potable, alcoholic liquor distilled from cereal grains."

The Standard Dictionary gives this definition:

> "An alcoholic liquor obtained from distillation of a fermented starchy compound, usually grain."

This definition is given in U. S. Pharmacopoeia:

> "A distilled alcoholic liquor made from any of the various grains. In the United States whiskey has been generally distilled from rye, wheat and maize or corn."

The word "derivation" is defined by Webster's Unabridged Dictionary as:

> "Obtained by, arising from, or consisting in derivation or transmission; derived; transmitted or educed."

The chemical definition of "derivation" in the Standard Dictionary is:

> "A body formed or regarded as being formed from another; usually by partial r eplacement."

When the Legislature used the term "agricultural products or the manufactured or processed derivative of agricultural products," it used very broad and inclusive language and evidently intended to include many articles or substances that might be derived from agricultural products. We think whiskey comes within this classification.

CONCLUSION

We are, therefore, of the opinion that whiskey comes within the meaning of these terms and is a manufactured or processed derivative of agricultural products and a loan may be made by a trust company not to exceed thirty-five per cent of the capital stock actually paid in and surplus fund of such

trust company if all the other conditions and requirements of this statute are complied with.

Respectfully submitted

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:DA

SMALL LOAN LAW:
BANKS AND BANKING: Small Loan Companies domiciled in another state may not have appraisers or agents in this state to solicit small loans in this state without a license.

April 17, 1942

4-29

FILE 37

Hon. D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

This is to acknowledge receipt of your letter of March 28, in which you request an opinion of this department. Your letter is as follows:

> "I am enclosing a copy of a letter written to Aliber & Company, 310 Equitable Building, Des Moines, Iowa, under date of January 10, 1942, and also a copy of a letter written to five persons in towns in North Missouri whose advertisements appeared to be in violation of the Small Loan Law. It developed upon inquiry that these five persons were soliciting loans for Aliber & Company.
>
> "On February 7, 1942, Mr. J. Francis O'Sullivan, Attorney for Aliber & Company, filed a 'Statement of Facts and Brief of Law in support of Aliber & Company's Noncompliance with Missouri's Small Loan Act' in this Department and filed a copy of the Statement of Facts in your office.
>
> "I shall appreciate an opinion as to whether the manner in which Aliber & Company and its 'appraisers' or 'solicitors' are operating in Missouri is in violation of the Small Loan Law."

As stated in your letter, the attorneys for Aliber and Company of Des Moines, Iowa, have filed with our department a statement of facts and brief in support of their activities in Missouri, in which they contend that they are not violating the Missouri Small Loan Laws and are not subject to the jurisdiction of the Commissioner of Finance of

the State of Missouri.

Aliber and Company, a co-partnership located at Des Moines, is duly licensed by the State of Iowa to make small loans under what is known as the Iowa Small Loan Act, Iowa Code, Sec. 9438-F1 to 9438-F25, and it has what it terms "appraisers" located in various cities in North Missouri to take applications for loans which are submitted to the office of Aliber and Company in Iowa for their approval or rejection. The so called appraisers in Missouri advertise in the local papers in the communities where they operate, and also send out circular letters to prospective customers, which letters might be termed "sales talks" advising the prospective customers of a plan for the borrower to borrow money from this company. The rate of interest, however, is not mentioned in the advertisement nor in the circular letters. Aliber and company has submitted, with their brief and statement, specimen copies of the application for a loan which must be made by the borrower, which is in the usual and customary form made by small loan companies, together with a specimen of a note and chattel mortgage which must be executed by the borrower before he secures the money on his loan, if a chattel mortgage is given. It is stated in the application as follows:

> "The note and chattel mortgate submitted herewith shall not become effective until the same are received by the company at its office in Des Moines, Iowa, and the company's check in the sum for which the application is approved is there deposited in the mails. If this application is approved in whole or in part, we hereby appoint the United States mails as our agent and request the loan as approved be forwarded by mail in an envelope addressed to (Name of applicant)."

Also, in the chattel mortgage it is stated that:

> "This mortgage and the note secured thereby are made and executed under the laws of the State of Iowa and their validity and construction shall be determined by and under the laws of said state."

There are certain parts of the chattel mortgage which are invalid under the laws of the State of Missouri, however, it is not necessary to pass on these clauses in this opinion. In the brief submitted by the company, there are statements and also a contention that the contracts entered into by the borrowers are Iowa contracts and are not subject to the Laws of Missouri, and this point is stressed at all times.

Section 8150, R. S. Mo. 1939, of the Missouri Small Loan Act provides:

> "That no person, co-partnership, or corporation shall engage in the business of making loans of money, credit, goods or things in action in the amount or to the value of three hundred dollars ($300.00) or less, and charge, contract for or receive a greater rate of interest than eight (8) per centum per annum therefor, except as authorized by this article and without first obtaining a license from the commissioner of finance hereinafter called the licensing official."

Section 8157, R. S. Mo. 1939, provides:

> "No person, co-partnership or corporation so licensed shall make any loan provided for by this article, under any other name or at <u>any other place of business than that named in the license</u>. Not more than one place of business shall be maintained under the same license, but the licensing official shall issue more than one license to the same licensee upon the payment of an additional license fee and the filing of an additional bond for each license." (Underscoring ours)

And, Section 8168, R. S. Mo. 1939, provides that no person, co-partnership or corporation except as authorized by this chapter shall charge more than 8 per centum per annum upon

the loan, use or forebearance of money of the value of $300.00 or less.

Section 8169, R. S. Mo. 1939, provides that the person violating any of the provisions of this article shall be guilty of a misdemeanor.

In their brief they have subdivided same into four divisions, viz:

(A) All of the loans made by it were made in Iowa, not in Missouri,

(B) The "business of making loans of money" by Aliber and Company was carried on in Iowa, not in Missouri, and the loans made to Missouri residents were made in interstate commerce,

(C) The Missouri Small Loan Act, aforesaid, has no extraterritorial effect,

(D) The Missouri Act contemplates interstate lending transactions.

The writer of this opinion will not undertake to reply to each of the legal contentions made by the attorneys for Aliber and Company for the reason that he deems it unnecessary in the writing of this opinion.

It may be admitted that it is the intention of the lender to make the loan contract an Iowa contract, and thereby, the company would not come under the Missouri Small Loan Act and required to take out a license in this state. The three common conflict of law rules governing the validity of contracts provide that contracts are to be governed by the laws of (a) the place of making, (b) the place of performance, or (c) the place intended by the parties. Beale Conflict of Laws (1935) Vol. II, pages 1079-1086-1090. It is expressly stated in all the loan papers that the parties to the contract are to be governed by the laws of Iowa.

Conceding, for the sake of argument, that the contracts, according to the usual conflict of law rules, would be governed by the laws of Iowa, it does not necessarily

follow that the courts of Missouri are required to recognize and enforce such contracts, where there is an effort and intention to avoid or escape the application of the laws of Missouri.

The method of doing business indicates an intention to avoid the laws of this state. The practice of sending applications to the office in Iowa and requiring the payments to be made by having them mailed direct to the company at Des Moines, may be a needlessly cumbersome way to do business since the lender has an office in Missouri where applications for loans may be taken, and to all intents and purposes, an agent with limited authority, it would seem that he would be permitted to accept payments on loans. All of this points unerringly to the fact that the lender has adopted a method of doing business for the purpose of avoiding the securing of a license in this state and other requirements of the small loan laws of Missouri.

Missouri has a small loan law very similar to the one in Iowa which has for its purpose the regulation of this type of business and to permit one to reach across state lines in the manner herein described would thwart the very purposes of the law.

We think that the activities of the Iowa lender are such that it is engaging in the small loan business in Missouri without the required license, and this is so, even though some of the business acts are performed in Iowa and the loan contracts are formally closed and performed in that state.

We think that the language used by Mr. Justice Holmes in the case of Horning v. District of Columbia, (1920) 254 U. S. 135, 41 Sup. Ct. 53, 65 Law Ed. 185, is applicable to the situation here:

> "* * * * It may be assumed that he intended not to break the law, but only to get as near to the line as he could, which he had a right to do; but if the conduct described crossed the line, the fact that he desired to keep within it, would not help him."

If a person in Missouri makes application by mail to Aliber and Company and secures a loan, the loan would be

in keeping with the laws of Missouri and Iowa, and to all intents and purposes would be valid. However, we have a different situation here, in that Aliber and Company has so called appraisers in Missouri who keep offices, run advertisements for loans, and, by circular letters, indicate the rate of interest to be charged.

If this company may have appraisers in a half dozen cities in North Missouri, it may place one in every city in the state and as many as the business may warrant. Other companies would do likewise and we would have a condition whereby these companies could say to the Missouri authorities, "We are engaged in interstate commerce. You cannot regulate us." This would bring about a chaotic condition in the small loan business. And, accordingly, the companies could also say to the Iowa authorities, "We are engaged in interstate commerce and you cannot supervise us," a position it could not very well take. This we gather from the following statement in the brief:

> "* * * If evils ensue with respect to interstate transactions, Congress would be ready to intervene in the public interest. * * * ."

We think the above position is wholly untenable.

We think that an endorsement of the modus operandi of Aliber and Company would have a far reaching effect on the administration of the small loan law in the State of Missouri, and would also open wide the doors for small loan companies in neighboring states to have so called appraisers in the various communities of the state to solicit loans in this manner, and would, therefore, put it beyond the power of the Commissioner of Finance of Missouri to regulate or supervise the loans so made.

CONCLUSION

It is, therefore, the opinion of this department that the plan adopted and used by Aliber and Company as set forth

above, is a violation of the Missouri Small Loan Law, and it will be necessary for them to secure a license from the Commissioner of Finance of the State of Missouri in order for them to continue their operations in this state.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:NS

BANKS AND BANKING:
MUNICIPAL CORPORATIONS:
BONDS:

Savings banks may not invest in municipal bonds when the bonded debt of the city exceeds 5%, under Sec. 8102, 1939.

May 9, 1942

FILE
37

Hon. D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

This is to acknowledge receipt of your letter of recent date in which you request our opinion. Your request is found in two letters from the Bond Department of the Commerce Trust Company of Kansas City, Missouri, and we herewith set forth both letters, as follows:

1. "One of our clients recently placed his business in the hands of a trust department, and one of the requirements in the trust agreement states that the trust department may purchase Missouri municipal bonds provided said bonds conform to laws governing State Savings Banks of Missouri. We recently submitted to this trust department a block of bonds to be considered for this particular estate, and the question was raised as to whether or not this particular block of bonds could qualify as the gross debt of the city was 12%, and after deducting the water and light bonds this city had a net debt of 2% of the assessed valuation.

   "Our attention has been called to Section 8102, the fourth section thereof, which states 'such bonded debt does not exceed 5%.' We would like to have an interpretation of this section as to whether the 5% means the gross or the net debt."

2. "We have your letter of April 29, in which you ask us to give you more particular information with reference to municipal

bonded indebtedness, and we enclose herewith a circular on the city of Kennett, Missouri, which clearly brings out our point in question.

"The total bonded debt, including the $60,000 Electric Light Plant bonds, is $201,000, or 11 1/2% debt, and after deducting the Waterworks and Light Bonds in the amount of $166,000 we have a net bonded debt of $35,000, or 2% of the assessed valuation. It is common practice to deduct the waterworks and light plant bond issues, they being classed as a utility and being self-supporting. Therefore, the amount of the tax levied on the valuation would be for the purpose of paying the $35,000 bonds which were issued for other purposes. While all of the $201,000 bonds are payable from an ad valorem tax, such tax is not generally levied as the utility bonds are self-supporting and are paid from the earnings of the utility.

"We, therefore, would like to have a ruling as to the interpretation of the bonded debt as referred to in our letter - whether we should consider it as a total bonded debt or the net bonded debt."

The above letters state that the city of Kennett has a gross bonded indebtedness of $201,000; $166,000 of which are Waterworks and Electric Light Plant bonds and $35,000 are other bonded indebtedness of the City of Kennett. It is also stated that the $166,000 Waterworks and Electric Light Plant bonds are, seemingly, classified as different from the $35,000 other bonded indebtedness of the city, for the reason that utility bonds are self-supporting; that is, the debt is payable out of the earnings of the utilities, notwithstanding the fact that both principal and interest are payable from unlimited ad valorem taxes which may be levied upon all the taxable property located in the City of Kennett. In other words, they call the $201,000 the gross debt of the city, and after deducting the $166,000 Waterworks and Electric Light Plant bonds from the total indebtedness, they call the $35,000 the net debt of the city. The $35,000 was evidently

voted under the provisions of Article 10, Section 12 of the Constitution of Missouri, and the $166,000 under the provisions of Article 10, Section 12a of the Constitution of Missouri.

Section 12, supra, limits the amount of debt a city of the size of Kennett may vote to five per centum of the value of the taxable property therein, and Section 12a, supra, states that cities under thirty thousand population, of which Kennett is one, may vote "not exceeding an additional ten per centum on the value of the property therein for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same." (Underscoring ours)

After the above statement of facts, we come to the question which they ask. The trust company states that they have a trust agreement in their trust department which provides that they may purchase Missouri municipal bonds, provided said bonds conform with the laws governing savings banks in the State of Missouri.

Section 8102, R. S. Mo. 1939, sets forth the class of securities which may be purchased by savings banks in this state, and the fourth subdivision of said section, applicable herein, provides:

> "Fourth - In bonds of any city, county, town, township or school district of this state that has not defaulted in the payment of any part of either principal or interest thereof, within five years previous to making such investment; and provided, such bonded debt does not exceed five per cent."

It will be noted that municipal bonds may be purchased by said savings banks, provided such bonded debt does not exceed five per cent. This statute does not make any distinction between the different kinds of municipal bonds, whether they be general bonds voted under Section 12, Article 10, of the Constitution of Missouri, or whether they be waterworks and electric light plant bonds voted under Section 12a, Article 10, of the Constitution of Missouri.

The statute does not make any distinction between the different kinds of bonds of a city, whether they be general bonds of a city or waterworks and electric light bonds, or any other bonds. All are obligations of the city to pay, and the property therein is liable therefor, through an ad valorem tax. The Legislature intended that savings banks should not invest their assets in bonds of a city where the bonded debt exceeded five per centum.

CONCLUSION

The combined bonded indebtedness of the City of Kennett, according to the calculation of the Commerce Trust Company, is approximately 11½%. Therefore, bonds of the City of Kennett would be ineligible for investment for the trust estate mentioned in their letters, for the reason that such bonded debt exceeds five per centum, as provided in Subdivision 4, Section 8102, R. S. Mo. 1939.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:NS

COUNTY COURTS: Mortgage for county sinking funds must convey title in fee simple.

May 21, 1942

Honorable Chas. K. Hart
Prosecuting Attorney
Linn County
Brookfield, Missouri

FILE
37

Dear Sir:

We are in receipt of your request for an opinion under date of May 20, 1942.

As we understand your question, a voluntary association in the county has rented or leased a tract of land for the purpose of growing vegetables to be canned and preserved, the product to be used to furnish free lunches for indigent pupils in the schools of Linn County. The organization desires to borrow $1,000 from the sinking fund of the county, and the authority of the county court to make a loan under such circumstances has been questioned.

There are two provisions which govern the lending of money from the county sinking fund created for the purpose of the payment of any county indebtedness on bonds. They are as follows:

Section 13776, R. S. Mo. 1939 -

> "The several county courts of this state are hereby authorized and required to loan out any money in the hands of the treasurer of such county collected for the purpose of constituting a sinking fund for the payment of the principal of any indebtedness incurred, for which bonds are outstanding, or collected to pay interest

> on the bonds of such county issued, and which has not been applied in the payment of such interest, in any case where such bonds are or may be in litigation, or the validity of which is at the time being contested by judicial proceedings, or bonds maturing at the highest rate of interest that can be obtained, not exceeding eight nor less than five per cent: Provided, that no loan shall, in case of loan of sinking fund, extend beyond the maturity of the indebtedness said sinking fund is provided for and intended to pay, but shall be due and payable a sufficient time before the maturity of said indebtedness to insure prompt payment thereof."

Section 13777, R. S. Mo. 1939 -

> "When any such money shall be loaned by the county court, they shall cause the same to be secured by a mortgage in fee on real estate, free from all liens and encumbrances, within the county, of the value of double the amount of the loan, with a bond and personal security in addition thereto; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned in addition to all debts for which he is otherwise liable, and property exempt from execution."

We think that that part of the latter section which requires that the money to be loaned be "secured by a mortgage in fee on real estate, free from all liens and encumbrances, * * *" furnishes a direct answer to the question presented.

The word "fee" has been interpreted when applied to lands and conveyances to mean the largest possible estate which can be held in lands. It is synonymous with "fee simple" and "fee absolute." The Supreme Court of Missouri has consistently followed this definition. In Jecko, Trustee v. Taussig, 45 Mo. 167, we find the rule clearly expressed as follows, l. c. 169-170:

> " * * * The term 'fee' implies an inheritable estate, and the addition of the word 'simple,' forming the compound word 'fee simple,' as used in 'modern estates' and conveyancing, adds nothing to the force and comprehensiveness of the original term. (1 Washb. on Real Prop. 65-6.) And Mr. Washburn says that a 'fee simple is the largest possible estate which a man can have in lands, being an absolute estate in perpetuity;' and further, that 'an estate in fee simple conveys at once the idea of an interest of unlimited duration.' (Id. 59, 66.) Nor does the addition of the term 'absolute,' as 'fee simple absolute,' add anything to the force and meaning of term 'fee' or 'fee simple.' (Id.) In modern estates these several terms, 'fee,' 'fee simple,' and 'fee simple absolute' are substantially synonymous."

To eliminate any question, the Legislature made the further provision in Section 13779, R. S. Mo. 1939, that "every mortgage taken under the provisions of this article shall be in the ordinary form of a conveyance in fee."

CONCLUSION

It is the conclusion of this department that the county court may loan money from the sinking fund with real

estate as security only when the borrower is possessed of a title in fee simple to the land covered by the mortgage and securing the indebtedness.

Respectfully submitted

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

BANKS AND BANKING: Banks must retain original deposit tickets and ledger sheets, and photographs of same are not sufficient under Sec. 7987, R. S. Mo. 1939.

May 27, 1942

6-7

FILE 37

Hon. D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. Accompanying your letter, you enclose a copy of a letter from a certain bank, which letter is explanatory of your letter and forms the basis of your request for an opinion. We herewith set forth the letters:

"The enclosed copies of letters received from Mr. G. C. Travis, Cashier, Cotton Exchange Bank, Kennett, Missouri, are self-explantory.

"Will you please let me have your opinion as to whether the practice of returning original deposit slips to customer with monthly statement and cancelled checks, after having recorded the deposit slips on photographic film of the Recordak, would be considered to be in keeping with the provisions of Section 7987, Revised Statutes of Missouri, 1939; also if the practice by a bank of photographing the original (and only) ledger sheet on Recordak film and returning the sheet to the depositor would be inkeeping with the banking laws."

"Will you kindly advise us if the practice of returning original deposit slips to the customer with monthly statement and cancelled checks, after having recorded the deposit slip on photographic film of the Recordak would be considered to be in keeping with the provisionsof Sec. 7987 of the 1939 Revision of the Banking Laws of the

State of Missouri (R. S. 1929, Sec. 5391).

> "We read an article published recently in one of the Bank Journals that one of the leading banks in Texas has instituted this practice of returning deposit slips after having photographed them on Recordak film, and while we are not considering this practice for immediate use, if we decide that it would work to the advantage of the bank and the customer we may do so, if not in conflict with the Banking Laws."

From these letters, we understand the question to be as follows: "Whether banks may return to the customer of the the bank the original deposit slips and original ledger sheets showing the depositor's account with the bank after both have been photographed on the Recordak film." We understand that since the advent of photography of instruments, many banks have adopted the plan of photographing checks given by a customer on the bank and passing through same so that the bank may have a record of the transaction. Also, some banks, we understand, photograph many other records of the bank, including deposit slips, all for the further protection of the bank and the customers. The answer to your question is found in Section 7987, R. S. Mo. 1939, which provides as follows:

> "Every bank shall preserve all its records of final entry, including cards used under the card system and deposit tickets, for a period of at least six years from the date of making the same or from the date of the last entry thereon."

The statute quoted above is mandatory and requires that the bank preserve all of its records of final entry, including cards used under the card system and deposit slips, for a period of at least six years. We do not think that the method of photographing the deposit tickets and ledger sheets outlined in your letter is a compliance with Sections 7987, supra, which requires the preservation of the records of final

entry and deposit tickets, for the reason that when the bank delivers to the customer the ledger sheets and deposit slips aforementioned, and retaines for its own records the photographic film, it would not, thereby, have in its possession the original deposit slips and ledger sheets. Of course, there can be no objection to the bank safeguarding its own interests and the interests of its customers by the Recordak film method, outlined above, however, we think the statute requires the preservation of the original records in addition thereto.

CONCLUSION

It is, therefore, the conclusion of the department that the method of photographing the deposit slips and original ledger sheets on Recordak film and returning the original deposit slips and ledger sheets to the customer, is not a compliance with the mandatory provisions of Section 7987, supra.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:NS

PENAL INSTITUTIONS: Costs of discharge and transportation of parolees to place of conviction.

July 6, 1942

FILE
37

Hon. Frank G. Harris
Chairman
Board of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "A question has arisen in the minds of the Governor, the Penal Board and the Board of Probation and Parole, as to who has the obligation, under the law, to transport paroled prisoners from the State Penitentiary, Algoa, and inmates from Boonville, back to the counties from whence they came, or to the places where they are to go upon parole after the parole is granted.
>
> "I refer you to the latter part of Sections 9126 and 9047, R. S. Mo., 1939, which is as follows:
>
> "'And each convict so discharged shall receive, in addition to such clothing, a sufficient sum of money to transport him to the county from whence he was sentenced.'
>
> "The Penal Board follows the Statute with reference to parolees or those leaving upon commutation. It has been the custom at Algoa to have the parole officer at that institution deliver,

when paroled, all parolees to the counties from whence the inmates came or to the places to which they are to go on parole. This practice was being followed when the present law relating to probation and parole went into effect in September, 1937, and has since been followed. This procedure at Algoa was put into effect, I think, while the handling of paroles and the paroling of inmates from Algoa and the State Penitentiary was under the Penal Board. The Board, no doubt, reached the conclusion that money would be saved to the State by having the parole officer deliver parolees to their homes, instead of following the Statute and giving to them a sum sufficient to transport them to the counties from whence they came. The Penal Board may have had in mind also that it was well to have an officer accompany the parolee back to his county, and deliver him to his parents or sponsor.

"The same procedure with reference to delivering parolees to the counties from whence they came, or to their homes, is being followed at the Training School for Boys at Boonville, as that followed at Algoa.

"Since the present probation and parole law went into effect in 1937, the expense of delivering parolees from Algoa and Boonville has been paid out of the appropriation for probation and parole, and the car used by each of these officers has been paid for out of said appropriation.

"We would like to have your opinion as to which Board, under the law, has the responsibility of delivering parolees from Algoa and Boonville to the counties from which they came, and also your opinion as to whether or not the procedure followed at Algoa and Boonville is proper under the law.

> "We are seeking to know the proper method, under the law, of delivering parolees from Algoa and Boonville to the counties from which the inmates came, and whose responsibility it is to deliver them."

Section 8972 R. S. Missouri, 1939, which was a re-enactment of Laws of Missouri, 1939, provides for the establishment of the Department now known as the Department of Penal Institutions. Under that Section the following institutions have been particularly placed under that Department: The Missouri Training School for Boys, at Boonville, Missouri; the State Industrial Home for Girls, at Chillicothe, Missouri; the State Industrial Home for Negro Girls at Tipton, Missouri; the Intermediate Reformatory at Jefferson City, Missouri, and the State Penitentiary and Prison at Jefferson City. This Section is part of Article 1, Chapter 48, R. S. Missouri, 1939.

In your request your inquiry is only as to parolees, but you also mentioned Section 9047 R. S. Missouri, 1939, Article 5, Chapter 48, which does not apply to the Board of Probation and Parole. This Section partially reads as follows:

> "And each convict so discharged shall receive, in addition to such clothing, a sufficient sum of money to transport him to the county from whence he was sentenced."

The same phrase is also used in Section 9126 R. S. Missouri, 1939, Article 6, Chapter 48, which does not apply, and is not a part of the chapter which creates the Board of Probation and Parole. It is very noticeable, under the partial section set out, (Sec. 9047), that it is further provided: "They shall furnish to each convict * * ." This means the Commission of the Department of Penal Institutions, and not the Board of Probation and Parole. This section is only applicable when the convict is "discharged"

from the penitentiary, and, under Section 9126, supra, the money furnished for transportation back to the county in which the convict was sentenced, only applies to convicts "discharged" from the Intermediate Reformatory for Young Men.

Since both Sections 9047 and 9126 specifically provide that the convict shall be issued clothing of a certain description and a certain amount of money when discharged, in case of a discharge that is the only procedure that can be followed. When special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and "forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out." (Kroger Grocery & Baking Co. v. City of St. Louis, 106 S. W. (2d) 435, l.c. 439). Since upon discharge it is the duty of the Department of Penal Institutions to furnish the clothing and the money as set out in Sections 9047 and 9126, supra, the payment of this expense must be made out of the appropriation to the Department of Penal Institutions, and not the Board of Probation and Parole.

There is a wide distinction between a final discharge and a parole. This matter was passed upon in the Federal Court, in the case of Ex parte Paris, 18 Fed. Cas. 1104, 1105, where it was held:

> "'Discharge,' as used in a statute providing for the payment of fees to United States marshals in case of the discharge of a person, means an order of discharge which releases the person entirely from custody. It does not apply to the removal of a person from one place to another, or merely bringing the person up to testify or be tried. It means discharge from the custody of the law."

In a case of parole there is no release, from all custody or jurisdiction of the parole board, to the convict.

We find no provision for the return of boys discharged from the Missouri Training School for Boys at Boonville, that is, where they are finally discharged and are not paroled. Under Section 8, Article V of the Constitution of Missouri the Governor of the State has the power to grant reprieves, commutations and pardons, except for treason and cases of impeachment. By reason of this section the legislature enacted Section 4188 R. S. Missouri, 1939.

In the case of State v. Asher, 246 S. W. 911, the Supreme Court held that Section 4188, which only provides for and grants the power of pardon to the Governor, also includes the power to parole.

The Governor, in granting a parole may make such conditions and restrictions as he sees fit, if such conditions or restrictions are not illegal, immoral or impossible of fulfillment. (Ex parte Strauss, 7 S. W. (2d) 1000; Ex parte Webbe, 322 Mo. 857, 30 S. W. (2d) 612.) By reason of the above authorities the Governor may include in his parole, which is made upon the recommendation of the Board of Probation and Parole, the condition that the convict submit himself to a parole officer to be transmitted back to the county in which he was sentenced.

The authority of the Board of Probation and Parole to recommend paroles to the Governor, for convicts incarcerated in the different State penal institutions, is granted by Article 8, Chapter 48, R. S. Missouri, 1939.

Under Section 9162 the parole officers and other employees of the Board of Probation and Parole shall perform such duties as may be prescribed by such Board. As stated in your request, parole officers have been returning parolees from the Training School for Boys at Boonville, and parolees from Algoa to the place of conviction. The payment of such return should be out of the appropriation made to the Board of Probation and Parole and not out of that made to the Department of Penal Institutions.

CONCLUSION

In view of the above authorities, it is the opinion of this Department that when a convict is discharged, either from the State Penitentiary or the Intermediate Reformatory, it is mandatory that the convict be furnished the clothing and money as set out in Sections 9047 and 9126 R. S. Missouri, 1939, and they cannot be transported back to the county in which they were sentenced by a parole officer.

It is further the opinion of this Department that there is no provision for the return of a convict after discharge from the Missouri Training School for Boys at Boonville.

It is further the opinion of this Department that upon parole when the proper condition is placed in the parole by the Governor, upon recommendation of the Board of Probation and Parole, the parolee may be transferred from the Missouri Training School for Boys at Boonville, the State Industrial Home for Girls and Chillicothe, the State Industrial Home for Negro Girls, at Tipton, the Intermediate Reformatory at Jefferson City, and the State Penitentiary and Prison at Jefferson City, by a parole officer.

It is also the opinion of this Department that when a parolee is returned to the place of conviction by a parole officer, the costs of the return should be paid by the Board of Probation and Parole, but, when a convict is discharged from the penitentiary, or the Intermediate Reformatory, the clothing and money advanced for transportation to the place of conviction must be paid by the Department of Penal Institutions.

APPROVED:

Respectfully submitted

VANE C. THURLO
Acting Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

ROADS AND BRIDGES: Road overseers in counties under township organization operate under the provisions of Sections 8819 and 8820 Revised Statutes of Missouri, 1939, and not under the provisions of Section 8525 thereof.

October 16, 1942

10-23

FILED
37

Hon. Chas. K. Hart
Prosecuting Attorney
Linn County
Brookfield, Missouri

Dear Mr. Hart:

This is an acknowledgment of your request for an opinion dated October 10, 1942, relating to the duties of a road overseer in counties under township organization, which is as follows:

> "I want to know whether or not you have passed on the meaning of Section 8525 R. S., 1939, with regard as to when work shall be done on roads. It has been put up to me by the Township Board of Parson Creek Township as to whether or not the grading of public road, that is, cleaning out the ditches on the side of the road, and grading the road can be done after August first; which section has a proviso that this section shall not be construed as preventing general or special road work after August First. This seems to me to be clear conflict and the township Board of Parson Creek Township desires to do this work at this time, which of course is after August First, and persons owning property abutting on said highway are objecting to this work at this time.
>
> "If your Department has not construed this section, I will appreciate your opinion construing same, being Section 8525 R. S. 1939."

Section 8813 R. S. Mo. 1939, is as follows:

"All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

Section 8819 thereof, is in part as follows:

"It shall be the duty of the road overseer to begin his road grading and filling as soon in the spring as the weather permits, ans shall give sufficient bond to the township board to have his roads graded and worked as well as the finances of his district will permit by August 1st." * * * * * It shall be the duty of all road overseers, in addition to those duties alread assigned them, to keep all culverts and holes in the floor of bridges in his district repaired and to make an inspection of the culverts and bridges in his district in the spring and fall and see that they are kept in a safe condition and that the nails are driven down and that the dirt at the abutments is properly filled in."

Section 8820, R. S. Mo. 1939, is as follows:

"It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit, to have all brush and weeds found growing along the roadside of the public highway cut and removed during the month of August of each year, and wherever there is a square corner or a sharp turn in the road that in any way hinders progress or obstructs the view and by such obstruction endangers the life and limb of those traveling thereon, to have such corners rounded, and if necessity demands, it shal have such land as may be required to round corners condemned in accordance with the

law regulating such procedure in counties not under township organization, and he shall have the road drag or harrow used upon the public highway when the road would be improved thereby." (Underscoring ours).

Section 8833, R. S. Mo. 1939, is in part as follows:

"It shall be lawful for the county court of any county, upon the application of the township board of directors, to empower and authorize the county highway engineer of said county, under the direction of the township board of such township to survey, locate and plat the public highways of such township; and when such plat shall have been completed and approved by the township board, it shall be filed in the office of the township clerk, together with the minutes and report of such survey, to be kept by such township clerk as a part of his official records, the expenses of such proceeding to be paid out of the road fund of the township."

Section 8665 R. S. Mo. 1939, relating to the holding of annual meetings of road overseers upon call of the highway engineer, is in part as follows:

"Any overseer failing to attend any such annual meeting without reasonable excuse shall, upon complaint of the county highway engineer, be removed from office by the township board, as the case may be."

Section 8525, Article 3, Chapter 46, R. S. Mo. 1939, is as follows:

"All grading and general road work or improvements, except in the opening of new roads

> or work made necessary by a relocation of change of road, shall be done prior to August first of each year: Provided, however, this section shall not be construed as preventing general or special road work after August first."

Section 8514, Article 3, Chapter 46, R. S. Mo. 1939, is in part as follows:

> "The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered."

In view of the provisions of Sections 8813 and 8514, R. S. Mo. 1939, supra, clearly it was not the intention of the Legislature that said Section 8525, supra, should apply to and control the road overseers in counties under township organization. Section 8514, supra, and other sections of such Article - including said Section 8525 - apply particularly to road overseers in counties not under township organization.

CONCLUSION

Therefore, it is the opinion of this Department that said Section 8525, Article 3, Chapter 46, R. S. Mo. 1939, does not apply to counties under township organization. It is further our opinion that the road overseers in such counties under township organization must operate under the provisions of Sections 8819 and 8820, Article 17, Chapter 46, of the Revised Statutes of Missouri, 1939.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

SVM/mc

SCHOOLS: Approval of substitute bus driver is within provisions of anti-nepotism law; clerk of common school district cannot be removed without cause and without a hearing.

October 26, 1942

FILED
37

Mr. A. C. Hammond
Clerk of the County Court
Forsyth, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Would your office be kind enough to give this office an opinion on the following two matters:
>
> "1. The anti-nepotism provision in the Missouri Constitution prohibits School Board Members from hiring relatives of the fourth degree or less as bus drivers etc. Now can a school board hire a bus driver and then this bus driver hire a substitute who has to be approved by the board and who is related by such degree to a majority of the board or to the majority approving the said substitute?
>
> "2. Can the Clerk of a common school district be removed by the board without cause and without a hearing?
>
> "These questions are before me and the matter is causing some trouble. The County Treasurer and I need to have an opinion from you because of the matter of paying some warrants drawn under such conditions and the clerk refusing to sign them and a new clerk be appointed and the old clerk claiming to hold over."

I.

Your first question has to do with the anti-nepotism provision of the Missouri Constitution, which is Section 13 of Article XIV, and which reads as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

A school director is a public officer. It was so held in the case of State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100, wherein the court used the following language:

> "Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

The section of the Constitution there being considered was the anti-nepotism section.

It follows, therefore, that a school director cannot name or appoint a relative within the prohibited degree to render service to the school district, which is a political subdivision of the state.

Your request states that the directors require that a substitute bus driver be approved by them before he can

operate a bus. That being true, the approval of the directors is necessary to allow him to render service and receive compensation. The approval by the directors is, therefore, equivalent to an appointment or designation by the directors, and would be prohibited by the anti-nepotism provision of the Constitution.

It is a general rule of law that what a person cannot do directly under the law, he cannot do indirectly or by subterfuge. In the case of Eisensmith, et al. v. Buhl Optical Co., et al., 178 S. E. 695, the Supreme Court of West Virginia said:

> "A person * * * individual or corporation may not do by indirection what he or it is precluded from doing directly."

Likewise, in the case of State ex rel. McKittrick v. Dudley & Co., 102 S. W. (2d) 895, the Supreme Court of Missouri, in discussing the right of a corporation to practice law through its paid attorneys, said, l. c. 900:

> "'As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.'"

If the directors could appoint substitute drivers who are within the prohibited degree of relationship to them, then the effect of the anti-nepotism law would be destroyed because they could always name as the principal driver a person who is not related to them and then designate a relative as a substitute. This would be a subterfuge and a clear evasion of the anti-nepotism law.

CONCLUSION

It is, therefore, the opinion of this office that school directors who require that their approval be given

to a substitute bus driver before he can operate a bus, cannot approve a substitute bus driver who is related to such directors within the fourth degree, either by consanguinity or affinity.

II.

Your second question has to do with the method and procedure for the removal of the clerk of a common school district.

A clerk of a school district is a public officer. The same reasoning which holds that a school director is a public officer would compel the conclusion that the clerk of the district is likewise a public officer. His office is created by law and he exercises some governmental functions. (See State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100.)

Section 10442, R. S. Missouri, 1939, provides for the appointment of a clerk of a common school district. It reads, in part, as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. * * * * "

While no term is specifically provided in the foregoing section, yet said section requires that the clerk shall enter upon his duties on the fifteenth day of July following his appointment. The section requires the appoint-

ment of a clerk after each annual school meeting. Therefore, it must follow that the term of the clerk is from the fifteenth of July of one year to the fifteenth of July of the following year.

Section 10424, R. S. Missouri, 1939, reads as follows:

> "The board shall have power to remove the district clerk from his office for dereliction of duty and appoint another in his place, to whom the former incumbent shall immediately deliver his books and papers pertaining to the office."

The right to remove public officers from office and the correct procedure in such cases has been before the courts of this state on numerous occasions. The rule as to whether the appointing power has the right to remove an officer at will has been definitely established. The rule was stated in the case of Horstman v. Adamson, 101 Mo. App. l. c. 124, as follows:

> " * * * The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results: These principals have been frequently recognized in numerous decisions,

> alike by the Federal courts as well as by the courts of many States, including our own." (Citing numerous cases.)

Likewise, in the case of State ex inf. Attorney General v. Hedrick, 294 Mo. 21, the Supreme Court of Missouri said, l. c. 64:

> "If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. (Throop on Public Officers, sec. 354; Mechem's Public Officers, sec. 445.) The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own;' i. e. he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this State. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. l. c. 502, it was said: 'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' This decision was fully approved by this court on appeal. (88 Mo. l. c. 145.) In another particular this case was disapproved in State ex rel. v. Johnson, 123 Mo. l. c. 51, but the language above set out was approvingly quoted and the rule it states was applied as decisive of the case then under consideration. The same rule was followed in State ex rel. v.

> Alt, 26 Mo. App. l. c. 676. In this case a formulation of the rule by Thayer, J., then on the circuit bench, was approved. Other decisions are in point. (State ex rel. v. Brown, 37 Mo. App. l. c. 204; Horstman v. Adamson, 101 Mo. App. l. c. 124, 125, and cases cited; State ex inf. v. Crandall, 269 Mo. l. c. 51.) A like principle is approved in State ex rel. v. Stonestreet, 99 Mo. l. c. 377; State ex rel. v. Hawes, 177 Mo. l. c. 378. The rule is said to be 'universal' in 29 Cyc. pp. 1370, 1371, 1408; and 'general' in 22 R. C. L. secs. 266, 267, pp. 562, 563; and 'uniform' in note to Wright v. Gamble, 136 Ga. 376, in Ann. Cases, 1912C, p. 374, et seq. Numerous authorities are cited in this note--State, Federal and English. Others may be found in note to Trainor v. Board (Mich.) 15 L. R. A. 95. * * *"

Again, l. c. 65, the court held:

> "It thus appears that when the Legislature provides for the appointment of one official by another, if it does nothing more, adopts no means to forestall it, the act authorizing the appointment will inevitably raise the power to remove at pleasure. * * * *
>
> "This power may be defeated by specific provisions which destroy it or by the fixing of a tenure, which is inconsistent with it. * * * * *"

Under the foregoing authorities it must be clear that the right of the appointing power to remove a public officer at will is destroyed if either one or both of two situations prevail. The first is, if the officer has a definite term

provided by law, and the second is, if the law has placed specific limitations on the right of the appointing power to remove such officer.

In the case of the clerk of a common school district, the law actually provides a term for his tenure of office. While not naming such period a term, the effect of the law is to create a tenure of one year, from July 15th of the year of his appointment to the following July 15th, when a successor would automatically enter into the office. Therefore, it would seem that since the clerk of the school district has a definite term of office, the school board could not remove him at will.

Furthermore, Section 10424, supra, places a further limitation upon the right of the board to remove the clerk. It provides that the board may remove him "for dereliction of duty." Therefore, the law has not conferred the simple power to appoint upon the board, but with that power of appointment has also provided when the clerk may be removed. Under the law the clerk has many important duties to perform in connection with the administration of the public schools, and undoubtedly the Legislature contemplated that he should be a more or less established officer for his term. We think the Legislature has, therefore, limited the power of the board to remove the clerk to a finding by it that he has been derelict in his duties.

In the case of Hudgins v. School District, 312 Mo. 1, 10, the Supreme Court used some language which at first glance might seem to refute the above principle. In that case the court was discussing the right of a board to appoint a clerk temporarily and the legality of the acts done by such temporary clerk. In discussing the office of clerk the court mentioned several statutes, including the statute regarding the removal of the clerk, and in that connection said:

> "While the authority of the board to remove him (Sec. 11217) is unqualified, it is solely a power of the board and bears no such relation to the statutes defining his powers and duties as to change their character."

The foregoing statement might indicate that the court was holding that the authority of the board to remove a clerk is unqualified or unlimited. However, from a reading of the facts in the case in connection with the question which the court was discussing, it will be seen that the court was in no way passing upon the right of the board to remove the clerk. The court was considering the validity of the acts of a temporary clerk, and there was no occasion for a holding as to when or how the board could remove a clerk. That question was not in the case, and the foregoing language, if holding that the power of the board to remove the clerk is unlimited, is certainly dictum and not controlling.

It is also well established that where the power of removal of a public officer is limited, such officer cannot be removed except upon charges made and a hearing had. The rule is stated in State ex rel. Denison v. City of St. Louis, 90 Mo. 1. c. 22, as follows:

> "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. Field v. Commonwealth, 32 Pa. St. 478; Ex parte Hennen, 13 Peters, 230. But where the appointment is during good behavior, or where the removal must be for cause, the power of removal can only be exercised when charges are made against the accused, and after notice, with a reasonable opportunity to be heard before the officer or body having the power to remove. Gaskin's case, 8 Term Rep. 209; Field v. Commonwealth, supra; State v. Bryce, 7 Ohio St. (part 2) 82; Dillon on Mun. Corp. (5 Ed.) secs. 250 to 254."

This rule has been uniformly followed in this state.

CONCLUSION

It is, therefore, the opinion of this office that the clerk of a common school district cannot be removed by the board without cause and without a hearing on charges placed against him.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

ELECTIONS: Votes shown by tally sheets should be counted rather than those shown by certificate of judges and clerks, where there is a discrepancy, but when canvassers have once tabulated the votes and said tabulation has been certified in to proper authorities, canvassers cannot retabulate the votes, nor can the county clerk certify either an amended or new abstract of the votes.

November 19, 1942

11-30

FILED
37

Mr. Chas. K. Hart
Prosecuting Attorney
Brookfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 12, which reads as follows:

"At the recent election, held on the 3rd day of November, 1942, Wayne W. Cowan was a candidate for the office of Representative. The ballots were canvassed officially by the County Court on the 6th day of November, 1942.

"I have the affidavit of Wayne W. Cowan, which I hand you herewith, in which he states that he was present at that count and of his own knowledge knows that the County Court failed to count the tallies in all of the Tally Books.

"He states that there were differences found in some of the books canvassed between the number of tallies and the number reported. He insists that the County Court should have counted the tallies in all of the books, and as these books are now in the hands of the County Clerk they may still be counted.

"Please let me know whether you have passed on the duties of the County

Court in this regard, and if so favor me with a copy of your opinion, and if not will appreciate an opinion from your department."

As to whether or not the canvassers should certify the number of votes as shown by the tally sheets or as shown by the certificate of the judges and clerks of the precinct, we think Section 11616, R. S. Missouri, 1939, settles the question. Said section reads as follows:

"When the judges of election of any voting precinct in any county in this state, or in any city in this state not within a county, in casting up the totals of the votes cast in such precinct at any primary or general election, shall make an error giving to any candidate for any district office voted for entirely within such county, or such city, a greater or less number of votes than such candidate actually received, as shown by the tally sheet of such precinct, it shall be the duty of the county clerk of such county, or of the board of election commissioners of any such city, and the board of election commissioners in all cities of this state having such board, before certifying to the nomination or election of any candidate for a county office, or for a district office voted for entirely within such county, or such city, to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candi-

> dates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

The foregoing section specifically provides that the number of votes as shown by the tally sheets shall prevail as against the number of votes certified by the judges and clerks.

Your second question is whether or not the county clerk may yet correct his certificate to correspond to the votes cast as shown by the tally sheets.

It is a general rule of law that when an officer has exercised a power given to him by law, he cannot re-exercise that power or correct his acts unless the law specifically gives him such power of amendment or correction. The rule is stated in 46 C. J. 1033, Sec. 292, as follows:

> "In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes his determination discretionary."

In your case Section 11616, supra, left no discretion to the county clerk as to which figure should be used in arriving at the correct number of votes which had been received by candidates. He exercised the duty which he had in that regard. We assume that he has carried out the provisions of Section 11463, R. S. Missouri, 1939, and has before now certified to the secretary of state an abstract of the votes as determined by the canvassers in his county. That being true, there would be no way by which the county

clerk and his associate canvassers could now retabulate the votes and send a supplemental or corrected abstract to the secretary of state.

CONCLUSION

It is, therefore, the opinion of this office that the votes shown by the tally sheets should be counted rather than those shown by the certificate of the judges and clerks, where there is a discrepancy, but that when the canvassers have once tabulated the votes and said tabulation has been certified in to the proper authorities, the canvassers cannot retabulate the votes, nor can the county clerk certify either an amended or new abstract of the votes.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

SCHOOL FUND MORTGAGE: Personal taxes of mortgagor cannot be deducted from surplus proceeds of foreclosure sale.

November 30, 1942

12-1

FILED
37

Mr. Leo J. Harned
Prosecuting Attorney
Sedalia, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date, which reads as follows:

> "I would appreciate an opinion on the following question to-wit:
>
> "Where a man had a School Fund Mortgage on his property and the property was foreclosed, and where the party owed personal taxes which were delinquent, can the surplus from the foreclosure of the School Fund Mortgage be applied by the county court to the payment of the delinquent personal taxes?"

We assume, of course, that the school fund mortgage which was foreclosed contained the provisions required by Section 10385, R. S. Mo. 1939. That being so, said mortgage provided that upon default in payment of the debt secured, "the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, * * * proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, * * *."

Section 10387, R. S. Mo. 1939, reads as follows:

> "Whenever the principal and interest, or any part thereof, secured by mort-

> gage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

From the two sections above quoted from, it appears that the authority of the sheriff is to sell the mortgaged premises to satisfy the debt secured by the mortgage and also to pay the costs of the foreclosure. He is given no authority to pay anything further out of the proceeds of the sale. His position in foreclosing a school fund mortgage is similar to that of a trustee under a deed of trust.

Of course, personal taxes do not constitute a lien against the land of the person against whom such taxes are assessed. It has been held in this state that the trustee under a deed of trust cannot even pay taxes against the mortgaged land out of the proceeds of a foreclosure sale. See Scott v. Shy, 53 Mo. 478. This case held that land sold at a foreclosure sale passed to the purchaser subject to all incumbrances prior to the one under which the sale was made. This doctrine was followed in the very recent case of Drannek Realty Co. v. Nathan Frank, Inc., 346 Mo. 187, 139 S. W. (2d) 926.

In the case of Schmidt v. Smith, 57 Mo. 135, 137, the Supreme Court said:

> "A trustee holding the naked legal title cannot, on a sale of the property, use part of the purchase money to satisfy taxes or prior incumbrances,

> unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances."

To the same effect is the case of Brown v. Bland, 229 S. W. 448 (Mo. App.).

In the foregoing case of Schmidt v. Smith, the taxes which had been deducted by the trustee from the proceeds of the foreclosure sale were taxes which were due a city, but it was agreed by the parties that under the law the taxes did not constitute a lien upon the property. In discussing the case, the court used the language above quoted and also said:

> "That the sale realized more than enough to discharge the whole debt, cannot alter the case or affect the principle. When the amount secured was paid off, the residue belonged to the grantor in the deed.
>
> "And more especially would this be the case here--where the taxes constituted a simple debt against the owner, and there was no lien against the property. No man can pay another person's debt without a request to do so, and then charge him therefor."

In the case of a sheriff foreclosing a school fund mortgage, he would have no authority other than that given him by the statutes. As pointed out above, nothing in the statutes authorizes him to pay any other than the debt secured by the mortgage and the costs of the proceeding. That being true, he would not even have the right to pay the taxes against the property itself, since his sale would pass the property subject to prior incumbrances, one of which would be taxes due. If he could not pay a prior lien against the

land, it would seem to follow that he could not pay a personal debt which the owner of the land owed.

If the school fund mortgage contained provisions authorizing the sheriff to pay taxes and other items out of the proceeds of sale, another question would be presented. We have assumed in this opinion that the school fund mortgage merely provided for the payment of the debt and costs of the foreclosure.

CONCLUSION

It is, therefore, the opinion of this office that the surplus from the foreclosure of a school fund mortgage cannot be applied to the payment of delinquent personal taxes owed by the mortgagor.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

CONSERVATION COMMISSION:
STATUTORY CONSTRUCTION: Construction of regulation #37 - (k) pertaining to resident State Wholesale Dealer's Permit.

January 15, 1942

F-15

FILE
38

Honorable Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads as follows:

> "I would like to know if under Sec. (k) Page 12, wildlife and forestry code of Missouri for the year 1941, if one who operates a fish market and sells fish to a restaurant is compelled to purchase a Resident State Wholesale Fish Dealer's Permit of $25.00.
>
> "The person in question has a wholesale and retail market, however, he does not ship any fish."

The regulation you referred to is now known as Section 37, subdivision (k), page 29 of the Wildlife and Forestry Code for 1942, which reads as follows:

> "To possess, buy, sell, transport and ship fish and frogs for wholesale purposes, as provided herein, upon the payment of a resident wholesale fish dealer's permit fee of twenty-five dollars ($25.00)."

The courts have defined wholesale dealer and wholesaler. The court, quoting approvingly from Veazey Drug Co. v. Bruza, 37 Pac. (2d) 294, l. c. 296, said:

> "A wholesale dealer is one whose business is the selling of goods in gross to retail dealers, and not by the small quantity or parcel to consumers thereof. State v. Lowenhaught, 79 Tenn. (11 Lea) 13; Webb v, State, 79 Tenn. (11 Lea) 662."

The court in Great Atlantic & Pacific Tea Co., v. Cream of Wheat Co., 227 Federal 46, defined wholesaler in these words:

> "A 'wholesaler' is one who buys in comparatively large quantities, and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a 'jobber,' a sort of middleman, or to a 'retailer,' who sells to the consumer. The quantities bought by the wholesaler may vary from a fraction of a car load to many car loads; it being the character, not of his buying, but of his selling, that marks him as a wholesaler."

A wholesale dealer has often been defined as one whose business is to sell goods in gross as contra-distinguished from one who sells in small quantities. It is common knowledge among business men that restaurants and eating establishments purchase practically all supplies at wholesale prices, that very few commodities are they required to purchase at consumer's cost. The usual procedure is that the restaurant owner purchases supplies at the same cost as a retailer.

The permit in question is that of a State Wholesale Fish Dealer. The fact that he does not ship fish does not lessen his

obligation requiring him to purchase such permit. One of the primary rules of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent which should be done from words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. (City of St. Louis v. Pope, 126 S. W. (2d) 1201.) You state that this party operates both wholesale and retail business.

Therefore, it is the opinion of this Department, in view of the foregoing, that such party is required to purchase a resident State Wholesale Dealer's Permit.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH:EAW

CANCER COMMISSION: Has no authority to convey right-of-way for street.

February 20, 1942

2-25

FILE 38

Miss Dorothy A. Hehmann
Executive Secretary, Cancer Commission
5715 Washington Boulevard
St. Louis, Missouri

Dear Madam:

This will acknowledge receipt of your letter of February 16, 1942, in which the following request for an opinion is made:

> "This office is in receipt of a letter from A. D. Sappington, attorney-at-law, Columbia, Missouri, reading as follows:
>
> > 'At the time that the City deeded the property to the State for the construction of the Cancer Hospital it was proposed that the street on the east side of the hospital tract be widened and opened as a street. The City is now in the process of obtaining the right of way for this street and it will be necessary for the City to have a deed from the Cancer Hospital Commission for 20 feet along the east side of the Cancer Hospital tract. Will you please advise me if this is satisfactory and I will prepare a deed conveying this tract to the City for street purposes.'
>
> "At the time the property on which the Cancer Hospital is erected was deeded by the City of Columbia to the State for that purpose, there was some discussion about the opening of a street on the east

side of the hospital tract. For your information, the hospital is bounded on the south by Highway 40. Running at right angles to Highway 40 and on the south side thereof is North Garth Avenue. If this avenue were projected northward across Highway 40, according to Mr. Sappington, it would require the use of about 20 feet of the east side of the tract now used by the Cancer Hospital.

"At the time this property was deeded to the State the Cancer Commission was agreeable to the construction of this street, having the thought at that time that they could use this street as their means of entrance to the hospital grounds from the east. As the street was not constructed at that time, the hospital was required to build a road from the hospital building to the southern end of its tract entering into Highway 40.

"Consequently no particular importance as far as hospital use is concerned could be attached to the extension of North Garth Avenue, as the present road from the public highway through the hospital grounds is adequate for all purposes.

"So that you are conversant with all of the facts, your office is requested to bear in mind that the Cancer Hospital property was a gift of the City of Columbia, and was purchased merely for the purpose of making the gift as the Cancer Commission required that the site of the hospital be within the corporate limits of the City of Columbia. A special bond election to authorize the purchase was had in Columbia, and the Cancer Commission has at all times received the

> utmost of cooperation from the City of Columbia.
>
> "It is the thought of the Commission that the deeding back of the 20 foot strip on the eastern end of its property to the City of Columbia would in no wise effect the efficiency of the hospital or its administration. The Commission, however, realizes that this property is the property of the State of Missouri, and what legal steps would be necessary to revest title to this 20 foot strip in the City of Columbia for street purposes, are, of course, unknown to us, and we will, therefore, ask your office to kindly advise us the legal position that should be taken by the Cancer Commission in its reply to Mr. Sappington's communication."

The laws of the State relating to the Cancer Commission and the State Cancer Hospital are contained in Chapter 125, Revised Statutes of Missouri, 1939, which were enacted by the 59th General Assembly in 1937. The Commission was authorized to establish the hospital; the Commission further has power to appoint the medical staff of the hospital, to select and fix the compensation of employees, to make rules and regulations for the conduct and discipline of the hospital, to establish clinics, and do other things relating to the operation of the hospital. There is no authority conferred upon the Commission by any of the provisions of Chapter 125, R. S. Mo. 1939, to convey property. A search of the statutes relating to property of the State fails to reveal any law which would authorize the Cancer Commission to execute any conveyance.

This office fully appreciates the cooperation the inhabitants and officers have given in the establishment of the Cancer Hospital.

The Cancer Commission was created by statute and derives all of its authority from the statutes. In the

absence of a statute authorizing the Commission to convey property, there is no action which the Commission can take to grant to the City of Columbia the strip of ground for street purposes.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

COUNTY AND SPECIAL ROAD DISTRICTS: Who shall pay special road districts' part of publishing county financial statement.

March 2, 1942

3-14

Honorable Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

FILE
38

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 13, 1942, which reads as follows:

> "Will you kindly advise who should pay Special Road district's part of publishing County Financial Statement.
>
> "In other words, should each special road district pay their proportionate part."

Your letter does not disclose what special road district you have in mind. However, from what information the writer can gather as to the special road district in your community I find Pascola, Bragg City and Little Prairie were all formed under the Eight Mile Road District Act, now known as Article 10, Chapter 46, R. S. Missouri 1939. Therefore, in rendering this opinion we have in mind that such road district referred to in your letter to be organized under this same article.

In construing statutory provisions one of the cardinal rules is to construe all provisions which are in pari materia together to determine the legislative intent and then give it that construction. In the case of State ex rel.

McKittrick vs. Carolene Products Co., 144 S. W. (2) 153, l. c. 156 the court said:

> "* * * * *It is our duty to keep the legislative intent in mind, if it can be ascertained, and the whole act, or such portions thereof as are pari materia should be construed together. * * * * * * * * * * * * * * *"

Therefore, we shall look to the statutes and endeavor to construe same.

Section 13827, R. S. Missouri 1939, provides that a detailed financial statement of the county for the year ending December 31, preceding, shall be made and published by the county court. Among other requirements as to what said financial statement shall contain we find the following requirement:

> "On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding. Said statement shall show * * * * * * * * * * * * * *

court shall pay the clerk and publisher for preparing the statement and publishing same and further provides that the person preparing said statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor. The same section further provides that any part not chargeable to any specific fund shall be paid from the fund from which officers salaries are paid. Section 13828, supra, reads in part as follows:

> "The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this section. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, and no

> pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor: Provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid..* * * *

> districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

In support of this see State ex rel. Moberly Special Road District vs. Burton, 266 Mo. 711 and State ex rel. vs. Barry County, 302 Mo. 280.

The above provision and authority is sufficient proof to show that the county court has no regular custody of any funds belonging to said special road district, but upon application of

the commissioner of said special road district the county court must draw a warrant for such moneys in the county treasury, payable to said commissioner or the special road district treasurer. Furthermore, Section 8699, R. S. Missouri 1939, requires the board to make an annual report or settlement with the county court showing all funds received and the purpose for such expenditures, also a copy of said settlement shall be filed with the city clerk and said settlement may be published in the same newspaper by the city council at the expense of the city and to be paid out of the city treasury. Section 8699, supra, reads as follows:

> "The said board shall make an annual settlement with the county court at the August term thereof, which settlement shall contain a full and correct itemized statement of all moneys received and from what sources received and for what purposes the same has been expended, giving each particular item, and shall be subscribed and sworn to by at least two members of said board before some officer authorized by the laws of this state to administer oaths, a copy of which settlement shall be filed with the city clerk, and may be published in some newspaper published in said road district in the discretion of the city council, the expenses of which shall be paid out of the city treasury. Any one or more of said board of commissioners failing to perform the duties required by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

Therefore, it is the opinion of this Department that since the county court does not have in its custody funds belonging to the special road district, there is no specific

fund whereby the county court may pay for this expense of preparing and publishing the financial statement of the special road district as required under Section 13828, supra, and since under Section 8699, supra, the city is required to pay for a settlement upon publishing a financial statement of the special road district it certainly was the intention of the legislature that such expenditure shall be paid by the county court out of the fund from which are paid officers' salaries.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:EAW

CANCER HOSPITAL:

STATE CANCER COMMISSION:

Cancer Commission is not liable for damages in tort nor can it pay for damages occasioned by the negligence of one of its employees.

March 3, 1942

3-5

Miss Dorothy A. Hehmann
Executive Director
State Cancer Commission
3713 Washington Boulevard
St. Louis, Missouri

FILE
38

Dear Miss Hehman:

This will acknowledge receipt of your letter of February 17, 1942, as follows:

> "Recently one of the automobiles owned and operated by The Ellis Fischel State Cancer Hospital while being used on state business was involved in an accident, resulting in property damage to the car belonging to a private individual.
>
> "We understand it is charged the accident was due to the negligence of the hospital employee. We are desirous of an opinion from your office as to:
>
> "1. The legal liability of the hospital, that is to say of the Cancer Commission as a state agency, in cases where injuries and damages result from the negligence of an employee of the Commission while in performance of his duties.
>
> "2. The authority of the Commission to make reimbursement for damages or injuries caused under such circumstances."

Miss Dorothy A. Hehmann ~~(2)~~ March 3, 1942

The State Cancer Commission consists of four persons appointed by the Governor and is created by the provisions of Chapter 125, R. S. Missouri, 1939. Its function was to establish and operate a state owned and maintained institution known as the "State Cancer Hospital."

In Bush v. State Highway Commission, 46 S. W. (2d) 854 (Mo. Sup.) the Highway Commission had been sued. Bush, the plaintiff, had sued for personal injuries sustained and demolition of his automobile, alleged to have been caused by collision with a truck of the Highway Commission upon the highways. Plaintiff alleged that his injuries and the destruction of his automobile were the direct result of the negligence of an employee of the Highway Commission. Defendant demurred to plaintiff's petition, and the trial court sustained the demurrer. Thus it stood admitted that the employee of the Highway Commission was at fault, and that his negligence was the cause of the accident. The court, in passing upon this case, first laid down the rule that (l. c. 857):

> "'* * * the state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment.'
>
> *
>
> "The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authority. * * * * * * *."

The court then said, l. c. 858:

> "* * * 'Let us consider, therefore, in what manner the state highway commission should be classified. It was created by

> a legislative enactment in 1921 (Laws 1921, 1st Ex. Sess. p. 132). It consists of four members appointed by the Governor. Its duties, generally stated, are the construction, improvement, and maintenance of highways; and to that end auxiliary power is conferred necessary to the performance of the main purpose of the creation of the commission (section 14, Laws 1921, 1st Ex. Sess. p. 137). Created by legislative enactment, and clothed with powers therein defined, through the appointment of the Governor, under all recognized rules of construction it is, when properly classified, a subordinate branch of the executive department.' * * * *.'"

It was held, l. c. 858:

> "* * * It thus having been determined that the commission is a subordinate branch of the executive department, it is not liable in tort for the acts of its agents and employees * * *."

There is no essential difference between the Cancer Commission and the Highway Commission so far as the source of its authority and for whom it acts. We think said Cancer Commission is also a subordinate branch of the executive department.

Therefore, in answer to your first question, it is our opinion that no liability is imposed on the State Cancer Commission for injuries or damages resulting from the negligence, while engaged in performance of their duties, of its agents and employees.

Your second question seems to contemplate an answer, viewed from the standpoint of the authority of the Commis-

sion to pay such damages or injuries even though there is no legal liability to do so.

Section 19, Article X of the Constitution provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * * * * * * * *; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. * * * * * * * * * * *." (Underscoring ours)

The appropriation to the Cancer Commission for the 1941-42 biennium appears in Laws of 1941, page 187, Section 17. That section pays heed to the Constitution by specifying the object to which the money appropriated is to be applied, as follows:

> "For operation of Cancer Hospital, including Personnel, Service, Addition, Repairs and Replacements, Operation, and all other necessary expense . . . . . .$442,730.00"

None of the purposes there enumerated include the payment of damages and injuries caused by negligent acts of the employees of the Commission.

In State ex rel. McKinley Pub. Co. v. Hockman, 282 S. W. 1007 (Mo. Sup.) it was expressly held that money could

not be paid out for a purpose not specified in the appropriation act. The court said, l. c. 1013:

> "* * * under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose. * * * * * * * * *."

Further, under no circumstances, could such items as these be paid because Section 46, Article IV, of the Constitution expressly provides that:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: * * * * * * * * * * *."

Therefore, it is our opinion that the Cancer Commission has no authority to pay for damages or injuries occasioned by the negligent acts of its employees.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General
LLB/rv

BURIAL ASSOCIATION: Mayes Burial Association Plan is a plan for insurance business and not a non-profit benevolent society.

- -

April 4, 1942 4-15

Hon. Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

FILE 38

Dear Sir:

Sometime ago you wrote this office requesting an opinion as follows:

> "I have been informed that you have filed an information in the nature of quo warranto against a burial association in Barry County, which has been operating on an assessment plan and issuing policies. A ruling on this character of association would not clear up matters in my county as burial associations here have reorganized under a new plan, a printed copy of which I herewith enclose.
>
> "As I understand the law, where a society is formed to furnish relief to its members out of mutual contributions without profit, it is not a business enterprise. I call your attention especially, to the following cases:
>
> Barbaro v. Occidental Grove, 4 Mo. App. 429.
> Kuhl v. Meyer, 35 Mo. App. 206.
> Froelich v. Asson, 93 Mo. App. 383.
> Blanchard v. Hamblin, 162 Mo. App. 242.
> 5 C. J. Page 1335.

> "Kindly furnish me at the earliest date possible, your opinion as whether the enclosed plan conflicts with any statute in this state and oblige."

The reply to your request has been delayed because of the large amount of business in the office and the amount of study required to prepare a reply to your question. The plan was apparently evolved for the purpose of providing a substitute for the type of burial societies outlawed by the decision of the Supreme Court in the case of State ex inf. Williamson v. Black, 145 S. W. (2d) 406, and a great deal of thought has gone into it.

The insurance code of the State applies alike to all persons, corporations and associations doing an insurance business in the State.

Section 6003, Article 10, Chapter 37, R. S. Mo. 1939, provides:

> "No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; a copy of which certificate, certified by the superintendent, and issued only upon the request of the president or secretary, or other chief officer of the company, or of a general agent of the company for this state, notice of whose appointment has been filed in the department, shall be held by every agent or solicitor for such company doing business for such company within

> this state, and such copy shall, in some convenient and distinct manner, set forth the name of the person, agent or solicitor for whose use it is issued: Provided, however, that where two or more persons comprise a firm doing business at the same place it shall be sufficient if one copy of said certificate, certified by said superintendent, shall be issued in favor of said firm, and one license fee only collected therefor. Every such company shall be required to procure annually for the use of its agents and solicitors, copies of the renewed certificate of authority provided for by law. The superintendent of insurance for cause shall have the authority to refuse to issue a license to an agent or may suspend or after 15 days' notice of his intention to do so given in writing to the agent and the company represented by such agent revoke any such license after a hearing before the superintendent of insurance. If the ruling of the superintendent of insurance be adverse, then, within thirty days after receiving notice of the revocation, suspension, or refusal to license, the person aggrieved shall have the right to petition any court of record of the county wherein the applicant resides to require said superintendent of insurance to show cause why the license so revoked, suspended, or refused, should not be reinstated or issued."

This section, as you will observe, provides "no company shall,"etc. In the case of State v. Stone, 118 Mo. 388, the Supreme Court held Section 5710, R. S. Mo. 1889 to apply not only to corporations but to individuals and associations. From this case we quote at length, beginning at l. c. 397:

"The use of the word 'company' in section 5910, Revised Statutes, 1889, which provides that no company shall transact in this state any insurance business, unless it shall first procure from the superintendent of insurance department of this state a certificate stating that the requirements of the insurance laws of the state have been complied with, authorizing it to do business, we have no doubt was simply because the business of insurance in this state is almost all done by incorporated companies. It should be read in connection with the following section and as including both companies and association of individuals. The letter of the section must yield to the evident intent of the legislature as deduced from the whole act in regard to insurance taken together, giving due consideration to the object of the act, and the fact that it is intended to regulate the entire system of insurance within the state. Perry County v. Jefferson County, 94 Ill. 214; Railroad v. Trustees, 43 Ill. 303.

"Section 5793, Revised Statutes, 1889, provides that the insurance department shall be charged with the execution of all laws now in force, or which may be hereafter enacted, in relation to insurance and insurance companies doing business in this state. Section 5801 provides that it shall be the duty of the superintendent of the insurance department 'to file in his office and safely keep all books and papers required by law to be filed therein, to issue certificates of authority to transact business in this state to any companies who have fully com-

plied with the laws of this state in the organization of insurance companies, and the transaction of the business of insurance, etc. Section 5802, makes it his duty to furnish to every insurance company doing business in this state blanks on which to make its annual report; while section 5805 provides for an examination by the commissioner of any insurance company incorporated or doing business in this state, and section 5807 provides for the payment of certain fees to be paid by such insurance companies.

"The whole of article 2, Revised Statutes, 1889, in regard to life and accident insurance uses the words company or corporation, and in no place does it make use of the word individual, and if taken by itself, it must be conceded that the various provisions therein contained relate to incorporated companies doing an insurance business in this state, and not to individuals or an unincorporated association of individuals. The first section of article 5, of the same chapter, being section 5910 of the Revised Statutes of 1889, is an old section brought down from the Revised Statutes of 1879; and, standing alone, it also relates to, and contemplates, incorporated companies, and not individuals or an unincorporated association of individuals. But the next section, as amended and carried into the Revised Statutes of 1889, provides that 'No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri, unless he or they shall first fully comply with all the provisions of the law of this state governing the law of insurance.'

"This section in express terms makes the provisions of article 2 applicable to an individual or an association of individuals doing an insurance business. The argument that section 5916, upon which this information is founded, should be disregarded, so far as it applies to a person or an unincorporated association of persons, because the law points out no method by which a person or such an association can procure a certificate to do business, is not well taken. The argument is based upon a false assumption; for, according to section 5911, an individual or such an association of individuals may, and indeed must, first comply with the laws governing the business of insurance, meaning, in case of life and accident insurance, the provisions of article 2. It is true that some of the provisions of that article can have no application to an individual doing insurance business, as, for instance, those relating to the organization of insurance corporations; and in other instances designated officers of the insurance corporation are required to do certain things. All these things can be done by the individual or the association of individuals proposing to do an insurance business. There is no difficulty whatever in this respect, and the indiviual or association proposing to do an insurance business can make the required deposits and do the other things necessary to procure a certificate to do such business.

"The evident intent of the legislature as shown by the sections of the statute quoted, was to regulate and systematize the business of insurance in this state, and that it was never its purpose to require strict observance of its statutory behests, by corpora-

> tions and companies, doing business in this state, and to require nothing whatever of individuals engaged in the same business. On the contrary, it is manifest that the intent was to require of them the same compliance with the law that is required of corporations and companies, and if we are correct in this position, while conceding that the offense with which the defendant is charged is penal in its nature, and that in such case a strict construction of the statute is required as is held in Com. v. Carroll, 8 Mass. 490; State v. Brady, 9 Humph. 74; Hamuel v. State, 5 Mo. 260, and Bishop on Statutory Crimes, sec. 220; yet it is not proper or reasonable to construe it strictly for the mere purpose of defeating it when the intent is plain as in this case."

Section 6003, supra, has the same language as Section 5910, R. S. Mo. 1889.

As the insurance code applies to individuals and associations as well as corporations, it is necessary to determine first whether or not the plan enclosed by you is a plan for doing an insurance business, and, second, if it is a plan for doing an insurance business, whether or not it comes under any of the exceptions to the insurance laws.

The cases you cite do not seem to shed any light upon your question. The case of Barbaro v. Occidental Grove, 4 Mo. App. 429, was a case in which enforcement of an agreement was sought, the court holding the paying of a death benefit to the family of a deceased member as one of the incidents of membership was not the doing of an insurance business, inasmuch as the defendant corporation provided in its by laws that 'aiding the families of deceased members' was one of the objects of the corporation. The defendant apparently was a benevolent and fraternal society similar to those authorized

by Article 13, Chapter 37, R. S. Mo. 1939. And all of the by laws of the organization are not included in the case. The sole purpose of the "Burial Association Plan" is to secure for its members, graves, burial supplies and funeral services as a non profit, non-commercial voluntary association.

The case of Kuhl v. Meyer, 35 Mo. App. 206, did not raise the question of the right of persons to voluntarily associate as an unincorporated voluntary benevolent association. While plaintiffs in the action alleged they were the trustees for said voluntary, unincorporated benevolent association, no question was before the court of the right of such individuals to so associate.

The case of Froelich v. Asson, 93 Mo. App. 383, involved an association of musicians, persons all engaged in the same profession. The "Burial Association Plan" submitted is not limited to any particular business, profession or trade, and the payment by the Musicians Association of a small sum towards the funeral expense of a deceased member was not the sole object of the association, it was merely incidental to membership, and was only payable if the deceased member had been in good standing for one year.

The case of Blanchard Co. v. Hamblin, 162 Mo. App. 242, was one involving reciprocal inter-insurance contracts between persons and firms in the same business. The Burial Association Plan is not limited to persons in the same business, further reciprocal insurance agreements are now governed by Article 1, Chapter 37, R. S. Mo. 1939.

Insurance is defined as follows in Vol. 32 of Corpus Juris, at page 975:

> "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. * * * * *"

Also, attention is directed to the case of State ex rel. Beach v. Benefit Assn., 6 Mo. App. 163. Attention is directed to the following extract from this case, at l. c. 169:

> "The text-writers generally give similar definitions; and, in the definitions of the contract cited by them from the reports, the amount to be paid on the happening of the loss is commonly spoken of as a fixed sum, or a certain sum. In Paterson v. Powell, 9 Bing. 320 (cited in the text of Bliss on Ins. 4), insurance is defined to be 'a contract in which a sum is paid as a premium in consideration of the insurer's incurring the risk of paying a larger sum upon a given contingency.' 'Insurance,' says Marshall (vol. 1, p. 1), following the civilians, whom he cites in the note, 'is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event;' and 'the insurance of life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum, or an annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, within a certain period, if the insurance be for a limited time.' 2 Marsh. on Ins. 766. The law, however, is not fond of definitions, and these definitions are to be taken, perhaps, rather as state-

> ments by the learned men who make them, of the contract as they find it existing around them, than as strict definitions which contain every essential element without which the thing cannot exist, and which exclude everything not necessary to its being."

Attention is further directed to the Tennessee case of State ex rel. Reece, Commissioner of Insurance v. Stout, 65 S. W. (2d) 827, where the court held, at l. c. 829, as follows:

> "Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished by and through a designated undertaker, or official undertaker. 1 Couch's Cyc. of Insurance Law, 47, Sec. 32; State ex rel. Unity I. L. I. & S. Ben. Ass'n v. Michel, 121 La. 350, 46 So. 352; Flynn v. Prudential Ins. Co., 145 App. Div. 704, 130 N. Y. S. 546; State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197; State ex rel. Fishback v. Globe C. & Undertaking Co., 82 Wash.

124, 143 P. 878, L. R. A. 1915B, 976; State ex rel. Coleman v. Wichita M. Burial Ass'n, 73 Kan. 179, 84 P. 757; Fikes v. State, 87 Miss. 251, 39 So. 783; Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319."

The Burial Association Plan submitted provides for the payment of dues by members, the furnishing of funeral merchandise and funeral by a designated undertaker upon the death of a member, these to be paid for from the dues collected from members. There is the payment of the premium, dues, the payment of the funeral upon the happening of the contingency, the death of the member. The plan seems to be clearly a plan for doing an insurance business.

Now it is necessary to determine whether the plan comes within the exceptions to the insurance laws. Article 13, Chapter 37, R. S. Mo. 1939, provides for the organization and supervision of Fraternal Beneficiary Associations, as follows:

"Sec. 6105. Fraternal benefit societies defined. -- Any incorporated society, order, or supreme lodge, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries and not for profit, operating on a lodge system and having a representative form of government and which shall make provision for the payment of benefits in accordance with this article, is hereby declared to be a fraternal benefit society."

"Sec. 6106. Lodge system defined. Every such society having a supreme governing or legislative body and sub-

> ordinate lodges or branches, by whatever name known, into which members shall be elected, initiated, or admitted in accordance with its constitution, laws, rules, and regulations, which subordinate lodges or branches shall be required by the constitution or by-laws of such society to hold regular or stated meetings at least once in each month, and either to conduct prescribed ritualistic ceremonies or to carry on other altruistic, educational, fraternal, religious, patriotic, or recreational activities, shall be deemed to be operating on the lodge system."

The Burial Association Plan submitted is not a fraternal society within contemplation of this article as the plan has no lodge system.

In Section 6137 of this article and as amended Laws 1941 page 398, certain associations are exempted from the provisions of the article. This section is as follows:

> "Section 6137. Exemption of certain societies. -- Exemption of certain societies. --(1) Nothing contained in this article shall be so construed as to affect or apply to grand or subordinate lodges of societies, orders, or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges, or to:
>
> (a) Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business; and the

ladies societies or ladies auxiliaries to such orders, societies or associations.

(b) Domestic societies which limit their membership to employees of a particular city or town, designated firm, business house or corporation which provide for a death benefit of not more than five hundred ($500) dollars or disability benefits of not more than three hundred and fifty ($350) dollars to any person in any one year, or both;

(c) Domestic societies or associations of a purely religious, charitable and benevolent description, which provided for a death benefit of not more than five hundred ($500) dollars or for disability benefits of not more than three hundred and fifty ($350) dollars to any one person in any one year, or both.

"(2) Any such society or association described in clauses (b) or (c) of subsection (1) which provides for death or disability benefits for which certificates are issued and any such society or association included in subsection (c) which has more than two thousand members, shall not be exempted from the provisions of this article, but shall comply with all the requirements thereof.

"(3) No society which, by the provisions of this section, is exempt from the requirements of this article, except any society described in clause (a), supra, shall give or allow, or promise to give or allow to any person any compensation for procuring new members.

> "(4) Any society whose membership is confined to any religious denomination shall not be required to have ritualistic ceremonies.
>
> "(5) Every fraternal benefit society heretofore organized and incorporated and which provides exclusively for benefits in case of death or disability resulting solely from accident and which does not obligate itself to pay natural death or sick benefits may be relicensed under the provisions of this article, if heretofore authorized, and shall have all of the privileges and be subject to all the applicable provisions and regulations of this article except that the provisions thereof relating to medical examination, standard provisions, prohibited provisions, valuations of benefit certificates and the requirement that the certificate shall specify the amount of benefits, shall not apply to such society.
>
> "(6) The superintendent may require from any society or association by examination or otherwise, such information as will enable him to determine whether such society or association is exempt from the provisions of this article."

An examination of the Burial Association Plan shows it does not come within these exceptions. It is not the scheme of operation of a grand or subordinate lodge existing at the time of the enactment of the statute; the membership is not limited to persons engaged in one or more hazardous occupations, or in the same business or similar lines of business; the membership is not limited to employees of any particular

city, town, business firm or corporation, nor is the membership limited to two thousand or less members.

As heretofore mentioned, this plan was evidently devised to take the place of the plan used by the ousted burial insurance associations. And a great deal of thought has apparently gone into the preparation of it. Whether or not the plan is one which is exempt from the operation of the insurance laws of the State, is a question that can only be definitely settled by the decision of a court of proper jurisdiction.

CONCLUSION

However, it is the conclusion of the writer, from the authorities cited herein and numerous others not cited, including the case of State ex inf. Williamson v. Black, 145 S. W. (2d) 406, that if the question were submitted to a court having jurisdiction of the matter the Burial Association Plan would be held to be a plan for doing an insurance business for the benefit of the undertaker designated and not a voluntary, non profit benevolent association.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

PUBLIC SERVICE COMMISSION: Under Section 5728, R. S. Missouri 1939, the annual license issued by the Commission must be attached to said motor vehicle.
MOTOR VEHICLES:

April 21, 1942

4-22

Honorable Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

FILE
38

Dear Sir:

This will acknowledge receipt of a request for an official opinion under date of April 17, 1942.

> "Please advise if by virtue of Sec. 5728 R. S. Mo. 1939 a holder of a permit or license is required to have them on the person of the one driving and operating a truck.
>
> "Several drivers for the Potasnick truck line have been arrested by the Highway patrol because they did not have such permit or license on their person; the license or permit being at the Office.
>
> "I find no provision requiring that this permit be carried on the person."

Section 5728, R. S. Missouri 1939, provides for an annual license fee on motor vehicles and reads in part as follows:

> "(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5721 shall, at the time of the issuance

> of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this article, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; * * * * * * * * * * * * * * * *"
>
> *
>
> "(e) The annual license fee required by this article is intended to cover only the motor vehicle for which it is issued and none other; * * * * * * *
> *"

Section 5730, Laws of Missouri 1941, page 521, l. c. 522, reads in part as follows:

> "The Commission, * * * shall promulgate * * * * * *. Any such safety rules promulgated, in addition to any others deemed necessary by the commission, shall include the following:
>
> *
>
> "The commission shall require and every motor carrier or contract hauler shall have attached to each unit or vehicle such distinctive marking as may be adopted by the commission."

The above provision specifically authorizes the Public Service Commission to promulgate safety rules, and any other

rules that the Commission deems necessary. Furthermore, subsection D, supra, indicates that it was the intention of the legislature that there should be attached to said motor vehicles some distinctive markers, as indicated in the act.

The Public Service Commission on the 14th day of September, 1931 approved certain rules and regulations known as General Order No. 27. These rules and regulations, in so far as we know, are still in effect and read in part as follows:

> "In the Matter of Prescribing Rules, Regulations and Forms relating to the operation of motor carriers and contract haulers in the transportation of persons and/or property for hire by motor vehicles over and along the public highways in the State of Missouri.
>
> "ORDERED: 1. That the following rules, regulations and forms relating to the operation of motor carriers and contract haulers in the transportation of persons and/or property for hire by motor vehicles on the public highways in the State of Missouri be and the same are hereby approved and adopted and made a part hereof and directed to be printed; that a copy thereof, duly authenticated by the Secretary of the Commission, be filed in the archives of the Commission, and that such copy, so authenticated and filed, shall be deemed an original record thereof."

The following Rule No. 27 was a part of said order and reads:

> "No motor vehicle shall be operated under any certificate of convenience and necessity or contract hauler's permit without having attached to said vehicle the annual license card issued by the Commission for that vehicle, which card shall contain

> sufficient information to identify the vehicle and the authority for the operation under which it was licensed."

Obviously, Rule No. 27, supra, refers to the same annual license which you now inquire about and specifically answers said inquiry by requiring same to be attached to each motor vehicle for which same was issued. In the writer's opinion this is a very reasonable rule, for the reason said license shall be issued only for individual motor vehicles and cannot be used on others and if said license were not attached to said motor vehicle it would only confuse and retard law enforcement.

It was held in Public Service Commission vs. Frisco Railway, 301 Missouri 157, l. c. 168, that the Public Service Commission may promulgate any rules necessary or proper to enable it to carry out fully the purposes of the act.

> "It is not necessary to hold, and we do not hold, that the Commission is without power to make general rules or regulations other than those specified in the statute. It is entirely conceivable that the promulgation of others are 'necessary or proper to enable it to carry out fully and effectually all the purposes' of the act.* * * * * * * * * * * * * * * * * * *"

Section 5731, R. S. Missouri 1939, further provides a penalty for the failure to comply fully with the rules and regulations promulgated by the Public Service Commission, and reads:

> "Every owner, officer, agent, or employee of any motor carrier, contract hauler, and every other person, who violates or fails to comply with or

> who procures, aids or abets in the violation of any provision of this article, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, and who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

In view of Section 5730, supra, requiring each motor vehicle to have distinct markers, as required by the Public Service Commission; the specific authorization of the Public Service Commission to promulgate all necessary rules and regulations; the penalty under Section 5731, supra, for failing to comply with any rules and regulations promulgated by the Public Service Commission; Rule No. 27 found in General Order No. 27 promulgated by the Public Service Commission, which specifically requires an annual license to be attached to said motor vehicle for which same was issued, it is obvious that it was the legislative intent that said annual license at all times, while said motor vehicle was being operated on the highways of this State, should be attached thereto. Also, that Rule No. 27 adopted by the Public Service Commission is a reasonable and valid regulation and leaves no doubt as to what is required of the licensee. Therefore, it is the opinion of this Department that said annual license shall be attached to the motor vehicle, for which said license was issued, at all times said motor vehicle is being operated over the highways of this State.

Respectfully submitted

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

ARH:EAW

STATE CANCER HOSPITAL: Inmate in other State Institution becoming infected with cancer, must be returned to county of his legal residence in order that county court may comply with Section 15149 R. S. Missouri, 1939.

April 30, 1942

5-4

Miss Dorothy A. Hehmann,
Executive Director
Cancer Commission
3713 Washington Blvd.
St. Louis, Missouri

FILE
38

Dear Miss Hehmann:

We are in receipt of your letter of recent date, in which you request an official opinion, as follows:

> "The Ellis Fischel State Cancer Hospital received a letter from the Superintendent of the State Soldier's Home of Missouri in St. James, relative to the admittance of a woman whose illness has been diagnosed as cancer. This woman has been a resident of the Soldier's Home for seven years. Originally she lived in St. Louis.
>
> "It is our understanding that no patient can be admitted to the hospital as a patient without an application from the county court of residence of the patient. The present question is what is considered the place of residence of this patient: namely, the City of St. Louis where the patient originally lived, or Phelps County, where the patient has lived in the Soldier's Home for the past seven years?
>
> "Also, it has occurred to us the State statutes might provide that individuals

> in one State institution can be transferred to another State institution temporarily for treatment, without a Court order."

In reply to the above request, we call attention to Section 15149 R. S. Missouri, 1939, which provides, in part, as follows:

> "Whenever the existence of a case described in section 15148 of this chapter shall come to the notice of the sheriff, health officer, public health nurse, peace officer, or any other public officer, or any physician or surgeon, it shall be his duty to, and any other person may, file with the judges of the county court of the county of the legal residence of such person, or if such person be a resident of the city of St. Louis, then with the corresponding authority of said city, and application for the treatment of such person at the state cancer hospital. * * * Upon the filing of such application, the judges of the county court shall make investigation in such manner as they shall deem advisable, * * * . If, upon filing said report, the judges of the county court shall be satisfied that the patient is one who should be treated at the state cancer hospital and that the person to be treated, or his parent, guardian, trustee or other person having legal custody of his person in case of a minor, is not financially able to provide such person with proper treatment, the judges of the county court shall enter an order finding such facts. * * * Upon the entry

> of the order of the judges of the county court, approving said application, they shall communicate with the administrator of the state cancer hospital and ascertain whether or not the applicant can be received as a patient. * * * the necessary expense incident thereto to be chargeable to the county of residence of the patient. A copy of each application and a copy of the report of the physician and court order in each case shall be sent to the administrator of said hospital." (Underscoring ours.)

From a reading of Section 15149, as well as the other sections contained in Chapter 125 of the Revised Statutes of Missouri, 1939, it will be noted that the legislature has set up a complete procedure for the admittance of an indigent person into the State Cancer Hospital. It will also be noted from the reading of Section 15149, supra, that it is incumbent upon the county court of the county of which the patient is a legal resident to first determine whether or not the person is indigent, and, secondly, whether or not such person shall, in the discretion of the court, be entitled to treatment in the State Cancer Hospital. Further, if said court is satisfied that the person is indigent and needs treatment, then it shall make an order sending the patient to the State Cancer Hospital for examination, and the necessary expenses incident thereto shall be paid by the county. Also, it will be noted from the reading of the other several sections contained in Chapter 125, supra, that there does not appear any section which gives the superintendent of any state hospital, or institution, authority to transfer one of its patients to the State Cancer Hospital, directly.

Hence, we must conclude that where a person is an inmate of a state institution, and becomes infected

with a cancer that such inmate must follow the same procedure as any other citizen of the county, as set out in Section 15149, supra. Further, it may be pointed out that Section 15150 R. S. Missouri, 1939, provides as follows:

> "The state cancer hospital shall not make any charge directly to a patient admitted on certificate of the judges of the county court as heretofore outlined, but shall make a charge against the county from which said patient is sent only for the necessary maintenance and supplies used for the benefit of said patient." (Underscoring ours.)

CONCLUSION

It is, therefore, the conclusion of this department that where an inmate of a state institution becomes infected with cancer such person must be returned to the county court of the county of which said person is a legal resident, and that said court must follow the procedure as outlined in Section 15149, supra, as if said person were making an original application for admittance and treatment in the State Cancer Hospital.

It is further our opinion that said county shall, under Section 15150, supra, pay for necessary maintenance and supplies used for the benefit of said patient, who must be indigent.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

BRC:RW

SCHOOLS:
SCHOOL LOANS: Duties of county courts in arriving at valuation of lands upon which a school loan is made.

October 13, 1942

11-5

FILED
38

Hon. Wyatt E. Hawkins
Clerk of the County Court
Plattsburg, Missouri

Dear Mr. Hawkins:

This is in reply to your letter of recent date wherein you submit the following statement of facts in request of an opinion from this department:

> "The laws of Missouri state, real estate must be assessed at full value. Also the laws of Missouri state, County Courts cannot make School loans for more than one half the value of the real estate. Will you please give me an opinion? Can the County Court make a School loan in excess of one half the assessed valuation of any real estate?"

County courts, in handling township and capital moneys belonging to schools, act as trustees. Under Section 10376, R. S. Missouri 1939, it is provided in part as follows:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; * * * * * * * * * * * *"

Section 10384, R. S. Missouri 1939, provides in part as follows:

> "When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumberances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution.
> * "

Your question is whether or not the county court, in determining the value of the land upon which the loan is made, shall only take into consideration the assessed value of such land. Said Section 10384, supra, simply provides that the value of the land upon which the loan is made shall be double the amount of the loan. It does not limit the county court to the assessed value. However, the latter part of the above quoted provisions of said Section 10384, does require the county court, in passing upon the solvency of a security on the bond, shall require such person going on the security bond to own property assessed in an amount equal to the loan. That portion of said section requires the county court to look to the assessment value of the property of the surety, but it does not bind or direct the county court to consider only the assessed value of the property upon which the loan is made.

In the case of Saline County v. Thorp, 88 S. W. (2d) 183, the court had before it for consideration the duties of the County Court in regard to school loans, and said, at l. c. 186:

> "* * * * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626.
>
> "Sections 9243-9256, R. S. 1929 (Mo. St. Ann. Secs. 9243 to 9256, pp. 7098-7104), say what a county court can do with reference to the investment, collection and reinvestment of public school funds. These statutes require that county courts 'diligently collect, preserve and securely invest * * * * * on unincumbered real estate security, worth at all times at least double the sum loaned * * * the county school fund'; and that these funds 'shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools. * * * * '"

By this statement it will be seen that the county court in performing its duties under this act is required to exercise its discretion in making loans, but under the statute the security must always be double the amount of the loan. In Vol. 65, C. J., 795, p. 672, the rule as to the duties of a trustee in the investment of the funds of a trust estate is stated as follows:

> "* * * * In the investment of trust funds the trustee must exercise sound discretion as well as good faith and honest judgment. * * * * * * * *"

Further considering this question we call attention to the provisions of the Constitution and statutes relating to valuations for tax assessment purposes.

Section 4, Article X of the Constitution, provides in part as follows:

> "All property subject to taxation shall be taxed in proportion to its value: * *"

Section 10981, R. S. Mo. 1939, provides in part as follows:

> "The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; * * * * * * * * *"

Speaking of the statutory duties of the officers in making assessments, the Supreme Court, in State ex rel. v. Western Union Tel. Co., 165 Mo. 502, l. c. 516, said:

> "The law contemplates that for purposes of taxation property shall be assessed at its true value in money, and it also presumes that all officers do their duty."

Said Section 10981, supra, requires the assessor to assess property at its true value in money. Section 4 of Article X of the Constitution requires it to be taxed in proportion to its value. Section 3 of Article X of the Constitution requires taxes to be uniform on the same class of subjects within the territorial limits of the authority levying the tax. Section 18 of Article X of the Constitution requires the State Board of Equalization to adjust and equalize valuations of real and personal property among the several counties in the State.

In the case of Jefferson City Bridge & Transit Co. v. Blaser, 300 S. W. 778, the court, in considering an attack on an assessment, in applying the provisions of said Section 4 of Article X, supra, said, l. c. 785:

> "* * * If the persons charged with making this assessment refused to assess plain-

> tiff's property in proportion to its value and in uniformity with all other taxable property in the state, they are presumed to have known that such assessment would be in violation of sections 4 and 3, respectively, of Article 10 of the Constitution of Missouri, and would result in unlawful discrimination against plaintiff's property. * * * * * * * * * *"

Even if the assessment is at the true value in money as required by Section 10981, supra, yet if it is not in proportion to its value as compared to the assessed valuation of other property in the same district, then such assessment would not be valid.

The State Board of Equalization in adjusting and fixing valuations for the counties fixes a total valuation for real and personal property in that county.

In the case of Bank of Carthage, et al. v. Thomas, 48 S. W. (2d) 930, l. c. 934, the court, in discussing the valuation fixed by the State Board of Equalization, said:

> "* * * The presumption that the valuation fixed by the state board of equalization 'is the true value attaches' to the action of that board. * * * * * * * * * * * * * *"

And, in State ex rel. v. Bethards, 9 S. W. (2d) 603, l. c. 604, the court said:

> "There is no such thing as an absolute true value of land. The 'values' mentioned in the statutes are the valuations of the officials whose duty it is to make them. Land is not like commodities which have a fixed market price at a given period. Its value is determined always by the estimate of the party who values it. The requirement of section 12802, that the assessor assess the property at its true value in money, means nothing more than that such

> true value is his estimate, his valuation. The law contemplates that, in accordance with that section, he does assess it at its true value as he judges it. * * * * * * * * *"

The court, in the Bethards case, referring to the section which applies to the county board of equalization, said, l. c. 605:

> "That section means, if anything, that the state board of equalization fixes values as well as the assessor or the county board. *"

The county taxing authorities, in making the assessment of properties in the county, must keep the aggregate valuation of real and personal property up to the aggregate amount fixed by the State Board of Equalization (Section 11038, R. S. Mo. 1939).

The State Board of Equalization in equalizing and adjusting the valuation for the counties shall first, add to the valuation of each class of property, real or personal, of each county, which it believes to be valued below its real value in money, such percentum as will increase the same in each case to its true value, and second, it shall deduct from the valuation of each class of property, real or personal, of each county, which it believes to be valued above its real value in money, such percentum as will reduce the same in each case to its true value (Section 11036, R. S. Mo. 1939). So, as a basis for adjustment and equalization, the State Board of Equalization uses the "true value" of the property.

The County Board of Equalization in performing its duties uses the "real value" of the property as a basis for equalizing properties for tax assessment purposes (Section 11003, R. S. Mo. 1939). This section reads in part as follows:

> "The following rules shall be observed by county boards of equalization: First, they shall raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed

> by this chapter for such valuation; * * * * * second, they shall reduce the valuation of such tract or parcels of land or any personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and personal property of the county."

The provisions of this section indicate that the lawmakers distinguish between "true value" and true value as compared with the average valuation of real and personal property in the county. Such a construction of this section would be in harmony with the provision of the Constitution that property shall be taxed in proportion to its value.

The County Board of Equalization is composed of the county court and other officers. Since the county court is the body which administers the school funds, we have the same body passing upon values in different capacities, namely, the Board of Equalization for tax purposes and the county court for loaning school funds. The members of the county court as members of the board of equalization fix a certain valuation on property for tax purposes and, as members of the court fix a valuation for loan purposes. With the presumption that officers are presumed to do their duty, in case the aforesaid valuations are fixed at different amounts, then, it would follow that one of the valuations is wrong and illegal unless there is a different standard to apply in fixing valuations. Since the standard for tax valuations is limited to the proportionate value, and to the value as compared with the average valuation of all real and personal property of the county, then this might be a different value than the real value contemplated by Section 10384, supra, as a basis for a loan.

CONCLUSION

From the foregoing, it is the opinion of this department that "true value" of property for taxing purposes may not always be used to determine the real value of lands upon which a school loan is sought, because the "true value" for tax assessment purposes is a comparative value; that is, it is fixed in

proportion to its actual value as compared with the average valuation of all other real and personal property of the county.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

OPTOMETRIST: Members in armed forces of the United States
FEES: government are not required to pay renewal fees.

October 16, 1942

10-23

FILED
38

Dr. N. R. Hatfield
Secretary,
State Board of Optometry
Edina, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of October 8, 1942, which reads:

> "At the meeting of the Missouri State Board of Optometry it was voted that the yearly renewal fees of our Registered Optometrists in the Armed Forces be waived for the duration. This vote was taken subject to your decision and if it does not conflict with the law and other States are doing this, may we have your opinion at an early date? I would like to get this word soon that I may answer the numerous inquires that come to this office."

Section 10120, R. S. Missouri 1939, provides when optometrists in this State must renew their certificate of registration and reads:

> "Every registered optometrist and every registered apprentice who continues in active practice or service, shall, annually, on or before the first day of April, renew his certificate of registration and pay the required renewal fee. Every certificate of registration

> which has not been renewed during the month of April in any year shall expire on the first day of May in that year. A registered optometrist or a registered apprentice whose certificate of registration has expired may have his certificate of registration restored only upon payment of the required restoration fee. Any registered optometrist who retires from the practice of optometry for not more than five (5) years may renew his certificate of registration upon payment of all lapsed renewal fees."

The above provision requires a renewal fee annually of every registered optometrist and apprentice who continues in active practice or service. "Active" has been defined by Webster's New International Dictionary, Second Edition as follows:

> "3. In action; actually proceeding; working; in force; - opposed to quiescent, dormant, or extinct; as, active laws, assets, or hostilities; an active volcano.
>
> "5. Requiring or implying action or exertion; - opposed to sedentary or tranquil; as, active employment or service."

In United States vs. Woodworth, 36 Federal Supplement 645,l.c. 646, Woodworth was discharged from the army. He reenlisted in the Medical Enlisted Reserve Corps, returned to college where he completed his dental education and subsequently reentered active service of the army. The court held that he was not in "active service" between the dates of such discharge and reentry and in so holding the court said:

> "The main question is then whether or not between November 1, 1917 and October 11, 1918, Woodworth was in the active service of the United States Army.

> "During that period this man was separated from his former outfit, was not identified with any other unit of the army, was not under the immediate direction of any superior officer, was paying his own expenses for his dental education, and was merely a member of the army reserves. Active service does not necessarily mean actual service, but does mean service performed at the direction of a superior officer or officers while receiving the emoluments to which a soldier is entitled. It does not include one who has separated himself from the army to follow his own pursuits, even though he may be subject to call to active service. The distinction between a reservist and one on active service has been recognized in opinion of the Attorney General when in listing the various types of active service he particularly excepted the reservist from such classification. See 7 Op. Atty. Gen. 149; 32 Op. Atty. Gen 12; and 32 Op. Atty. Gen. 193. See also, State v. Peake, 22 N.D. 457, 135 N. W. 197, 40 L.R.A.,N.S., 354; State v. Josephson, 120 La. 433, 45 So. 381; Redd v. American Cent. Life Ins. Co., 200 Mo. App. 383, 207 S. W. 74; Betty v. State, 188 Ala. 211, 66 So. 457."

Also, in Caswell et al. vs. Somer ville Retirement System, 28 N. E. (2) 231, l. c. 232; 306 Mass. 373; the court held that individuals who were appointed and confirmed as police officers prior to December 27, 1930, but whose daily routine service and pay did not actually begin until January 11, 1931, were not in active service on January 1, 1931, when the Retirement System took effect and were not covered by statute in effect and force on January 1, 1931, and prior thereto, providing for pensioning of police officers when retired from active service, so that deductions were properly made from their salaries under the Somerville Retirement System. In so holding the court said:

> "Even though the plaintiffs were police officers on January 1, 1931, that was

> not enough to place them within the pensionable class under G.L. (1921) c. 32, Sec. 83. That statute provides for the pensioning of a police officer only when he is retired 'from active service'. To be retired from active service, one must already have been in active service. Until a police officer is in active service he is not within the class which upon disability may be pensioned under that statute. See Dunn v. Commissioner of Public Service, 281 Mass. 376, 183 N.E. 889, 87 A.L.R. 998. When the Somerville Retirement System took effect on January 1, 1931, these plaintiffs were not yet in active service, and consequently were not 'covered' by G.L. (1921) c. 32, Sec. 83. They therefore fell within the Somerville Retirement System."

In State vs. Josephson, 45 So. 381, l. c. 381-382; 120 La. 433; the court in holding that a member of the militia was not in active service of the State and was still subject to the jurisdiction of civil courts when not ordered into active service by the Governor said:

> "At the time of the alleged offense defendant's company had not been 'ordered into active service' by the Governor.
>
> "But the learned counsel for defendant contends that the state National Guard is in 'active service' all the time, and in support of this contention refers to section 99 of the act by which members of the guard, after four years of 'active service', are exempt from jury duty. But, manifestly, the statute contemplates two kinds of 'active service'-- the 'active service' which follows upon call of the Governor, and the 'active service' which consists in merely being a member of the organization in good standing. The former

> withdraws the militiamen from the jurisdiction of the civil courts; the latter does not. In fact, the contention that a member of the militia is all the time not amenable to the powers of the courts can hardly be serious."

If this Department should hold that a member of the armed forces should be required to pay this renewal fee while in the active service of the armed forces, and while it is physically impossible for him to actively practice optometry in this State even if he so desired, it would be in effect declaring the words, "who continues in active practice or service" (Section 10120, supra.) superfluous and meaningless.

One of the cardinal rules of statutory construction is that effect should be given to all the provisions of a statute so that no part or section will be inoperative, superfluous, contradictory or conflicting. The court in Graves vs. Little Tarkio Drainage District No. 1, 134 S. W. (2) 70, l. c. 78, 345 Missouri 557; an nounced this rule and said:

> "* * * * * *'It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d.Ed.) 731, 732, Section 380. Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.' State ex rel. Dean v. Daues, 321 Mo. 1126, 1151, 14 S. W. 2d. 990, 1002.* * * * * * * "

Apparently it was the intention of the General Assembly in enacting Section 10120, supra, that no registered optometrist or

registered apprentice shall be required to pay renewal fees who does not continue to be actively engaged in the practice of optometry, with this exception, when a registered optometrist retires from practice. Such a construction gives meaning to all provisions of Section 10120, supra, and is reasonable. Certainly, it will be conceded that such optometrists cannot be actually practicing their profession while enlisted in the armed forces of this country for the duration of this war and since the renewal fee applies only to such optometrists who continue the active practice or service as optometrists, it is the opinion of this Department that the Missouri State Board of Optometry is not required under the law to collect renewal fees from such persons in the armed forces.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARH:EAW

COUNTY COURT AND
COUNTY DEPOSITARIES: County funds can only be placed in a legally designated and qualified county depositary.

November 24, 1942

11-30

FILED
38

Hon. Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 18, 1942, which reads as follows:

> "Will you kindly advise me for the use of Pemiscot Co. Court how they can dispose of surplus money belonging to the school fund and the County when the banks refuse to accept any more money and give legal security for the same.
>
> "The County has some $90,000 of school money on hand and cannot loan it as the law directs.
>
> "The bonding companies say they will cancel the collectors and treasurers bonds if the County cannot get relief from some source."

Section 13846 R. S. Missouri, 1939, partially reads as follows:

> "It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals * * * * *."

The above partial section is mandatory upon the county court, and there is no exceptions in that section. It was so held in Huntsville Trust Co. v. Noel et al., 12 S. W. (2d) 751, l. c. 754, par. 3, where the court said:

> " * * * As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. * "

That it was mandatory was also held in the case of Howard County v. Fayette Bank, 149 S. W. (2d) 841, par. 5, where the court said:

> "Was the failure to publish the notice for bids 20 days before the first day of the regular May term fatal to the legal selection of a county depository? The statutory requirements relative to the selection of a county depository are mandatory and 'failure of compliance prevents title to the public funds passing to the bank and the relation of creditor and debtor arising', but 'a literal compliance with all the statutory provisions is not required, if no public or private right is prejudicially affected.' Liquidation of People's Bank, 344 Mo. 611, 127 S. W. 2d 669, loc. cit. 671, and cases there cited."

Section 13848 R. S. Missouri, 1939, provides the procedure for the bidding of banking corporations or individual bankers in the local county on the accepting of county funds.

Section 13850 R. S. Missouri, 1939, partially reads as follows:

> "Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, * * *

to deposit the funds of the county with one or more banking corporations in an adjoining county. It also limits the rate of interest in an adjoining county and the same procedure must be followed as followed in the local county.

Section 13846 R. S. Missouri, 1939, which applies to local banking corporations acting as county depositaries, and Section 13852 R. S. Missouri, 1939, which allows the county court to designate banks in adjoining counties as county depositaries are the only two methods of procedure for the designation of county depositaries.

It is common knowledge that some counties are now depositing money in banks that are not designated as county depositaries, for the reason that the banks will not pay the interest as set out in Section 13846, and Section 13852 R. S. Missouri, 1939, for the reason that banks will not give the proper legal security for the deposit of the county funds. Such a procedure is unlawful and does not comply with the County Depositary Act, but it has been held that where county money is deposited in a bank which is not a county depositary and has not been designated as such the bank holds the money as trustee, and in case of a failure of the bank it would be a preferred claim. It was so held in the case of Consolidated School Dist. No. 4 of Texas County v. Citizens' Sav. Bank of Cabool, 21 S. W. (2d) 781, l. c. 789, where the court said:

> " * * * While other jurisdictions variate the rule in a greater or less degree, Missouri follows the rule that, if a trust fund is proved to have been deposited in a mass, and wrongfully and illegally mingled therewith, even though indistinguishable, it may be recovered and taken from the estate of the insolvent, on the ground that it went into, increased and swelled the volume of the insolvent's assets, and it is chargeable against the insolvent estate to the amount of the converted fund as a preferred demand. * * * "

The same holding was had in the case of Fidelity & Deposit Co. of Maryland v. Peoples Bank, 44 F. (2d) 19, l. c. 21, which is a Missouri case, and the court in that case said, at par. 2:

> "In the instances where the banks received from the county treasurer county funds and placed them on deposit when they were not legal county depositories, they became trustees ex maleficio. * * * * * * * * * * * * * *."

The same holding was also had in School Cons. Dist., No. 10, of Arbyrd v. Wilson, 135 S. W. (2d) 349.

Even though the money deposited in banks that are not legally designated county depositaries is a preferred claim, in case of a failure of the bank and loss of public money belonging to the county, the county treasurer would be liable by reason of Section 13861 R. S. Missouri, 1939, which reads as follows:

> "The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

Under the above section the county treasurer is not responsible for loss of county funds through negligence or failure of any depositary, but if any loss resulted from

from any official misconduct on his part, or from responsibility for funds of the county, he would be liable if the proper county depositary had not been legally selected and the funds deposited therein. That he would be liable in such an event was held in the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22.

In setting out the above authorities we are merely following the legislation as enacted by the legislature, and the opinions of the Appellate Courts of this State. In order to remedy the situation which you find in Pemiscot County, the matter should be taken up with the legislature.

CONCLUSION

It is, therefore, the opinion of this department that under the present law the county court can only dispose of surplus money belonging to the school fund and the county, to a bank legally designated and qualified as the county depositary.

It is further the opinion of this department that if the county court should deposit surplus funds in a bank that had not been legally designated as a county depositary, and who has not given the proper security for the funds of the county, such a procedure would be illegal.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

INTOXICATING LIQUORS: Army Post Exchanges and C.C.C. camps' canteens not liable for "gallonage" on intoxicating liquors and non-intoxicating beer, as it is collectible from manufacturer or first vendor.

June 12, 1942

FILED
39

Mr. W. G. Henderson
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

Your letter of April 6, 1942, requesting an opinion has been referred to me. Omitting caption and signature, such opinion request is as follows:

> "I respectfully request an opinion upon the following subjects.
>
> "This Department is collecting gallonage tax on all intoxicating liquor and beer going into Jefferson Barracks, Fort Leonard Wood and Camp Crowder. It has been argued that in view of the fact that these camps are located on Federal Reservations that the State of Missouri has no right to charge this tax. If possible, could you include in this same opinion, Civilian Conservation Camps with respect to the State of Missouri collecting gallonage tax and also charging a state permit fee.
>
> "We are not considering charging a state permit fee for the army camps, but have taken a position that canteens at Civilian Conservation Camps should have a state permit. The position that the Civilian Conservation Camps has taken is further explained by the enclosed correspondence between this office and officials of the United States Government."

The first question to be considered is whether or not

the State of Missouri can collect a "gallonage" tax on intoxicating liquor and beer shipped into army camps, to-wit, Fort Leonard Wood, Camp Crowder, Jefferson Barracks, and also Civilian Conservation Camps in this State.

Referring to the Statutes, we will cite you to Section 4900, R. S. Mo. 1939, Sub-sections "(a)" and "(c)", and Section 4925, R. S. Mo. 1939. In speaking of gallonage the statute provides (Sec. 4900, Sub-sections "(a)" and "(c)":

> "(a) For the privilege of selling in the state of Missouri spirituous liquors, including brandy, rum, whiskey, and gin, and other spirituous liquors and alcohol for beverage purposes, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of eighty cents ($.80) per gallon or fraction thereof."
>
> "(c) The amounts required to be paid by this section shall be evidence by stamps or labels purchased from the supervisor of liquor control and affixed to the container of such spirituous liquor. The person who shall first sell such liquor in this state shall be liable for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container."

Section 4925, supra, provides as follows:

> "For the inspection and gauging of all malt liquors, containing alcohol in excess of three and two-tenths (3.2%) per cent by weight, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of sixty-two (62¢) cents per barrel."

Also, we will cite you to Sections 4956 and 4957, R. S. Mo. 1939, which prescribe the following:

"Sec. 4956. The supervisor of liquor control shall be entitled to receive, and shall collect, for the inspection of non-intoxicating beer, inspection fees at the rate of sixty-two cents (62¢)per barrel for the inspection of all nonintoxicating beer manufactured or brewed in this state for sale in this state, or manufactured or brewed in another state and shipped or transported into this state for sale subject to the provisions of this article."

"Sec. 4957. Nonintoxicating beer brewed or manufactured in this state for shipment and sale outside of this state shall be exempt from the inspection fees by this article required to be collected for the inspection of nonintoxicating beer brewed or manufactured for sale in this state, but shall be inspected by the supervisor of liquor control as required by this article."

The Supreme Court of Missouri, in the case of John Bordenheir Wine & Liquor Co. et al. v. City of St. Louis et al. 135 S. W. (2d) 345, held that the fees as set out in Section 4900, supra, were in the nature of inspection fees and not license fees, and, therefore, such fee is not regulatory, but a revenue measure or tax.

It seems to be plain that the person first selling spirituous liquor in this State is subject to pay the "gallonage". Therefore, as far as distillers, located in the State are concerned, they are required to pay this "gallonage", in view of the fact that they are the first one to sell their products in this State. But, what about distillers and manufacturers who are residents of another state and ship their merchandise into Missouri for sale in this state? If the Federal Government purchases said liquors or beer from out of state companies, and has it shipped into this state, who is then liable for the "gallonage?" For answer to this, we will cite you to Section 4932, R. S. Mo. 1939, which provides as follows:

> "Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

This section is construed by us as meaning that if any distiller ships spirituous liquor into this state without paying the "gallonage" fee, the person hauling such products will be deemed guilty of a misdemeanor. In other words, before any company sells commodities of this type in this state, it must first pay the inspection or "gallonage" fees.

This is further borne out by reading Section 4900, R. S. Mo. 1939, sub-section "(d)" which is as follows:

> "(d) Any person who sells to any person within this state any intoxicating liquors mentioned in subsection (a) of this section, unless the same be contained in a container stamped or labeled as provided in this act, shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment."

As to "malt liquors" containing alcohol in excess of three and two tenths (3.2%) per cent by weight, we will cite you to Section 4889 R. S. Mo. 1939, relative to the power of the Supervisor of Liquor Control to make regulations concerning intoxicating liquors. This section provides as follows:

> "The supervisor of liquor control shall have the authority to suspend or revoke for cause all such licenses; and to make

the following regulations (without limiting the generality of provisions empowering the supervisor of liquor control as in this act set forth) as to the following matters, acts and things; fix and determine the nature, form and capacity of all packages used for containing intoxicating liquor of any kind, to be kept or sold under this act; prescribe an official seal and label and determine the manner in which such seal or label shall be attached to every package of intoxicating liquor so sold under this act; this includes prescribing different official seals or different labels for the different classes, varieties or brands of intoxicating liquor; prescribe all forms, applications and licenses and such other forms as are necessary to carry out the provisions of this act; prescribe the terms and conditions of the licenses issued and granted under this act; prescribe the nature of the proof to be furnished and conditions to be observed in the issuance of duplicate licenses, in lieu of those lost or destroyed; establish rules and regulations for the conduct of the business carried on by each specific licensee under the license, and such rules and regulations if not obeyed by every licensee shall be grounds for the revocation or suspension of the license; the right to examine books, records and papers of each licensee and to hear and determine complaints against any licensee; to issue subpoenas and all necessary processes and require the production of papers, to administer oaths and to take testimony; prescribe all forms of labels to be affixed to all packages containing intoxicating liquor of any kind; and to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act."

The last provision of this statute prescribes, "And to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act." As can be seen from Section 4925 R. S. Mo. 1939, supra, although the statute provides for the payment of a gallonage tax, it does not prescribe who shall pay such "gallonage". Therefore, in accordance with Section 4889 R. S. Mo. 1939, above cited, the Supervisor has made a regulation to govern who shall pay the gallonage tax. This regulation is part of Regulation #17. It provides:

> "Malt liquor * * * * * must be inspected and labeled and the Inspection fee paid while in the hands of the brewer."

In accordance with the above, we are of the opinion that the "gallonage" tax on malt liquor, to-wit, beer containing more than three and two-tenths (3.2%) per cent alcohol by weight shall be paid by the brewer or manufacturer in this State. As to the out of State brewers or manufacturers, the Supervisor has also made a regulation under the authority above, which regulation is the last paragraph in Regulation #17 and provides:

> "Any malt liquor * * * * * * * * * * shipped into, sold or offered for sale in this State without the Missouri inspection stamps, labels or certificates of appropriate number and denomination being affixed thereto, shall be deemed to be contraband, by the Supervisor or his inspectors, seized and disposed of as such."

As to who shall pay the gallonage on "Non-intoxicating" beer, it will be seen that in Section 4956 R. S. Mo. 1939, cited above, the Supervisor shall collect an inspection fee at a rate specified in such statute. However, this statute, as in the case of Section 4925, supra, does not specify who is to pay the tax. This is set up in

Section 4951 R. S. Mo. 1939, which is as follows:

> "Every person who shall maintain or operate any brewery in this state for the brewing or manufacture of nonintoxicating beer within this state, shall cause such nonintoxicating beer to be inspected by the supervisor of liquor control of this state."

The liability for "gallonage" on "Non-intoxicating beer" manufactured out of this state is set up in Section 4972 R. S. Mo. 1939. This section provides:

> "Any person who shall sell, or offer for sale, any nonintoxicating beer within this state, which has not first been inspected and labeled as required by the provisions of this article, or which is contained in any package or packages not having thereon the certificate of the supervisor of liquor control required by this article, or any person who shall fail to destroy said certificate or label after the contents of such package are disposed of, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine of not less than fifty dollars($50.00) nor more than one thousand dollars($1000.00) or by both such fine and jail sentence."

In other words before the manufacturer or brewer in another State can sell non-intoxicating beer in this state to anyone, including the Federal Government, the beer must be inspected, which presumes the payment of the inspection fee or gallonage tax.

Furthermore, this construction of the Statutes is borne out by the actual practice, which practice is that

before spirituous liquor, malt liquors and non-intoxicating beer are brought into this state, the "gallonage" is always paid by the shipper. Consequently, no further "gallonage" is to be collected after such manufacturer or shipper has paid it and the Federal Government would not be required to pay any "gallonage" because, (1) the manufacturers of this state are required to pay such fee since they sell it first in the state, and (2) the manufacturers out-state pay this "gallonage" fee before it is shipped into the state.

The above conclusions will refer to Camp Crowder, Fort Leonard Wood and the Civilian Conservation Camps, but we do not think that they will refer to Jefferson Barracks. In 1892, Jefferson Barracks and the territory attached thereto was ceded to the United States and is not a part of the State of Missouri.

This Department has written three opinions dealing with state taxation in connection with Jefferson Barracks. The first opinion written November 5, 1937, dealt with collection of state tax on Athletic shows: the second written on April 26, 1938, dealt with liquor tax and the third written on January 15, 1940 dealt with State Liquor Regulations. All three opinions held that the State of Missouri could not tax Athletic shows in or the shipments of liquor consigned to Jefferson Barracks. See Laws of Mo. 1892, Extra Session #16: U. S. Const. Section 8, Article I.

Now as to the second question, which seems to be whether or not the State of Missouri can force Civilian Conservation Camps to have a permit before liquor and beer is sold in their canteens or post exchanges. The Civilian Conservation Camps have been held to be a government instrumentality. In U. S. v. Query, et al., 21 Fed. Supp. 784, the court said:

> "The Civilian Conservation Corps camp exchange is a governmental undertaking. It has its existence by virtue of Congressional legislation, Act June 28, 1937, 16 U. S. C. A. Sec. 584 et seq. Federal funds are used to pay the expenses in connection with its conduct, operation, and management. Act June 28,

1937, Sec. 17, 16 U. S. C. A. Sec. 584p. The federal statute creating the camp exchange provides that it be established and operated in accordance with regulations prescribed by the Director, at the camps designated by him. Section 17, Act June 28, 1937, 16 U. S. C. A. Sec. 584p. The camp exchanges in South Carolina were established in pursuance thereof. The camp exchange is an integral and necessary part of the Corps which is engaged in providing employment as well as vocational training to unemployed citizens of the United States for the performance of useful work and in salvaging and conserving the natural resources of the United States. Such a function of the government is authorized under article 1, Sec. 8, cl. 1, of the Federal Constitution. A high state of morale and contentment is necessary to a full consummation of the objectives of the Corps, to create and maintain which the institution of the camp exchange was established as an essential element of the program for unemployment relief. It is operated in a building erected and maintained by federal funds on lands privately owned, but leased for a specified term by the United States. It was not created for private gain, but wholly for governmental purposes. It is not conducted primarily for profit, but is operated essentially for the welfare of the camp's enrollees in furtherance of the objectives of the Corps. Sales to outsiders are strictly prohibited by the statute creating the camp exchange. It follows that the Civilian Conservation Corps camp exchange is a federal instrumentality. * * * * * * * * * * * * * * * * "

In Standard Oil Company of California v. Charles G. Johnson, Treasurer of the State of California, Case No. 1125, October Term, 1941, decided June 1, 1942, the court held that post exchanges were Government instrumentalities and are "arms of the Government deemed by it essential for the

performance of governmental functions."

From information received by this department, the "canteens" in the Civilian Conservation Camps are operated in the same manner as those in the army camps. Therefore, the same law would apply to the "canteens" or "post exchanges" in each place.

In McCulloch v. State of Maryland, 4 Wheaton 316, 4 L. Ed. 579, the court held that the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the Constitutional laws enacted by Congress to carry into effect the powers vested in the National Government.

Also, in Johnson v. Maryland, 65 L. Ed. 126, the Supreme Court stated:

> "With regards to taxation, no matter how reasonable or how universal or undiscriminating, the states' inability to interfere has been established since McCulloch v. Maryland, (supra). The decision in that case was not put upon consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way at least, the instrumentalities of the United States."

In October 1940, the Buck Resolution was passed, which set up certain exemptions to the general rule that Government instrumentalities could not be taxed. Said amendment is under Title 4, U. S. C. A., Sections 13, 14 and 15. These sections provide as follows:

> "Sec. 13. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area;

and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. Oct. 9, 1940, c. 787, Sec. 1, 54 Stat. 1059.

"Sec. 14. (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. Oct. 9, 1940, c. 787, Sec. 2 54 Stat. 1060.

"Sec. 15. (a) The provisions of sections 13 and 14 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

> "(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy. Oct. 9, 1940, c. 787, Sec. 3, 54 Stat. 1060."

In other words, a tax of the instant kind is not made an exception to the general rule and therefore a permit to sell liquors and beer is not required on the part of the Civilian Conservation Camps. In support of this contention, we will cite Falls City Brewing Co., Inc. v. Reeves, et al, 40 Fed. Supp. 35, D. C. Ky. 1941. In this case the Post Exchange at Fort Knox, Kentucky, was selling malt beverages without first having secured a license from the State of Kentucky. Apparently, the Post Exchange was operated in the same manner as the ones in the Civilian Conservation Camps. In this case the court said:

> "The Court is accordingly of the opinion that the Post Exchange at Fort Knox, Kentucky, is a federal instrumentality within the purview of the exemption clause of the Buck Resolution, being section 3 of the House Resolution 6687; that neither the defendant Captain Robert Stevenson, nor the defendant Post Exchange is required to purchase a license from the Commonwealth of Kentucky authorizing them or either of them to engage in the business of selling malt beverages, and that the Commonwealth of Kentucky is without right to levy or to impose its regulatory statutory provisions, on the sale of malt beverages sold by the Plaintiff Falls City Brewing Company to the Post Exchange at Fort Knox, Kentucky, for resale to the authorized purchasers from that organization. Counsel for plaintiff will prepare and tender for entry a proper judgment in accordance with this opinion."

This case went to the Circuit Court of Appeals and was affirmed and then on a writ of certiorari to the United States Supreme Court. However, the Supreme Court sent it back to the District Court because appeal would not lie to the Circuit Court of Appeals but directly to the Supreme Court. The question of taxation was not passed on by the Supreme Court and, therefore, remains as the District Court decided it at the present time.

CONCLUSION

(a) It is the conclusion of this department that the Federal Government is not liable for "gallonage" on intoxicating liquors, malt liquors and non-intoxicating beer, shipped or destined to be shipped to Army Camps and Civilian Conservation Corps Camps for the following reasons:

(1) The distillers of spirituous liquors in this State, must pay the gallonage fee, regardless of the destination, since they are the first persons to sell in this State. Distillers of spirituous liquor out of this State must pay "gallonage" or inspection fee in order for their product to enter this State.

(2) Brewers of intoxicating malt liquors in this State, are by Statute and regulation, required to pay the inspection fees while in their hands.

(3) Brewers and manufacturers of Non-intoxicating beer in this State are required to have such beer inspected by the Supervisor.

(4) Brewers of intoxicating malt liquors and non-intoxicating beer out of this State, are required by Statute and regulation, in order to have their product enter this State, to pay the required inspection fees.

In other words a "gallonage" tax is a tax on the manufacturer or vendor and not the vendee. Since the Federal

Government does not manufacture spirituous liquor or malt liquor or non-intoxicating beer, they would not be liable for the tax.

This conclusion must not be construed to mean that liquors or beer shipped into Army or C. C. C. Camps should be free of "gallonage" tax. Since it is paid by the brewer, distiller or manufacturer, it is not necessary for the Federal Government to pay such tax.

(b) It is further the opinion of this department that a "post exchange" or "canteen" in a Civilian Conservation Corps Camp, is not required to purchase a State Permit to sell liquors or beer, since it is a government instrumentality and is not subject to regulation by the State of Missouri

Respectfully Submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

_____

ROY McKITTRICK
Attorney-General

JSP:jn

TAXATION: erchant's and manufacture[illegible] tax against frozen goods.

June 25, 1942

6-26

FILED
39

Mr. Chris. F. Hessler
County Assessor
Buchanan County
St. Joseph, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department as follows:

> "The question has come up here in regard to paying Merchants & Manufacturer's tax against frozen goods. Most of the merchants do not want to pay a tax on frozen goods, will you kindly give me an opinion as what to do about this matter."

Under Section 10936 R. S. Mo., 1939, it is provided that a tax shall be levied on all property, real or personal, except such taxes as are exempt under Section 10937 R.S. Mo., 1939.

Under the Constitution, certain exemptions are granted. We refer to Section 6 of Article 10. This section reads as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon,

> may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Section 7 of Article 10, reads as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Since the subject of your inquiry does not fall within the exempted class mentioned in said Section 6, supra, then any statute which would attempt to exempt any other property would be in violation of said Section 7 of the Constitution. In our research of the statutes, however, we do not find where such goods, because of the fact that they are "frozen" would be exempt from taxes. Numerous cases hold that exemption statutes must be strictly construed and unless the person claiming exemptions can clearly show himself within the provisions of such exemption sections, then he is subject to taxation.

CONCLUSION

From the foregoing, it is the opinion of this department, that merchants and manufacturers should pay the tax against "frozen" goods.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

ROY McKITTRICK
Attorney General

TWB:AW

INTOXICATING LIQUOR: Licensee may employ agent to conduct his business.

December 23, 1942

FILED
39

Honorable W. G. Henderson
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

Under date of December 14, 1942, you wrote this office requesting an opinion as follows:

> "I respectfully request an opinion from your office upon the following question:
>
> "When the holder of a license, issued by the Supervisor of Liquor Control, executes a power of attorney to another individual empowering such individual to conduct, manage, or sell the business, to pay all taxes on the same, and to obtain licenses necessary, is it legal for the attorney to continue the business under the same license or should a new license be required in the name of the attorney?

It is first desired to call to your attention some statements of fundamental law applicable to your question. In this connection your attention is directed to the definition of a power of attorney found in Volume 2 of Corpus Juris at page 452:

> "An agent for any purpose may be, and often is, appointed by a writing, called his power or letter of attorney, which is defined as an instrument authorizing a person to act as the agent or attorney of the person granting it."

It is next desired to call to your attention the following brief extract from Volume 2 of American Jurisprudence, page 29, paragraph 26:

> "Attorneys in fact created by formal letters of attorney are merely special kinds of agents. In matters with respect to the extent of their authority and the manner in which they exercise it, they differ little, if any, from other agents. * * * * * *"

Also the following statement from Volume 37 of Corpus Juris at page 243 from paragraph 100:

> "Unless prohibited by statute, a licensed person or firm may exercise the privilege conferred by the license through clerks or agents; but under some statutes, a separate license must be obtained for each agent."

The qualifications required of an applicant for a license to deal in intoxicating liquors are set out in Section 4906 R. S. Mo., 1939:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village: and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ra-

> tification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid: Provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors, to, by or through a duly licensed wholesaler, within this state."

and by the provisions of Section 4893 R. S. Mo., 1939, a license to sell intoxicating liquor is not transferable.

The selling of intoxicating liquor is a business which a person may not engage in as a matter of right but may only engage in such business in accordance with the laws regulating such privilege which have been enacted governing the selling of liquor. A careful search of the Liquor Control Act does not reveal any prohibitions against a licensee having an agent to operate his business, and no Missouri cases have been found dealing with this question. However, cases from other states have been found. In the case of Rana v. State, 11 S. W. 692, decided by the Supreme Court of Arkansas, it was recognized by the Court that while possession of liquor raised a presumption that the person in whose possession the liquor was found was the owner, that it would be a valid defense to a charge of illegal possession, that the liquor was held by an authorized agent of someone who was duly licensed. In the Alabama case of Barnard v. State, decided by the Supreme Court of Alabama, reported in Vol. 48 So. Rep. at page 483, the Court specifically recognized the right of an unlicensed agent to have possession of the liquor of his licensed

principal. From this case the following quotation is taken:

> "From the whole arrangement between the parties, read from their writings, Barnard was an employe of the licensee to conduct the business until the agreed purchase price was paid, and was to be paid a monthly salary for his services. The provision for Barnard's engagement as manager of the business was induced by an idea of securing Barnard in the payment of the purchase price, due from Lenzer, for the stock, and was entirely consistent with the protection the parties desired and agreed to afford Barnard in the premises. That consideration or inducement did not render the business any the less Lenzer's business of retailing the stock. And the provision in the mortgage that possession should be with Barnard until the purchase price was paid obviously from sales to be effected from the stock was, for like reason, an element not only of security to Barnard, the seller to Lenzer, but was also, consistent with the ample authority conferred by Lenzer on Barnard as general manager of the business. Had the stock been burned without Barnard's misconduct, manifestly the loss would have been Lenzer's. It was his property, subject to the liability fastened upon it by his purchase from Barnard. For purposes of taxation it was Lenzer's property, not Barnard's, and might have been the subject of levy and sale under execution for legal liabilities not canceled by the adjudication of Lenzer's bankruptcy. Under the circumstances here present, we think Barnard's relation to the business of retailing, conducted as shown in the record, was that of an employe of the licensee, and within the protection of the license to Lenzer to retail liquors."

The Michigan case of Wiemer, Prosecuting Attorney, v. Knappen, Circuit Judge, decided by the Supreme Court of Michigan and reported in 134 N. W. Rep. at page 481, is another case recognizing the right of a liquor licensee to have his business conducted by an agent. The strongest case we have been able to find is the case of State v. Dudley from the appellate court of Indiana, reported in Volume 71 of N. E. Rep. at page975, from which case the following quotation is taken:

> "The appellee was indicted for selling intoxicating liquor without a license. Upon trial by the court he was acquitted. The evidence consisted of an agreed statement of the facts, from which it appeared, among other things, that the appellee, at the time of the sale in question, was carrying on the saloon in the city of Wabash, Wabash county, where the sale was made by him as an employe of one Morrow, owner of the saloon and of the liquor sold, under a written contract of employment between Morrow and the appellee. The sale was made in September, 1903. Morrow was duly licensed to sell liquors at that place for one year from January 20, 1903, he being then, and for more than three months prior to that date, a bona fide resident of Noble township, Wabash county, Ind. He sold intoxicating liquors under the license until March 1, 1903. About that time he removed to the city of Peru, Miami county, Ind., where he was living at the time of the trial, having continuously lived there from about March 1, 1903. The appellee had no license, and the sale in question was made in pursuance of the employment under the written contract above mentioned, which was entered into April 1, 1903.
>
> "The only question presented for decision is whether or not license to sell intoxicating liquor at retail under the statutes of this state will protect an employe of the licensee from liability

> for sales made by him as such within the period for which the license was granted, but after the licensee has permanently changed his residence to a county in this state other than that in and for which the license was granted. It has been held in a number of cases that, while a license to sell intoxicating liquors is not transferable by assignment or otherwise, a licensed retailer of intoxicating liquors may employ an agent to conduct and carry on the business, and that such an agent would not be liable to prosecution for selling without license. Pickens v. The State, 20 Ind. 116; Runyon v. The State, 52 Ind. 320; Keiser v. The State, 58 Ind. 379; Heath v. The State, 105 Ind. 342, 4 N. E. 901. * * * * * "

This case further holds that an agent may not conduct the business of a licensee who has lost his qualifications to hold the license.

In none of these cases are the statutes which were construed identical with the Liquor Control Act of Missouri, but in the Dudley case, supra, there was a requirement of residence and all of the cases were dealing with the subject of intoxicating liquor. Further, the following brief quotation is taken from Volume 33 of Corpus Juris at page 535, paragraph 99:

> "A licensed vendor of intoxicating liquors may employ an agent to carry on his business, and the agent will be under the protection of the licensee.* * * * * "

The Missouri Liquor Control Act impliedly recognizes that a liquor business may be operated by agent when it authorizes the issuance of a license to corporations. Also Section 4907 R. S. Mo., 1939, recognizes that an agent

may sell liquor for a licensed principal by the following language:

> "No person or corporation, or any employee, officer, agent, subsidiary, or affiliate thereof, shall have more than three licenses, * * * *"

CONCLUSION

From the foregoing, it is the conclusion of the writer that a license to sell liquor should not be required for the duly appointed agent of a properly licensed dealer so long as the dealer retains his qualifications under the Missouri Liquor Control Act. It is desired to call to your attention in this connection that the appointment of an agent might be used as a subterfuge to permit someone not properly qualified to engage in the liquor business. In such an event it is believed the appointment of the agent or attorney in fact would be no protection.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

WOJ:FS

ROY McKITTRICK
Attorney-General

ELECTIONS: BOARD OF ELECTION COMMISSIONERS: Certificates of nomination filed with Board of Election Commissioners

February 17, 1942

2-77

FILE 40

Honorable William Hicks
County Clerk
Jackson County
Kansas City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter in which you request our opinion as to the proper place to file certificates of nomination to fill vacancies existing in the General Assembly from the Sixth and Ninth Districts of Kansas City, Missouri. We understand that on January 30, 1942, the Governor served on the Board of Election Commissioners of Kansas City writs of election to fill said vacancies and calling a special election to fill same.

The question is, should the certificates of nomination be filed with the County Clerk of Jackson County or with the Board of Election Commissioners of Kansas City?

It is our information that the Sixth and Ninth Districts are wholly within Kansas City. We have heretofore, on October 29, 1941, rendered an opinion to Governor Donnell that the writs of election to fill vacancies in the House of Representatives in Jackson County should be directed to the Board of Election Commissioners of Kansas City.

Section 11527, R. S. Mo. 1939, provides:

> "Certificates of nomination shall be filed with the secretary of state for the nomination of candidates for offices to be filled by the electors of the entire state, or any district or division of a greater extent than one county. For all other nominations to public offices, certificates of nomination shall be filed with the clerks of the county courts of the respective counties wherein the offices are to be filled by the electors."

Section 11538, R. S. Mo. 1939, provides in part as follows:

> "Certificates of nomination filed with the secretary of state shall be filed not more than sixty and not less than thirty days before the day fixed by law for the election of the person in nomination. Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than sixty days and not less than fifteen days before election: Provided, that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the election commissioners the name or names of candidates to fill such vacancy: Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination and with the board of election commissioners or county clerk not later than ten days before such election: * * * * * * * * * * *"

In Section 11540, R. S. Mo. 1939, Art. 4, Chap. 76, providing for objections to certificates of nomination, we find the following proviso:

> "* * * that in all cities having a board of election commissioners, the said board shall perform all the duties herein required of county clerks and be governed in all respects by the provisions of sections 11539 and 11540, the same as county clerks."

It will be noted that all of the above sections are found in Article 4, Chapter 76, R. S. Mo. 1939.

Section 11630, R. S. Mo. 1939, in Article 7, Chapter 76, provides:

> "The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

While it is true that section 11630 R. S. Mo. 1939, is not now a part of Article 4, Chapter 76, and from reading same one is unable to determine whether the word "herein" as used in said section refers only to Article 7, Chapter 76, or refers to the whole of Chapter 76. We have examined the Session Acts of 1889 at pp. 105-111, and find that what is now Section 11630, R. S. Mo. 1939, was Section 37 in the original act.

In the revision of 1899 we find that what is now Section 11527 was Section 7080; Section 11538 was 7087 and Section 11630 was 7117. All of said sections were in the same article and chapter, namely Article 2, Chapter 102, in the revision of 1899. From this, we have come to the conclusion that the "herein" as used in Section 11630 has reference to the preceding sections, namely Section 11527, 11538 and 11540.

After reading all of the aforementioned sections together and tracing the history of same, we have reached the conclusion that the filing of the certificates of nomination aforesaid, should be made with the Board of Election Commissioners.

CONCLUSION

From the above and foregoing, it is our opinion that the certificates of nomination for the special elections to be held on March 10, 1942, to fill the vacancies in the House of Representatives of the Sixty-First General Assembly from the Sixth and Ninth Districts of Kansas City, Missouri, both of

which districts are wholly within Kansas City, should be filed with the Board of Election Commissioners of Kansas City, Missouri.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:NS

LOTTERIES: : The sales plan for defense stamps and bonds is a lottery.

February 27, 1942

3-5

Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

FILE 40

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "A group of men have devised a scheme they intend to promote in Ray County, which has as its goal the giving of defense bonds and stamps as awards.
>
> "The plan is this: A club is formed in which new members are charged $1.00 to belong; they are given an application blank which carries 10 blank lines and their name is placed on the first blank; for every two members they bring in (who pay the $1.00 fee each) their name is put up one line, until when they reach the fourth or fifth space and are then paid a certain amount of defense stamps or bonds. This is similar to the chain letter idea.
>
> "I am inclosing you herein a sample of the blank which they have printed and intend to use. My contention is that whenever plans are ceased and operations halted, someone who has paid to join will lose and therefore the scheme constitutes a lottery."

In your request you assume the scheme involved in the application plan attached, which is marked as "The V Sales Plan for Defense Stamps and Bonds" is similar to the chain letter. In checking over the application I find that it is the same as the chain letter idea. There is no question but that under the chain letter, and under the scheme or plan as set out in your request chance is involved, for the reason that one having paid the one dollar, may, if all following subscribers pay according to the plan, receive One Hundred, Twenty-eight ($128.00) Dollars, and the applicant, if no one else subscribes to the plan, loses the original one dollar payment.

There is no question but that the consideration in the scheme, or plan, is one dollar, which the member pays on the original application.

Section 10, Article XIV, Constitution of Missouri reads as follows:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise ticket, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704 R. S. Missouri, 1939, reads as follows:

> "If any person shall make or establish, or aid or assist in making or

> establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

This section was passed upon in the case of State v. Emerson, 1 S. W. (2d) 109, par. 2, where the court said:

> "The people in framing the state Constitution (section 10, art. 14) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State ex rel. Hughes, supra, loc. cit. 534 (253 S. W. 229). In State v. Becker, supra, loc. cit. 560 (154 S. W. 769), in line with our former rul-

> ings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word, and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme, or device whereby anything of value is disposed of by lot or chance.
>
> "The crime having been properly charged, the proof of the existence of the elements necessary to establish it are held to be consideration, chance, and a prize. Were these elements shown to have been present in the instant case? Let the facts bear witness. The moving consideration in the making of the contract was the payment by the holder of weekly installments; the chance was that of an early selection of the holder's contract for a discount; and the prize was the furniture to be received. Further than this, the inequality between the different contract holders whereby one might secure $55 worth of furniture for a few dollars while another would be required to pay that amount in full for the same quantity of furniture consituted a prize, within the meaning of the Constitution. The lack of knowledge of a holder as to when his contract would be discounted constituted a chance within the contemplation of the law."

Under the holding in the above case a lottery is described as a "scheme" or "Device" where anything of value is for the consideration allotted by chance. Under the

facts in your request there is no question but the consideration is one dollar and the chance is that subsequent applicants to the plan may not pay the original applicant who has paid his, or her, dollar.

In the case of State v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705, l. c. 713, pars. 1,2, and 3, the court said:

> "It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633. 639, l. S. W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. State v. Schwemler, 154 Or. 533, 60 P. 2d 938; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529, 537, 253 S. W. 229, 231, 28 A. L. R. 1305, 1310; State v. Becker, 248 Mo. 555, 562, 154 S. W. 769, 771.
>
> "The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element--chance--

> was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C. J. section 5, p. 291; 17 R. C. L. section 10, p. 1223; Waite v. Press Publishing Ass'n, 155 F. 58, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill, judgment, or research enter thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

Also, in the case of State v. McEwan, 120 S. W. (2d) 1098, l. c. 1101, quoting from the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, said:

> "We like the expressions of the United States Circuit Court of Appeals, Tenth Circuit, in the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, loc. cit. 599, involving an injunction proceeding to restrain an infringement of a copyright on 'bank night.' The scheme of 'bank night' there was the same as described in the information under consideration. The court said:

'The plan or system portrayed in the copyrighted sheets discloses more than once that an admission charge must not be exacted as a condition entitling one to participate in the drawing. Everyone, if he holds or does not hold or buys or does not buy a paid admission ticket to the show, is entitled to register at the entrance or in the lobby of the theatre, and he is thereupon designated by number opposite his name and must be permitted to have an equal chance with every other registrant in drawing the prize. This seems to be a subterfuge to escape the stigma of being a lottery. It is apparent that no one would give prizes if all participants in the drawings paid no admission fees. Show places are conducted for profit. The plan would be wholly worthless as a money making scheme, both to lessor and lessee. It is further apparent that when non-paying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent one who paid to get in only because of his interest in the drawing. Indeed, that is more than probable. Then how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift. If not within the literal definitions of those vices, plaintiff's plan and system is too closely akin to have the protection and assistance of a court of equity.'

The court in the case of State v. McEwan, supra, further said:

> "We agree with the reasoning in the above cases that a sufficient consideration exists in the scheme to come within the terms of our statute, which makes it a felony to establish or aid in establishing any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery. We are supported in this conclusion by the following authorities: City of Wink v. Griffith Amusement Co., supra; State v. Danz, 140 Wash. 546, 250 P. 37, 48 A. L. R. 1109; Featherstone v. Independent Service Station Ass'n (Tex. Civ. App.) 10 S. W. 2d 124; Affiliated Enterprises, Inc. v. Gantz, supra; Maughs v. Porter, 157 Va. 415, 161 S. E. 242; Iris Amusement Corp. v. Kelly, supra; State ex rel. v. Fox Theatre Co., 144 Kan. 687, 62 P. 2d 929, 109 A. L. R. 698; Commonwealth v. Wall (Mass.), supra; Jorman v. State, 54 Ga. App. 738, 188 S. W. 925, loc. cit. 927. In the last case cited the Court of Appeals of Georgia had this to say: 'It cannot alter the fact that the operator may have given free chances to some without the purchase of tickets; even so, the lottery scheme as to a gift enterprise was present to all the rest, and this fact did not prevent it from being a lottery under the law of Georgia.' (Italics ours.)
>
> "The court also quoted with approval the following from Equitable Loan & Security Co. et al v. Waring, 117 Ga. 599, 44 S. E. 320, loc. cit. 327,

> 62 L. R. A. 93, loc. cit. 100, 97 Am. St. Rep. 177: 'As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful.'"

In Missouri a lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S. W. (2d) 109, 111; State ex rel. vs. Hughes, 299 Mo. 529, 253 S. W. 329, 28 A. L. R. 1305; State vs. Becker, 248 Mo. 55, 154 S. W. 769.

The English and Federal forms are alike in that they do not specifically mention consideration, but the element is implied. The Monetary form limits the consideration to the payment of money--legal tender. The Judicial form is so named because state courts, in the absence of statutory definitions have frequently used it. The Judicial and Statutory forms require a payment to be made; namely a direct benefit to the promisor. The Missouri form requires only "consideration" in any form recognized by law. It appears in the singular form and represents the total consideration from all contestants as a unit.

The Missouri form keeps alive the spirit of Article XIV, Section 10 of the Missouri Constitution, and Section 4704, R. S. Missouri, 1939, and gives to the word "lottery" its popular and non-technical meaning--a goal which all definition makers have sought. This definition is brief, clear, complete, comprehensive, and satisfactory in every respect. It assembles the elements of a lottery in bold relief, shows their relation to each other with no attempt to place any limited or confined meaning on one or more of the elements. It furnishes an accurate standard or hard stick for testing any lottery scheme.

There are two kinds of chance which are recognized in different jurisdictions as one of the elements of lottery. Some courts follow what is known as the "pure" chance doctrine, while other jurisdictions hold to that of "dominant" chance.

17 R. C. L. 1223 says:

> "Chance as one of the elements of a lottery has reference to the attempt to attain certain ends not by skill or any known or fixed rules, but by the happening of a subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity, and it is essential * * * * in order to give to the scheme the character of a lottery. In the United States * * * * it is not necessary that this element of chance should be 'pure' chance but may be accompanied by an element of calculation or even of certainty."

Under the above ruling a lottery is described as something happening at a subsequent time, and, under the facts in your request some of the earlier applicants to this scheme, or plan, would not derive any benefit, unless the later applicants continued to buy, and give the dollars worth of defense stamps as set out under the plan.

The same proposition is presented in 38 Corpus Juris 291.

Commenting upon the element of chance, Thomas on Non-Mailable Matter, Section 67, page 79, said:

> "* * * * But one can not read the opinions of the courts on this subject without being impressed with the proposition that chance, after all, consists in our ignorance of

> the event upon which a wager is laid, rather than upon anything that inheres in that event itself. If a man does not know whether an event will turn out one way or the other and he stakes money on it, as to him the event will happen by chance, because it is brought about without his will or choice."

A New York Court in People vs. Lavin, 179 N. Y. 164, l. c. 169, 71 N. E. 753, in discussing the element of chance, said:

> "Therefore, that may be a matter of chance to one man which is not a matter of chance to another, and with different men the chances of the occurrence of any event may differ greatly. It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence."

The Supreme Court of the United States in Dillingham vs. McLaughlin, 68 L. Ed. 742, l. c. 747, said:

> "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

The general rule is amply stated in Thomas on Non-Mailable Matter, Section 16, page 35, as follows:

> "The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprize a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

Other cases to the same effect are: Union Gas and Oil Co. vs. Wiedeman Oil Co., 277 S. W. 323, 330; McNulty v. Kansas City, 198 S. W. 185; Mayfield vs. Eubank, 278 S. W. 243, 246; Mayers vs. Groves Bros. and Co., 22 S. W. (2d) 174, 177; Loveland vs. Bode, 214 Ill. App. 399; Maughs v. Porter, (Va.) 161 S. E. 242; 38 C. J. S. 7, p. 291; Tucker v. Dolan, 109 Mo. App. 442, 456; Underwood Typewriter Co. vs. Realty Co. 118 Mo. App. 197, 202.

CONCLUSION

In view of the above authorities, and under the description of the plan and scheme set out in the "The Sales Plan for Defense Stamps and Bonds", we are of the opinion that this scheme, or plan, both in its theoretical and practical effect is a lottery under Section 4704 R. S.

Missouri, 1939, and Article 14, Section X of the Missouri Constitution.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION:
COUNTY CLERK: Duties of county clerk in relation to equalization of assessment by county Board of Equalization, State Board of Equalization and State Tax Commission.

April 16, 1942

H-30

FILE 40

Mr. William Hicks, Secretary
Jackson County Board of Equalization
Kansas City, Missouri

Dear Mr. Hicks:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the following statement of facts:

> "As Secretary to the Board of Equalization of Jackson County, Missouri, I have had it called to my attention that it is my duty to see that the tax base is substantially in accordance with the valuation for Real Estate as certified to me by the State Tax Commission for this County.
>
> "Due to the numerous and unforseen complaints being received by the Jackson County Board of Equalization, it appears our new base will be substantially lower than the amount as certified to me.
>
> "Kindly advise me as to what position I am to take in regard to this matter so that I may extend the tax books accordingly."

In speaking of the steps which an assessment takes in the process of taxation, the court in State ex rel. Thompson v. Bethards 9 S. W. (2d) 603, 605 said:

> "The regular course is as follows: After fixing the valuation under section 12802, the assessor makes an abstract of his footings and forwards the same to the state auditor. Section 12810, R. S. 1919. (Section 10990 R. S. Mo. 1939) The clerk is liable to a penalty if he fails to do that.

> And when erroneous assessments are corrected by the county court for persons who make complaints (section 12817), (Section 10998, 1939) the clerk shall correct the tracts on the books under orders made by the county court (section 12818). (Section 10999, 1939)
>
> "The state auditor, under section 12855, (section 11036, 1939) must lay before the state board of equalization the abstracts of all the taxable property of the state returned to him by the respective county clerks. The state board then equalizes the valuations of property between the several counties. Under section 12857, (sec. 11038, 1939) when the state board of equalization shall have completed its labors, it must transmit to each county clerk the per cent, added to or deducted from the valuation of the property of his county. Then the clerk shall furnish one copy thereof to the assessor, and one copy shall be laid before the annual county board of equalization. * * *"

Section 11007 R. S. Mo., 1939, provides as follows:

> "In case the report from the state board of equalization be not received at or during the session of said county board, then it shall be the duty of the county clerk to adjust the tax books according to such report when received."

So, if the state board of equalization has not completed its work on the assessment at the time the county board of equalization meets, then the duty falls on the clerk to add or deduct the per cent necessary to adjust the tax books in conformity to the valuation as finally fixed by the state board of equalization.

Under section 11002 R. S. Mo. 1939, the county board of equalization is limited in its power to the amount fixed by the state board of equalization. This section reads as follows:

> "Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk, fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value: Provided, that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

Section 11027 R. S. Mo. 1939, which applies to the powers and duties of the state tax commission provides in part as follows:

> "It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:
>
> *
>
> "To require from any officer in this state, on forms prescribed by the commission, such annual or other reports as shall enable said commission to ascertain the assessed and equalized value of all property listed for taxation, the amount of taxes assessed, collected and returned, and such other matter as the commission may require, to the end that it may have complete information concerning the entire subject of revenue and taxation and all matters and things incidental thereto."

> "To furnish the state board of equalization at each session thereof a statement of the value of the taxable property in each county in the state, and, when so requested, to meet with the state board of equalization. The said statement herein referred to shall include a statement of the amount to be added to or deducted from the valuation of the real and personal property of each county, specifying the amount to be added to or be deducted from the valuation of the real or personal property, to the end that the state board of equalization may adjust and equalize the valuation of real and personal property among the several counties in the state as is provided by law."

By virtue of the provision of these sections, the State Tax Commission, requires the abstract of the assessment referred to in Section 10990 R.S. Mo, 1939, to be sent to it on what is called "Form 11". This information is furnished on Form 11, to the State Tax Commission in lieu of the report being made to the State Auditor, as is provided by said section 10990. The State Tax Commission, in lieu of the State Auditor, then lays this report before the state Board of Equalization, as is provided under Section 11036. After the County Board of Equalization has completed its work, the commission, under authority of the sections hereinbefore cited, requires the clerk of the county court to send to it, a report of the work of the said Board of Equalization, including the various classes of property taxed on Form 11a. This report is also submitted to the State Board of Equalization and the labors of that board are not completed until it has passed on this report.

Section 11038 R. S. Mo., 1939, provides as follows:

> "When the state board of equalization shall have completed its labors, the state auditor shall immediately transmit to each county clerk the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property respectively,

> and also the value of the real and personal property of his county as equalized by said board; and the said clerk shall furnish one copy thereof to the assessor; and one copy to be laid before the annual county board of equalization. And it shall be the duty of the state auditor to require of clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties, for those years in which no state board of equalization is held, to the aggregate amount fixed by the last state board of equalization."

Under this section, the state board of equalization, completes its labors relating to an assessment when it has finally considered and passed on the information contained in Forms 11 and 11a, which are returned by the county clerk to the state tax commission. If the labors of the state board of equalization, under Section 11038 R. S. Mo. 1939, are performed after the county board of equalization has adjourned, then under section 11007 R. S. Mo. 1939, it is the duty of the county clerk to adjust the tax books according to such reports, when received.

The duties of the county clerk in relation to the county board of equalization and the state board of equalization are stated in Section 11004 R. S. Mo. 1939, which is as follows:

> "The said board shall hear and determine all appeals made from the valuation of property made by the assessor in a summary way, and shall correct and adjust the assessment accordingly. The county clerk shall keep an accurate record of the proceedings and orders of the board, and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of said board and the orders of the state board of equalization; Provided, that in adding or deducting such per centum

> to each tract or parcel of real estate as required by said board, he shall add or deduct in each case any fractional sum of less than fifty cents, so that the value of any separate tract shall contain no fractions of a dollar."

It will be noted here, that the clerk is subject to the orders of both, the county board of equalization and the state board of equalization. In other words, if the county board of equalization makes an order equalizing property in a class then it would be his duty to keep an accurate record of same and to adjust the books according to said order, subject, however, to any change which may be ordered by the state board of equalization.

Again referring to Section 11002 R. S. Mo. 1939, it will be seen that the county board of equalization cannot reduce property in a class to a value below that fixed by the state board of equalization, and if it has so done, such acts are void.

We also refer to Section 11029 R. S. Mo. 1939, which is in part as follows:

> "When the work of assessment and equalization shall have been completed, the secretary of the state tax commission shall immediately certify to each county clerk a statement giving the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property respectively, and also the value of the real and personal property of his county as equalized; and the said clerk shall furnish one copy thereof to the assessor and one copy to be laid before the annual county board of equalization. It shall be the duty of the state tax commission to require of clerks of the several county courts of this state to keep up the aggregate valuation of real and personal property in their respective counties to the aggregate amount fixed by the state tax commission. * * * * * * *"

By this section, when the state board of equalization has completed its work on the assessment, that is, after it has considered the reports submitted on Form 11 and 11a, referred to above, the state tax commission then certifies to the clerk of the county court the per centum added to or deducted from the valuation of his county, specifying the percentage added to or deducted from the valuation of real and personal property and classes thereunder. This report is laid before the county board of equalization if such board is still in session and if not, then the clerk of the county court, under Section 11007 R. S. Mo. 1939, carries out the order of the state board of equalization and adjusts the books accordingly.

It will also be noted by this section that it is the duty of the state tax commission, to require the clerk of the several county courts to keep up the aggregate valuation of real and personal property in the respective counties to the aggregate amount fixed by the commission. The language used here respecting the duties of the tax commission to require the clerks to perform their duties is almost identical with the language used in Section 11038 R. S. Mo. 1939, which places the duty on the auditor to require the clerks to perform their duties relating to the assessment fixed by the state board of equalization and state tax commission. These sections may be read together and we think a proper construction on same would be that either the tax commission or the state auditor would be authorized to compel the county clerks to carry out their duties pertaining to these tax matters. In the Bethards case, supra, at l. c. 605, the court in speaking of the duties and powers of the board of equalization in reference to fixing the valuation at less than that fixed by the State board of equalization, said:

> "That section means, if anything, that the state board of equalization fixes values as well as the assessor or the county board. Therefore the county board of equalization of Shelby county had no authority to reduce the valuation fixed by the state board. When it attempted to equalize the values in accordance with the prior valuations fixed by the assessor, which valuations had been annulled by the order of the state board of equalization, the proceeding was a nullity. The entire proceeding of the county board in the matter was of no effect."

* *

> "The county board of equalization, under article 3, c. 119, sec. 12821, is authorized to hear complaints and equalize valuations made by the assessor. It is nowhere authorized to increase or reduce the aggregate valuation fixed by the state board of equalization. It has no power to assess. State ex rel. v. Baker, 170 Mo. loc. cit. 391, 70 S. W. 872. Its duty is to equalize among the separate tracts the valuations fixed by the assessor. If the county board of equalization refuses to perform its duty, as it did in this case, then the statutes clearly contemplate that the county clerk shall adjust the valuation in accordance with the orders of the state board. * * * * * * * * *"
>
> *"

By the opinion in the Bethards case, supra, it will be seen that the county clerk must adjust the tax books according to the orders of the state board of equalization or those of the state tax commission, which are approved by the state board of equalization.

In the case of State ex rel. Thompson v. Dirckx, 11 S. W. (2) 38, an action was brought against the county clerk to require him to adjust the tax books to conform to the orders of the state board of equalization. The order of the state board of equalization in that case was made on May 16th, which was sometime after the labors of the county board of equalization had ended.

At l. c. 40, the court said:

> "Respondent refuses to correct or adjust the assessor's books of Cole County so that they will conform to the order of the state board of equalization, giving as his reason therefor that he cannot do so without doing violence to and disobeying the order and judgment of the county board of

> equalization, which he believes and alleges to be a valid and legal order and judgment.
>
> "From the foregoing it is manifest that either the state board of equalization or the county board has exceeded its statutory jurisdiction, or else the statutes themselves engender an irreconcilable conflict. In order to determine where the fault lies it will be necessary to make a brief examination of the statutory scheme of assessing property for the purpose of levying ad valorem taxes."

Following the foregoing statement, the court in this opinion reviewes the various taxing statutes relating to the duties of the county board of equalization, state board of equalization and county clerks.

At l. c. 41, in speaking of the county board's authority, the court said:

> "* * * The county board's authority is limited to equalizing valuations of property within a class. If it finds one piece of property within a class overvalued, it follows as a necessary implication that the remaining property in the class, or at least some of it, is undervalued. This for the reason that the valuation of the whole as a class, is fixed by the state board and that cannot be changed. A reduction of the valuation of one or more pieces of property therefore requires a corresponding increase of the valuation of some or all of the remaining property in the class.
>
> *
>
> "* * * The assessor is commanded to value

> and assess all property according to its true value in money, and the state board of equalization to determine as to each class of property its true value in money. If these plain mandatory provisions are violated through discrimination as between the different classes of property, the power of correction does not lie with the county board of equalization. The taxpayer who suffers from such discrimination must find relief in a court of equity."

By this statement, it will be seen that the county board is limited to equalizing valuation within a class and it is not authorized to increase or decrease the total valuation in that particular class and if it does, it acts beyond its jurisdiction and therefore such acts are void.

In this case, the court held that the county clerk could be compelled by mandamus to adjust the tax books in conformity to the order of the state board of equalization.

In connection with your question, we are not unmindful of the duties of the county clerk with respect to the extension of taxes as provided by Section 11048. However, we do not think the assessor's books would be considered as corrected and adjusted until after the orders of the state board of equalization respecting the same have been complied with and the county clerk would thereafter have ninety days to perform his duties under said section.

CONCLUSION

From the foregoing, it is the opinion of this Department that it is the duty of the county clerk to adjust the tax books according to the orders of the county board of equalization and the state board of equalization and that in the performance of this duty he shall keep up the aggregate valuation of real and personal property to the aggregate amount fixed by the state board of equalization as certified to him by the state tax commission.

We are further of the opinion that if the county board of equalization completes its labors before the state board of equalization has completed its labors on such assessments, then it is the duty of the county clerk to adjust the assessor's books in accordance with the orders of the state board of equalization and of the state tax commission.

We are further of the opinion that in cases where the state board of equalization has completed its labors pertaining to the assessments before the county board of equalization adjourns, and in cases where the county board of equalization attempts to reduce the valuation of real or personal property in a class below the value thereof, as fixed by the state board of equalization, it is the duty of the clerk to refuse to enter such orders on the record of the proceedings of the board because such acts on the part of the board of equalization are null and void, under provision of section 11002 R. S. Mo., 1939.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

TWB:AW

ROADS AND BRIDGES - (1) Commissioner cannot appoint his brother to work as laborer on the roads; (2) it is against public policy to sell supplies to his (Commissioner's) road district; and (3) city attorney of city in special road district may charge for legal services rendered special road district.

October 7, 1942

10-9

FILED
40

Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

Your request of October 15, 1942, for an opinion on three questions, in reference to Special Road Districts organized under Section 8673 R. S. Missouri, 1939, has been received.

I

Your first question reads as follows:

> "Can one Commissioner employ his brother to work as a laborer on the roads in said district and pay him out of the District funds?"

The constitutional section applicable to the above question is Section 13, Article XIV of the Constitution of Missouri, which reads as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or

> to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

There is no question but that the Commissioner of a Special Road District organized and acting under Article 10, Chapter 46 R. S. Missouri, 1939, is a public officer. He is a public officer for the reason that he has a designated term of office, as set out under Section 8675 R. S. Missouri, 1939. He is also invested with some portion of the sovereign functions of government to be exercised for the benefit of the public. That he is a public officer was held in the definition set out in the case of State ex inf. Ellis v. Ferguson, 65 S. W. (2d) 97, Par. 7, where the court said:

> "The first question in this connection is: Is the mayor of a city of the third class a public officer? The answer must be yes. A public office is well defined to be: 'The right, authority and duty created and conferred by law, by which for a given period, fixed by law, * * * an individual is invested with some portion of the sovereign functions of government, to be exercised, for the benefit of the public,' and a public officer is one who receives his authority from the law and discharges some of the functions of government. Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700, 701."

If the Commissioner, as set out in the above question, has the power to appoint, or participates in the appointment of his brother to work in the road district, and pay him out of the district funds, he is violating Section 13 of Article XIV of the Constition of Missouri, which section is self enforcing.

It has been held in this State that where the appointment is made by a board and the appointee comes within the limitations, as set out under Section 13, of Article XIV of the Constitution of Missouri, and is not appointed or voted upon by the board member who is a relative of his, the nepotism section is not violated. It was so held in the case of State v. Becker, 81 S. W. (2d) 948, l. c. 950, where the court said:

> "The relator takes the position that the true meaning of said provision, as decided in that case, would render the appointment of Commissioner Sutton by the two members of the Court of Appeals not related to him, just as obnoxious to the provision as if one of the two were related to him; this, notwithstanding the fact that the third member, who is related to the proposed appointee, declines to participate in any manner in the purpose of his associates or in aid of the result of the combined action of the two.
>
> "In the carefully considered opinion in that case, written by Gantt, C. J., the conditions that led to the adoption of the nepotism provision, and the evils sought to be corrected thereby, are pointed out and commented upon. It is unnecessary to repeat here what was there said in that regard. Any interested reader may examine that case for

> details. The decisive passage quoted by the relator from that opinion is as follows: 'The amendment is directed against officials who shall have (at the time of the selection) "the right to name or appoint" a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment.'"

CONCLUSION

It is, therefore, the opinion of this department, that if the Commissioner participated in the appointment of his brother he has violated Section 13, of Article XIV of the Constitution of Missouri, but if his brother was appointed solely by the other two members of the Board of Commissioners, then Section 13, of Article XIV of the Constitution has not been violated.

II

Your second question reads as follows:

> "Can a Commissioner order gasoline and other fuel to be purchased by the Road District foreman from a firm composed

of the Commissioner and his brother?"

In a careful research for prohibitions against an officer of a road district buying supplies from a firm in which the officer is a member, or is interested, we find no statute which prohibits such a purchase. The courts of this State, however, have held that such proceedings by officers of the state, county, or other municipal corporation is against public policy. The case of State v. Bowman, 184 Mo. App. Rep. 549, is a case where a member of the city council attempted to appoint himself city clerk of the city of Springfield, Missouri. In that case the court, in holding that it was against public policy for a public official to attempt to use his official power directly, or indirectly to increase the emoluments of his office, at page 557, said:

> "A great statesman has voiced the basic principles governing official conduct by declaring that: 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

The above case was a question of working for the body of which he was a member, but the same theory should apply apply to the buying of supplies or entering into contracts as a member of a body with a firm in which he is interested.

CONCLUSION

Therefore, it is the opinion of this department that it is against public policy for a Commissioner of a Special Road District, organized under Section 8673 R. S. Missouri, 1939, to order gasoline and other fuel to be purchased by the Road District foreman from a firm composed of the Commissioner and his brother.

We do not hold, however, that this is a criminal act, but do hold it would be a civil affirmative defense on a suit for the purchase price under the contract.

III

Your third question reads as follows:

> "This being a Road District, in which the Commissioners are selected by the Mayor and Council, together with the County Court, would the City Attorney of the City, which created said district, be bound to render his services free, or without extra charge other than his usual salary as City Attorney, for legal advise to said commissioner, and his advise and legal work done in drafting a bond issue, if one Provision of the Ordinance is as follows:

> "'The City Attorney shall draft all bonds, contracts and such other instruments of writing as may be required by the City Council, and examine and inspect tax assessment rolls, and all proceedings in reference to the collection of taxes and assessments, and perform such other professional service incident to his office as may, in any case be required by the city council or any of its committees or officers.'"

In the facts stated in your third question, you have set out part of a city ordinance, which in no way effects the action of the city attorney in advising, or rendering services to the Special Road District of Ray County. The city attorney is employed by the city, the name of which you do not mention in your request, but the city in no way is connected with the Special Road District, except that in the organization of the road district, under Section 8675 R. S. Missouri, 1939, the mayor and members of the city council of the city within the special road district at the time of the organization, together with the members of the county court of the county in which the district is located meet within two weeks after the adoption of the proposed district and appoint a board of commissioners composed of three persons, one to serve three years, one for two years, and one for four years, who shall be resident taxpayers of the district, and serve until their successors are appointed and qualified.

The road district is a separate entity from that of the city and, under the provisions of Section 8674 R. S. Missouri, 1939, it is specifically set out that the road district shall be a body corporate, having a special name, and shall be capable of suing and being sued, and of contracting and being contracted with. The city, except physically, is in no way a part of the special road district. The ordinances of the city do not in any way govern or control the city attorney in his actions, in rendering his services as an attorney at law, for compensation, to the special road district, and his salary and employment do

not include the rendering of such services without compensation.

CONCLUSION

Therefore, it is the opinion of this department that even though the city created the special road district, as organized under Section 8673 R. S. Missouri, 1939, the city attorney is not bound to render his services free or without extra charge for legal advice to said commissioners, or for his advice and legal work done in drafting a bond issue.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY TREASURER: VACANCY: Person filling vacancy in office of County Treasurer is not entitled to receive increase in compensation during the term of office.

January 16, 1942

1-20

FILE

Hon. W. A. Holloway
Chief Clerk
State Auditor of Missouri
Jefferson City, Missouri

Dear Mr. Hollowa :

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts:

> "Recently the office of County Treasury of Ralls County was vacated and in the early part of this month an appointment was made by the Governor for the unexpired term.
>
> "Last October the County Treasurer's new salary bill became effective but could not be applied in this county because of the salary basis established by the new law. This was due, of course, to the Constitutional barrier of an increase in salary to an officer during his term.
>
> "The question has now been raised concerning the salary basis of the newly appointed Treasurer for the remainder of this term, and we would appreciate your opinion on this question."

The office of county treasurer is not an office created by the Constitution of the State, there being only two county offices that may be termed constitutional offices, these being the offices of sheriff and coroner. However, by Section 14, Article 9 of the Constitution, the General Assembly is authorized to provide for the election of such other county officers as the public convenience may require. In accordance with this authorization, the General Assembly, by Section 13790, Article 8

Chapter 100, provided for the election of a county treasurer in counties having a population of less than 40,000 inhabitants. This section is as follows:

> "On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that nothing in this section shall apply to counties under township organization."

Ralls County, by the 1940 Census, has less than 40,000 inhabitants, and the election of the County Treasurer would be governed by this section of the statutes.

A vacancy occurring in the office of County Treasurer would be filled under Section 11508, Article 2, Chapter 76, R. S. Mo. 1939, which is as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office, originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff, or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such

> office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

It will be noted that the county treasurer is elected for a term of four years, and until his successor is elected and qualified. In the event of a vacancy, some person would be appointed to perfrom the duties until a successor could be elected for the unexpired portion of the term. It obviously was the intention of the lawmakers that the period for which the officer was elected should be one term, without regard to the number of persons who might have tenure of the office, and that tenure of the office by more than one person would not have the effect of creating a new term.

Section 8, Article 14, is the Section of the Constitution which applies to your question. This section is as follows:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of Givens v. Daviess County, 107 Mo. 603, it was held this section was applicable to a county treasurer.

The question of whether or not a person appointed or elected to fill a vacancy in an office is entitled to

receive an increase in compensation, authorized before his election or appointment to fill the vacancy, but which the officer whose term he is finishing could not have received, because of the above constitutional provision, is one which the Missouri appellate courts have not passed on. In other states having somewhat similar constitutional provisions, this question has been before the courts and the decisions are not in harmony.

In the California case of Larew v. Newman, 23 Pac. 227, when a similar question was presented to the Supreme Court of California, the court ruled against allowing the person filling the vacancy to receive the increase in compensation. The following quotation is from this case:

> " * * * * * Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at $650 per annum. This act enacted that its provisions for salaries 'shall not affect the present incumbents;' and also that a vacancy in an office should be filled by appointment by the supervisors, 'the appointee to hold office for the unexpired term." Section 9, art. 11, of the state constitution, provides that 'the compensation of any county * * * officer shall not be increased after his election, or during his term of office.' Section 1004 of the Political Code provides that 'any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills.' We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed."

The case of Storke v. Goux, 62 Pac. 68, also a California case, in which it was sought to have the case of Larew v. Newman, supra, overruled, followed and cited with approval the Larew case. The case is also cited with approval in the case of Wilson v. Shaw, 188 N. W. 743, decided by the Supreme Court of Iowa in 1922, and in the case of State ex rel. Hovey v. Clausen, 251 Pac. 772, decided by the Supreme Court of Washington in 1922. In both of these cases the person filling the vacancy was denied the increased compensation. The Kentucky case of Bosworth v. Ellison, 147 S. W. 400, 148 Ky. 708, is also a case which is similar, and in which the case of Larew v. Newman, supra, is cited.

The most recent case we find citing and following the Larew case, supra, is the case of Clark v. Frohmiller, 88 Pac. (2d) 542, decided by the Supreme Court of Arizona in March of 1939. In none of these cases was the constitutional provision identical with ours.

The leading case allowing the person filling the vacancy to receive an increase in compensation which could not have been received by the person whose term was being filled, is the case of State v. Frear, 120 N. W. 216, 138 Wis. 536, 16 Ann. Cas. 1019. This case recognizes the rule announced in the case of Larew v. Newman, supra, as the general rule, but allowed the person filling the vacancy the increased compensation. The ruling was largely based on administrative interpretation acquiesced for over fifty years. This case is followed in the Oklahoma case of Carter v. State, 186 Pac. 464, 74 Okla. 31. The Montana case of State ex rel. Jackson v. Porter, 188 Pac. 375, allowed a person filling a vacancy in the office of district judge increased compensation which the person whose term was being filled could not have received. This case was decided upon the ground that constitutional provisions prohibiting increase or decrease of compensation during a term of office, were placed in constitutions to prevent improper influence by the legislative branch of the government upon the executive and judicial branches of the government. The authority cited is 1 Kent's Commentaries, p. 393; The Federalist No. 79; 1 Scott's Federalist and Other Constitutional Papers, p. 431. After allowing the person filling the vacancy to receive the additional compensation, the court mentioned all of the above mentioned cases and a few others without comment and the decision was not based on any of them.

In the early Tennessee case of Gaines v. Horrigan, 4 Lea Tenn. 608, a similar result was achieved. The constitutional provision there construed used the word "time" instead of "term", and the decision is based on the use of this word "time."

The cases mentioned will serve to illustrate the lack of harmony in the decisions on similar questions. The cases allowing the person filling the vacancy to receive the increased compensation, while uniform in the result achieved, namely, permitting some person to have an increase in compensation, are not uniform in their reasoning or the authority upon which the decisions are based. The cases refusing the increase in compensation are more nearly uniform in the reasoning and all follow the case of Larew v. Newman, supra. As pointed out heretofore, the case of State v. Frear, 120 N. W. 216, 138 Wis. 536, recognizes it to be the general rule that the person filling the vacancy is not entitled to receive the increase in compensation, and indicates the general rule might have been followed, had it not been for the administrative interpretation in that state.

The provision of the California constitution construed in the case of Larew v. Newman, supra, provided that the compensation of any county officer shall not be increased after his election, or during his term of office, and the statute relating to vacancies provided the person filling the vacancy should possess all the rights and powers, and be subject to all the liabilities, duties and obligations, of the officer whose vacancy he fills. The Missouri Constitution, Sec. 8, Art. 14, supra, provides that the compensation of no state, county, or municipal officer shall be increased during his term of office.

In the case of State ex rel. Emmons v. Farmer, 271 Mo. 306, in ruling upon the meaning of Sec. 8, Art. 14, of the Constitution, the Supreme Court used the following language: (l. c. 314)

> " * * * * The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Under the provisions of Section 11509, supra, a person filling a vacancy performs the duties of the office for the unexpired portion of the term of the person succeeded, and does not have a separate term. The person originally elected to the office could not have received an increase in compensation during his term.

CONCLUSION

The conclusion is reached that a person filling a vacancy for an unexpired portion of the term of a county treasurer is not entitled to receive an increase in compensation which the person elected for the full term could not have received.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:NS

MISSOURI REAL ESTATE COMMISSION - Several questions on the granting of a license.

February 3, 1942

2-4

Mr. John W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

FILE

Dear Sir:

Your request for an official opinion from this Department, in regard to various matters connected with the Missouri Real Estate Commission, has been received.

In view of the many questions involved, it will be necessary for us to give our opinion separately on each question.

The Missouri Real Estate Commission Act appears in the 1941 Session Laws, Pages 424 to 431, inclusive. Although the Legislature passed this Act no appropriation was made for the carrying out of it, and we are answering the questions contained in your request, and, at the same time are taking into consideration the fact that no appropriation was made.

Section 19, of Article 10, of the Constitution of Missouri, partially provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * ."

Under the above constitutional limitation the state treasurer at this time cannot recognize warrants drawn by the Missouri Real Estate Commission, even though they have received the fees set out in that Act for the payment of licenses granted to brokers and other dealers. The

money received from the license fees under Section 6, of the Act, must be collected by the Commission and paid into the treasury to constitute a fund for the purpose of carrying out the provisions of the Act. Section 6 also provides:

> " * * * No money shall be paid out of this fund except by an appropriation by the General Assembly. * * * "

Since there has been no appropriation the state treasurer cannot recognize warrants upon this fund.

The first question in your request reads as follows:

I

> "Under the law could the Commission appoint or employ special investigators to investigate applicants throughout the State?"

It is impossible, at this time, for the Missouri Real Estate Commission to employ special investigators unless they serve without pay, for the reason that no appropriation has been made for their compensation. The Commission could be authorized to employ special investigators under Section 4 of the Act, - which partially reads as follows:

> "* * * The commission shall employ a secretary and such other employees as it shall deem necessary to discharge the duties imposed by the provisions of this act, and shall outline their duties and fix their compensation, and shall require such surety bonds as deemed necessary. * * * "

It is certain that the Legislature did not expect, or intend, the members of the Commission to personally do all the administrative and clerical work necessary to effectuate the purposes of this Act and to fulfill the numerous duties placed upon them by the various laws applicable to the Commission. They were expected to provide for themselves such assistance as would be necessary to effectuate the purposes of this Act.

In the case of Aull v. City of Lexington, 18 Mo. 401, the city of Lexington, in 1851, adopted an ordinance providing for a City Board of Health, whose duties were prescribed and set out as follows:

> "It shall be the duty of the board of health to exercise a general supervision over the health of the city, and from time to time make such report to the mayor and city council as they may deem necessary; and said board are hereby vested with all power necessary to carry the provisions of this ordinance into effect."

Under that authority the Board leased quarters for a transient hospital in which to place persons infected with cholera, who were landing from steamboats. The plaintiff in the case was suing the city for the rental agreed upon by the board. The court held that the term "general supervision over the health of the city" conferred more than mere authority to examine into the condition of the health of the city, that it was intended that the board should have active and sufficient power to be exercised for the public good, and the court provided for the payment of the agreed rental.

In the case of Kent v. Village of Tarrytown, 64 N. Y. Supp., 178, the court considered the power of the board of health to employ persons to carry out their rules and regulations. The plaintiff in that case had been employed by

the board to investigate local health conditions and was suing the municipality for the reasonable value of the services. The defense was made, on the part of the village, that:

> "The criticism is made that it nowhere appears that any legal regulation or order was made by the Board of Health, that without such preliminary step it was not authorized to employ any person * * * the complaint should have contained an averment of the regulations and orders as made by the board of health before any legal employment could be shown."

The court overruled the contention of the defendant stating that in view of the duties of the board to execute the laws to suppress nuisances and to protect the public health, narrow construction should not be placed upon the board's authority to legally employ assistance. The above cases apply to boards of health, but the rule of law is similar to rules and regulations that will be made by the Missouri Real Estate Commission.

It is therefore our conclusion in your first question that the Commission may appoint or employ special investigators to investigate applicants throughout the State at this time, providing they serve without pay; but, at the next meeting of the Legislature, the appropriation, if made, should set out that part of the appropriation is for the employment of special investigators and other activities of the Missouri Real Estate Commission.

Your second question reads as follows:

II

> "Could the Commission employ its own attorney or will they have to use the Attorney General's Office exclusively for their work?"

Section 12901 R. S. Missouri, 1939, reads as follows:

> "The attorney-general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

Under the above section it is the duty of the Attorney General to represent the State, which includes the Missouri Real Estate Commission, in all civil suits and other proceedings at law or in equity.

The Legislature, when it enacted the Missouri Real Estate Commission Act, could have designated in the Act that the Missouri Real Estate Commission could employ lawyers to represent the Commission, and could have appropriated the money to pay the lawyers. However, under the present Act the Missouri Real Estate Commission cannot employ its own attorney and is compelled to use the Attorney General's office exclusively for its work.

Your third question reads as follows:

III

> "As secretary to the Commission, do we involve the Commission in any way in asking the Better Business Bureau's Police Officials etc, for any and all information they may have on applicants?

> Would the Secretary of the Better Business Bureau, civic organizations, or the Real Estate Exchanges of the various towns be personally liable for information they would send the Commission about an applicant, if part or all of said information not be correct?"

The above question is covered by Section 7 of the Act, which reads as follows:

> "A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

Under the above section, by implication, the reputation and honesty of the applicant, in regard to the business of a real estate broker, or a real estate salesman, must be investigated before a license shall be granted, and we see no reason why the Commission would be involved in making an inquiry of the Better Business Bureau, Police Officials and other officials as to the information they may have on applicants.

As to the question of whether or not the secretary of the Better Business Bureau and other organizations are personally liable for information they would send the Commission about an applicant, we think that would depend upon the correctness of the information, and is a matter of fact to be passed upon by a jury in case a suit would be brought against them.

Your fourth question reads as follows:

IV

"If we find through the above source that applicant has been convicted of crime or has had some complaints filed against him, but was not convicted, could the Commission reserve the sole right to issue or deny a license to said applicant?"

This question is covered by Section 7, as above set out, and a license may be granted or it may be refused, under Section 11, of the Act, but the holding of the Commission is not the final determination of the granting of the license to the applicant, for the reason that under Section 11, the applicant may have a hearing, as set out in said Section, which reads as follows:

"* * * If the commission shall determine that any applicant is not qualified to receive a license, a license shall not be granted to said applicant, and if the commission shall determine that any licensee is guilty of violation of any of the provisions of this act, his or its license shall be suspended or revoked. The findings made by the commission acting within its power shall, in the absence of fraud, be conclusive but the circuit court of the county in which said hearing is had or where such licensee or applicant resides shall have power to review said proceedings on writ of certiorari, or other proper proceedings, provided, that application is made by the aggrieved party within thirty days after the determination of the commission; or said hearing may be by mandamus brought in a court of competent jurisdiction and such court shall make such other orders in respect thereto as justice may require, and the return of the commission to any writ issued by said court shall

> be accompanied by a transcript of the papers filed and proceedings had before said commissioner duly certified. All expenses and costs of proceeding and hearing under this section shall be assessed and paid as costs are assessed and paid in any court of record."

Also, Section 11 provides that before the applicant can be denied a license, or the license be suspended or revoked after issuance, the licensee effected shall be given at least ten days written notice specifying the reason for denying the applicant a license or in case of suspension or revocation, the offense or offenses of which the licensee is charged. The hearing on such a notice shall be at such time and place as the Commission may prescribe.

Your fifth question reads as follows:

V

> "What would be the legal procedure if complaint or complaints are filed with the Commission against a licensee? Would all such complaints have to be sworn to?"

The Act does not set out specifically the procedure or manner of making complaints against a licensee, but the procedure to be followed is the same procedure set out in Section 11 of the Act. It is not necessary that the complaints be sworn to, but the Commission may make rules and regulations requiring that such complaint be sworn to by the person making the complaint.

As to the making of rules and regulations by a Board or Commission, 53 C. J. 1175, sets out the rule as follows:

> "The power to regulate, it has been said, carries full power over the thing subject to regulation; and that, in the absence of restrictive words, the power must be regarded as plenary over the entire subject. The power to regulate may include the power to confine a business with reference to place or time; to control; to grant the use of a (thing) on stated conditions; to increase and reduce; to license; to refuse a license, to require bond from an applicant therefor, and to require the taking out of a license; to prescribe reasonable rules, regulations and conditions upon which a business may be conducted or permitted, to enforce them, and to prescribe punishment for violation thereof; to restrain; or to tax or to exempt from taxation."

In the case of State ex rel Wagner et al v. Fields, Mayor, et al., 263 S. W. 853, par. 5, the court, in defining "regulate" stated as follows:

> "To 'regulate' means 'to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or laws; subject to rules, restrictions or governing principles.' New Standard Dictionary. Hence the city in granting a license would, even on the theory now conceded for argument's sake, have the right to consider the regulations and restrictions to be placed about the license and the business to be operated, including the qualifications of those operating it and the place where it was to be carried on. * * * * "

Your sixth question reads as follows:

VI

"When applicant in making application for license states that he has been convicted of crime which happened in the past and the Judge and Prosecutor and other interested parties recommend his receiving a license could the Commission still refuse applicant a license?

This question is answered by our opinion rendered on your fourth question.

Your seventh question reads as follows:

VII

"Where applicants check is returned unpaid, and license has been issued, what procedure should Commission take for revocation of license?"

This question is covered by Section 10, of the Missouri Real Estate Commission Act, which partially reads as follows:

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of: * * * "

Under the above partial statement, it is specifically stated that a license obtained by fraud or fraudulent reputation can be revoked, which revocation shall follow the procedure as set out in Section 11 of the Missouri Real Estate Commission Act.

Since the check mentioned in your letter has been returned unpaid the license has been obtained by fraud and can be revoked by the Missouri Real Estate Commission, and if the licensee continues to use said license he may be prosecuted under Section 17 of the Missouri Real Estate Commission Act.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:RW

TAXATION:
TRUSTEES SALE
DISTRIBUTION OF
PROCEEDS OF SALE:

Trustee appointed under the provision of Sec. 11131 R. S. Mo., 1939, may sell such lands with approval of county court. Purchase price, after payment of costs therefrom is apportioned by the county court as per the collector's deed and turned over to collector for distribution.

February 17, 1942

275

FILE
41

Mr. June Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

This is in reply to yours of recent date wherein you call to our attention opinions dated January 7, 1942, to Charles B. Butler, Prosecuting Attorney of Ripley County, Missouri, and January 14, 1942, to Frank W. Jenny, Prosecuting Attorney of Franklin County, Missouri, wherein we held that the proceeds of the sale of delinquent lands by a Trustee, after payment of costs, should be turned over to the County Treasurer for distribution.

You request that we give this question further consideration because of the fact that under the accounting and bookkeeping system your department has recommended to county officers a satisfactory control and supervision of the tax items for which such delinquent lands are sold can better and more efficiently be maintained by providing that the surplus be turned to the county collector for distribution.

The opinion to Mr. Butler was the only one of the above opinions bearing on this particular question. It held that these funds should be turned over to the treasurer for distribution because the statute section 11131 is silent as to who should make distribution and in the absence of such a provision the county treasury is the only logical place the funds could be placed. Giving this matter further consideration we find as follows:

Section 11124 Revised Statutes of Missouri, 1939, entitled "Shall record delinquent tax property" provides in part:

"* * *And where the words 'back tax book' are now used in laws pertaining to the collection of taxes on delinquent lands, real estate and/or lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this law shall be held to be (where applicable and except as to city or town 'back tax book') such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. Said collector shall be charged with the taxes, penalty and interest shown on such record of the list of delinquent lands and lots." (underscoring ours.)

Section 11130 thereof, is in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed.* * *"

Section 11131 thereof, is as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at

all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be

> delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixedby the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees: Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest andcosts, then the trustees herein designated shall be without authority to further bid on any such lands or lots." (underscoring ours).

Under the provision of Section 11124, supra, the collector is charged with delinquent taxes, penalty and interest due on real estate.

Under the provision of Section 11130, supra, the sale is final, and it must be consummated by the immediate issuance and delivery of a collector's deed.

Section 11131, supra, provides for the appointment by the county court of a trustee"* * *with discretionary authority to bid at all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids.* * *"

The office of trustees under said statute is "* * *to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold,* * *" and each trustee as grantee, in such deed, "* * *holds title, as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold.* * *"

With reference to the costs said Section provides:

> "* * *The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such funds as may be designated therefor by the authorities of the City of St. Louis,* * *"

Such lands or lots shall be sold by the trustee only when ordered by the county court, and the proceeds of such sale or sales:

> "* * * shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * *" (underscoring ours).

The county court further fixes the compensation of the trustee, who must be paid from such proceeds, before they are distributed.

The Legislature provided a complete scheme of procedure for the collection of delinquent taxes levied against real estate, investing the collector with the duty of the collection thereof. Under such scheme loss, in many instances, was sustained by said funds and for that reason the Legislature supplemented such scheme with that provided in said Section 11131. Said statute is silent as to whom the county court shall order the proceeds delivered for pro rata distribution after such costs are paid.

The sections of the Revised Statutes relating to the collection of delinquent taxes on real estate designates the collector, and the collector alone, as the official who must collect and make settlement for all taxes.

Section 11089 R. S. Mo., 1939, is in part as follows:

> "At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists and back tax books, and in the city of St. Louis the uncollected tax bills and back tax books, under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue, and the amount of such delinquent lists, or so much thereof as the court shall find

properly returned delinquent, shall be allowed and credited to him on his settlement. * * *"(underscoring ours).

Section 11093 thereof is in part as follows:

"The county court shall cause such settlement to be entered of record, so as to show the amount due the state and county, respectively.* * *"

Section 11098 is as follows:

"Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

Section 11103 is as follows:

"Every collector of the revenue having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant him full quietus under the seal of the court."

The collector is the only bonded official responsible for delinquent taxes in process of col-

lection and only he can be granted quietus. This can be granted only after such collector has paid into the county treasury the amount found to be due.

In passing section 11131, supra, the Legislature clearly intended to provide a scheme " * * * to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids." * * ** It certainly had no intention to repeal by implication the liability and duties of a county collector, as provided in the above sections without designating another official and fixing his liability and duties with respect to such delinquent taxes under such process of collection.

CONCLUSION

Therefore, the statute being silent as to whom the county court shall order such proceeds delivered for pro rata distribution, after said costs are paid, it is the opinion of this department that the Legislature intended that said funds should be, by court order, turned over to the collector and by him distributed.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

Roy McKittrick
Attorney-General

TWB:FS

MISSOURI REAL ESTATE COMMISSION: Four questions on application, suspension and revocation.

February 25, 1942

FILE 41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Dear Sir:

Your request of February 16, 1942, requesting an opinion based on four questions involving the granting, suspension and revocation of a license from your Commission, has been received.

Your first question reads as follows:

I

> "The Missouri Real Estate Commission Act passed by the Last General Assembly states that the Commission must notify a licensee ten days before a hearing on the revocation of his license. Would you kindly write a legal notification which we can follow for such notices?"

Section 11, Laws of Missouri, 1941, Page 429, reads as follows:

> "Application may be denied only after hearing. - The commission may deny an application for a license, or sus-

> pend or revoke a license issued, only after a hearing, of which the applicant or licensee affected shall be given at least ten days' written notice specifying the reason for denying the applicant a license, or, in case of suspension or revocation, the offense or offenses of which the licensee is charged. * * "

Under the above partial section the Commission may deny an application for a license, or suspend or revoke a license, only after having given at least ten days' written notice, which should specify the reason for the denial, suspension or revocation. Of course, if a license is granted no notice is required. This notice should be served as provided by law for other services, or by mailing a copy by registered mail to the last known residence or business address of such applicant, or licensee. The Commission in the notice may set the time and place for the hearing. If the notice is to be served on a licensee or applicant who is a salesman, the Commission shall also notify the broker with whom he is associated, or in whose office he is about to enter, by mailing a notice to the broker's last known business address.

It is very important that this notice contain the reason why the application may be denied, or a license already issued may be suspended or revoked. The main reasons for suspension or revocation are set out in Section 10, Laws of Missouri, 1941, Page 428. The other reasons are set out in Section 7, Laws of Missouri, 1941, Page 427.

We are enclosing a form of legal notification which may be served upon the applicant, licensee or broker. This legal notice is drawn to be used in case the Commission believes that the application for a license should be refused. In case the notice required is for the suspension or revocation of license this notice should be changed to read: "Suspension", or, "Revocation"; and should specifically set out the causes for the suspension or revocation, as set out in Section 10 of the Missouri Real Estate Commission Act.

Your second question reads as follows:

II

> "We have a few complaints sent to the Commission against licensees. Could we request your office for a legal, form notifying the real estate broker against whom the complaint had been filed and also a form of subpoena for witnesses involved?"

This question is answered by our opinion on your first question. The enclosed notification should be changed to read: "Broker"; and should specifically set out the same causes for suspension or revocation, or, as mentioned in Section 10, of the Missouri Real Estate Commission Act.

We are enclosing a form of subpoena to be used for the witnesses.

Section 11, of the Act, specifically states:

> " * * * The commission shall have the power to compel the production of records and papers bearing upon the complaint. The commission shall have the power to subpoena and bring before it any person in this state or take testimony of any such person by deposition with the same fees and mileage and in the same manner as prescribed by law in judicial procedure, before courts of this state in civil cases. * * * The commission shall have the power to

> issue subpoenas under the seal of the commission and direct the service of the same. * * * "

This subpoena can be issued and served by the sheriff of the county, the same as any other subpoena.

Your third question reads as follows:

III

> "What procedure do we follow in the event an applicant applies for a license and upon inquiry or through information on his application we are informed that he has been indicted, sentence, fined or paroled or that we are advised by the Prosecuting Attorney or Sheriff of his county that he is not deserving of a license may we have a legal notification from your office that we may send denying him a license and a reason?"

This question is covered by our opinion given in your first question.

Your fourth question reads as follows:

IV

> "We have a few applicants whose record will make it impossible to issue a li-

> cense however, the county authorities believe that they will continue to operate as real estate brokers, this of course would be against the law. Will it be necessary that the Commission which has no appropriation, file charges against them in their county? If so, would it be done through your office or does the Prosecuting Attorney's Office of said county have the right to file suit against such persons and would they be compelled to do so upon advise of the Commission?"

Section 1, of the Missouri Real Estate Act, Laws of Missouri, 1941, Page 425, reads as follows:

> "License must be procured. - After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Section 17, of the same Act, (Laws of Missouri, 1941), Page 431, reads as follows:

> "Any person or corporation violating any provision of this act shall be guilty of a misdemeanor, and, if a person, be punished by a fine of not more than $500 or by imprisonment in the county jail, not exceeding six months, or by both such fine and im-

prisonment, and if a corporation shall be punished by a fine of not more than $1,000. Any officer or agent of a corporation, or member or agent of a copartnership or association, who shall personally participate in or be an accessary to any violation of this act, shall be subject to the penalties herein prescribed for individuals. This law shall not be construed to release any person from civil liability or criminal prosecution under the general laws of this state. The commission may cause complaint to be filed for violation of Section 1 of this act in any court of competent jurisdiction, and perform such other act as may be necessary to enforce the provisions hereof."

Under the two above sections, unless a license is obtained, the broker or salesman who continues to act as a real estate broker, or salesman, is guilty of a misdemeanor. The procedure to be followed is the same as in any criminal action. The jurisdiction of the case would be in the county where the sale, or purchase of real estate was contracted by the broker or agent, and if he did not have a license lawfully granted to him, it is the duty of the prosecuting attorney, upon the furnishing of sufficient evidence, to issue a warrant, the same as in other criminal proceedings. You will find that you will be aided in this matter by real estate brokers, or salesmen, who have procured licenses. In this question you also refer to the fact that no appropriation has been made for the Missouri Real Estate Commission, but no fee is required by the prosecuting attorney in the filing of such a criminal charge.

APPROVED:

Respectfully submitted

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

BEFORE THE MISSOURI REAL
ESTATE COMMISSION.

IN THE MATTER OF THE DENIAL
OF APPLICATION FOR LICENSE TO
ACT AS REAL ESTATE _____
(Salesman or Broker.)

TO: _____
(Name of Applicant.)

_____
(Residence.)

_____
(Business Address.)

YOU ARE HEREBY NOTIFIED That the Missouri Real Estate Commission will, at 9 o'clock A. M., on the ___ day of _____, 19___, or on the next succeeding days, hold a hearing at _____
(Place designated by Commission.)
in reference to denying your application for a license as a _____:
(Salesman or Broker.)

That the reason we are notifying you of this hearing is that you are charged with (set out specifically any of the charges from "a" to "k", both inclusive, in Sec. 10, of the Missouri Real Estate Commission Act, or, set out the charge as contained in Sec. 7, of the same Act.) which is a violation of Par. ____, of Sec. 10, or Sec. 7, Laws of Missouri, 1941, of the Missouri Real Estate Commission Act.

- (Form of notice continued - Page 2.)

YOU ARE HEREBY REQUESTED to be present at this hearing and show cause why a license to sell real estate should be issued to you in accordance with the Missouri Real Estate Commission Act of the Laws of Missouri, 1941.

(SEAL)

_____

Secretary of Missouri Real Estate Commission

ATTEST:

_____

Chairman of the Missouri Real Estate Commission.

SUBPOENA

THE STATE OF MISSOURI,

To _____ GREETING:
(Name of Witness.)

You are hereby commanded, all excuses and delays set aside, that you be and appear before the Missouri Real Estate Commission at _____
(Any place designated by Commission.)
on the ___ day of _____, 1942, at the hour of 9 A. M., then and there to testify, and the truth of your knowledge to speak of and concerning a certain matter of controversy pending before the Missouri Real Estate Commission and concerning the application of _____
(Name of Applicant.)
for a real estate license to sell real estate as a _____, and that you bring with you
(Salesman or Broker.)

_____
(Books, records, etc.)
and this you shall in no wise omit under legal penalty.

(SEAL)

_____
Secretary of Missouri Real Estate Commission.

ATTEST:

_____
Chairman of the Missouri Real Estate Commission.

2.

- Return to appear on reverse side of subpoena -

SHERIFF'S RETURN

Executed this writ in _____ County, Missouri, as follows, to-wit: _____

_____

_____

_____ Sheriff

_____ Deputy

FEES: To _____ services, $_____

To _____ non est, $_____

To _____ miles, $_____

COUNTY
ROADS AND BRIDGES
MACHINERY:

County Court is not authorized to purchase road machinery to be leased to townships or special road districts, or other municipal subdivisions.

February 26, 1942

FILED
41

Mr. W. A. Holloway
Chief Clerk
State Auditor's Dept.
Jefferson City, Mo.

Dear Mr. Holloway:

This is in reply to your letter of recent date, wherein you submit a question which had been submitted to you by the presiding judge of the County Court of Bates County, Missouri. The question is as follows:

> "The Court is contemplating the leasing of a Tractor, Rock crusher and elevator and a loader from the Hobson-McFarland Co. for a sum of something over $12,000.00 and payable $4,000.00 rental each year until paid. This is the problem.
>
> "Can the Court in a Township organization county, lease a Tractor, Rock crusher, elevator and loader paying rental of $4,000.00 each year to crush rock for bridges and when not in use to be leased to the various Townships to crush rock to build road? Is this a legitimate expenditure and if so what fund shall the same be paid from, Class #3?"

This request involves two questions:

1. The authority of the County Court to make the purchase of $12,000.00 road machinery to be paid for on what is called a "rental plan" of $4,000.00 each year.

2. The authority of the court to rent such machinery to the various township boards to crush rock and build roads for such townships.

As to the powers and duties of the County Courts, townships, boards and special road commissioners to construct and maintain roads and bridges, we find the following statutory provisions applicable.

Section 8595 R. S. Mo., 1939:

> "Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor.* * * *"

This section gives the court authority to purchase equipment and materials which it may need to perform the duties imposed thereby. It will also be noted that this same authority is granted to townships, boards and commissioners of special road districts.

Under Section 8534 the county court determines what bridges should be built and maintained at the expenses of the county. Bridges which cost over fifty dollars, under this section, are to be built by the county; after such bridges are built, then the county court may attach the same to the road district and any repair on such bridge over fifty dollars, is borne by such road district.

Section 8536 R. S. Mo., 1939. Under Section 8538 R. S. Mo., 1939; under certain circumstances the county court is required to pay one-half of the contemplated costs of bridges.

Section 8539, 8540, 8541 and 8562, contemplate the expenditures by the county for the maintenance of roads and bridges under certain circumstances. Under Section 8825 R. S. Mo., 1939, where a bridge which is located in a county, under township organization and costs over one hundred dollars, the county court may build the bridge at the expense of the county.

Article 17 of Chapter 46 R. S. Mo., 1939, pertains to road districts in counties under township organization. In referring to the article, it will be seen that the duties of the township board with respect to maintaining, repairing and constructing roads and bridges are similar to those of the county court. If the county court is authorized to purchase this machinery on a rental plan and to rent it to the township board or to any other municipal subdivision, the authority so to do, must be obtained from the statute. The rule as to the powers and duties of a county board being confined to the statute is stated in Volume 20 C. J.S. page 849 Section 82 as follows:

> "It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties. * * *"

For the purpose of considering whether or not the contract for the purchase of this machinery is a valid contract, we call your attention to the case of Hawkins et al. v. Cox et al. 66 S.W. (2d) 539. In that case, it was held that a special road district could not purchase road machinery costing $2,500.00, paying $500 cash and $500 per year and interest thereafter, where such road district only had on hand the sum of $600 and where the revenue for the year of the purchase of such machinery was approximately $600. The reason for such ruling was that the commissioner of a special road district could not obligate the revenue of future years without being authorized so to do, by the voters of the district. The same rule applies here and if the county court of Butler County by the proposed contract, obligates the revenue of future years by this purchase, then under the Hawkins v. Cox case, supra, it would be void because it is in violation of Section 12, Article 10 of the Constitution of Missouri, which prohibits the incurring of an indebtedness in excess of anticipated revenue of that year without a vote of the people of the district.

This request indicates that the contract is purely a rental contract and that the revenue of future years is not

to be obligated thereby.

On the question of whether or not a debt is incurred by such a contract--we find that the Supreme Court in the case of Ebert v. Jackson County 70 S. W. (2d) 918 passed on a rental contract whereby it held that a contract extending over a period of four years to pay rent in advance on the first day of each month for the use of certain properties, created a debt within the meaning of said section 12 of Article 10 of the Constitution and was voided. If the contract for the purchase of this road machinery is an unconditional promise to pay a fixed sum at some future specified date, then under the Jackson County case supra, it creates a debt, the contract is void and the court would not be authorized to enter into same.

On the question of the authority of the court to rent this machinery to the various townships as stated in your request--we must find such authority from the statute. The rule on the authority of the county to lease property is stated in Volume 20, C. J. S. page 1002 Section 170 as follows:

> "In accordance with the general rule, stated in section 82, that county boards or county courts have no power other than those conferred, such courts or boards have no power to rent or to lease property or franchises owned by the county, unless they are expressly or impliedly authorized to do so,* * * * * * *."

In King v. Maries County 297 Mo. 488, 496, the court announced the rule as follows:

> "It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted."

From a review of the statutes hereinbefore referred to and any other statute which might be pertinent thereto, we fail to find where by expression or implication, the county court has been authorized to lease road machinery to special road

districts, township boards or to any other municipal subdivision. We do not find any case in Missouri where this question has been before the court, however, we do find a Kentucky case, which is somewhat in point here. It is Jefferson County Fiscal Court et al. v. Jefferson County ex rel. Lawrence S. Grauman, County Attorney et al. 129 S. W. (2d) 554, 122 A. L. R. 1151. In that case the County Court had entered into a contract with a city of Louisville for fire protection for certain public buildings outside the city limits of Louisville. Some of these buildings belonged to the county and others belonged to other public instrumentalities. At l. c. 1155 Volume 122 A. L. R. the statement of the trial court is reported as follows:

> "'Examining the question whether the County possesses power to provide such protection for the properties of the independent instrumentalities, it is to be observed that the Legislature has conferred power, express and implied, upon those separate corporate entities to acquire, hold maintain and repair the properties owned by them. The independent corporate instrumentalities possess the power, and are obligated, to employ reasonable measures to safeguard their properties against fire hazards. The existence of this power in them would seem to militate against finding that the delegation of power has been duplicated by a like grant--by implication--to the County.
>
> "'It is my opinion that neither by expression nor necessary implication has the Legislature delegated power to the County to contract for fire protection services to be rendered with respect to the buildings owned and maintained by the independent governmental agencies as distinguished from those owned by the County itself.'"

The court in that case held that the county court did not have authority to contract for fire protection for public instrumentalities other than those under the supervision of the county court. This case also held that the county court should have confined and limited itself to the protection of county owned properties and should have refrained from incurring additional

expenses for the protection of properties of separate governmental agencies.

So, in the question here since the townships and special road districts are authorized to purchase machinery, materials and supplies for the purpose of the construction and maintenance of roads and bridges, then by following the reason announced in the Kentucky case above, the county court should be confined and limited to expenditures only to the purchase of machinery, materials and supplies for the construction and maintenance of the roads and bridges, which it is required to construct and maintain.

CONCLUSION

From the foregoing, it is the opinion of this department:
First, that if by the proposed contract for the purchase of certain road machinery a debt is incurred, then the county court is not authorized to enter into such a contract without a vote of the voters of the county.
Second, that the county court is not authorized to lease to the various townships, road machinery for the purpose of crushing rock to build roads in such townships.

Respectfully submitted

EYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

MISSOURI REAL ESTATE
COMMISSION - Two corporations must obtain two licenses, but salesmen should only obtain one license.

March 6, 1942

3-14

FILE
41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "May the Commission request an opinion in regard to two separate corporations doing a real estate business in Missouri and the officers actively engaged in the real estate activities are the same in both corporations. We have several instances where the officers are the same but the corporations are two separate operating companies and some contend that they should pay only one fee as members of both corporations."

Section 2, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, reads as follows:

> "A corporation, copartnership or association shall be granted a license when individual licenses have been issued to every member or officer of such copartnership, association or corporation who actively participates in its brokerage business, and to every person who acts as a salesman for such copartnership, association or corporation."

Under the above Section, a corporation, copartnership or association cannot obtain a real estate license unless every member or officer, and every person who acts as a salesman has obtained such a license.

Under Section 3 of the same Act, it is specifically stated:

> "* * * A real estate salesman, within the meaning of this act, is any person, who for a compensation, or valuable consideration becomes associated, either directly or indirectly with a real estate broker to do any of the things above mentioned, as a whole or partial vocation. * * * "

We find no provision in the Act that the salesman should procure a separate license to do business for each individual corporation.

It is also noticeable that under Section 9 of the Act, an annual fee for real estate brokers' licenses shall be Five ($5.00) Dollars, and when issued to a corporation there shall be an additional annual fee of Two ($2.00) Dollars for each member or officer who actively participates in the real estate business. Under this Section the officers and members of each corporation shall pay the additional Two Dollars, but there is no provision that the salesmen should obtain additional licenses. It does provide though that the annual fee of a real estate salesman's license shall be Two Dollars and Fifty Cents ($2.50). The statutes should be read together, and if it was the intention that each salesman of a corporation should obtain an additional license in order to sell real estate for another corporation it would have been mentioned in Section 9, as an additional fee.

As to the corporation license they are separate entities and, although they have the same officers, they should obtain a license for each corporation.

It has been repeatedly held that a corporation is distinct and separate from its members or stockholders. 14 C. J., page 58, section 19, states the rule as follows:

> "Since a corporation is a person distinct from its members or stockholders, it follows that, even though the same individuals may be the incorporators of, or own stock in, two separate corporations, and even though such corporations may have the same individuals as officers, there is no identity between the two corporations, and neither is liable for the acts or faults of the other merely because of the identity of the members or stockholders and officers. A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless the facts show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth."

Also, in the case of Knott v. Fisher Vehicle Woodstock & Lumber Co., of Erin, Ark., 190 S. W. 378, the court said:

> "This is an interplea ingrafted on an attachment suit. The defendant in the attachment is the Fisher Vehicle Woodstock & Lumber Company, a Missouri corporation, and the interpleader is a corporation of Arkansas with practically the same name. For convenience we

> will designate the defendant as the Missouri corporation and the interpleader as the Arkansas corporation. The Missouri corporation became indebted to plaintiff, and he brought suit and attached the property of interpleader, some woodworking machinery, as defendant's property, and the Arkansas corporation has interpleaded claiming ownership. A. B. Fisher purchased this attached machinery from an Indiana manufacturing company and mortgaged it back to secure $2,500 of the purchase price. Fisher then helped to organize the Missouri corporation, which took over the property subject to the mortgage which had been duly recorded. The Missouri corporation became involved in debt and made default in the payment of this mortgage debt. The mortgage was foreclosed by the holder of the note, and Indiana bank, and that bank became the purchaser and owner of the machinery. Fisher then helped organize the Arkansas corporation, and the Indiana bank sold this machinery to it. Plaintiff, a creditor of the Missouri corporation, attached this property of the Arkansas Corporation as belonging to the former."

The court further said, at l. c. 379:

> "There was no fraudulent conveyance by the Missouri corporation, plaintiff's debtor, and, unless the property on its transfer to the Arkansas corpora-

> tion became the property of the Missouri corporation, plaintiff had no right to attach it. This, however, was not the theory upon which plaintiff recovered, as his instruction predicated his right to recover on the transfer being fraudulent. This particular property was no more subject to attachment as the property of the Missouri corporation than was any other property owned by the Arkansas corporation. Similarity or even identity of names does not make the identity of corporations formed under different sovereignties. Even if there was identity of stockholders, the corporations would be distinct (10 Cyc. 287; 5 Thompson on Corporations, sections 5985, 6094; Richmond & I. Const. Co. v. Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625; * * * * * * * * "

In the above case the stockholders of the Missouri Corporation were the same stockholders of the Arkansas Corporation. The court in that case, under the facts as set out in the case, held that the two separate corporations were not formed for any fraudulent purpose. The rule is greatly discussed in the case of Majestic Company v. Orpheum Circuit, 21 Fed. 2d 720, l. c. 724, where the court said:

> "In legal conception a corporation has an entity separate and distinct from its stockholders; and the act of the corporation is not that of the stockholders. Nor is its obligation that of its stockholder. (Cases cited.) * * * * * * * ." (Parenthesis and explanation therein ours.)

In the above cases cited and set out in the above partial opinion in that case, it appears that the rule is not settled conclusively, but is a mixed question of fact and law; that in each case a separate rule or opinion could be formed, all depending upon the facts in the case. It is all based upon the general rule that the legal entity of a corporation is recognized and the courts uphold the separate and distinct entity in all cases, except in very few exceptions where it is used as a blind, or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and in that case the courts have interpreted the corporation as an association of persons.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that two separate corporations having the same officers should obtain two licenses, as set out in Section 2 of the Real Estate Commission Act, but real estate salesmen employed by two separate corporations are not compelled to obtain two licenses.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI REAL ESTATE COMMISSION - Owners dealing in their own real estate not required to have license.

March 6, 1942

3-14

Missouri Real Estate Commission
Jefferson City, Missouri

FILE 41

Attention - Mr. J. W. Hobbs, Secretary

Dear Sir:

We are in receipt of your request for an opinion, under date of March 3, 1942, in regard to two questions concerning the Missouri Real Estate Commission Act.

I

Your first question reads as follows:

> "The Commission would like to ask for an opinion from your office on the following. We have received a letter from the Union Electric Land and Development Company which owns approximately 50,000 acres of resort, hill lands in six counties surrounding the Lake of the Ozarks and they wish to be advised if they would come under the law requiring a license. The Company pays salaries to their employees in the disposal of this land however, they make contracts with real estate brokers in all other counties of Missouri that they pay a commission to on sales that are made. I am enclosing their letter which expresses their desire and request."

Section 3, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, partially reads, as follows:

> "A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a compensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. A real estate salesman, within the meaning of this act, is any person, who for a compensation, or valuable consideration becomes associated, either directly or indirectly with a real estate broker to do any of the things above mentioned, as a whole or partial vocation. This act shall not apply to rent collectors or counter clerks employed in the rental department of the office of a real estate broker. This act shall not apply to any person, copartnership, association or corporation who as owner or lessor performs any of the acts aforesaid, with reference to property owned or leased by them, nor to their employees in the regular course of the ownership and management of such property; * * * "

Under the above Section, and under the facts stated in your letter, and the letter of H. C. Williamson, real estate and tax officer of the Union Electric Company of Missouri, the real estate involved belongs to the Union Electric Land and Development Company, and comes within the exemption as set out in above Section 3.

It is, therefore, the conclusion of this department that the Union Electric Land and Development Company, in selling and leasing property belonging to the corporation, is not compelled to obtain a real estate license for the company or for its salesmen.

II

Your second question reads as follows:

> "The Commission would also like your opinion on about the last part of Section 7 as to whether under that Section of the Act that they could deny a license to applicants who bear a good reputation to honesty, integrity and fair dealing, but who have no previous experience in the real estate business."

Section 7 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 427, reads as follows:

> "A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business

> of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

It is very noticeable, under this Section, that the following is used:

> " * * who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

Under the above partial section if the Commission, in its discretion, believes that the person who is making application for a license is not competent to represent persons in a real estate transaction, it may, upon proper notice, give the applicant a hearing, and, in its discretion refuse the application for the license.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI REAL ESTATE
COMMISSION : - Alien may obtain license.

March 19, 1942

FILE.

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "May the commission request an opinion in regard to the following.
>
> "Can the Commission deny a license to an applicant that is an alien, also would they have authority to deny a license to an applicant that is an alien but had filed and received his first naturalization papers."

Section 7, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, Page 427, reads as follows:

> "A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real

> estate salesman in such manner as to safeguard the interests of persons whom they represent."

The above section does not provide that the person obtaining a license must be a citizen of the United States. Under Section 8920 R. S. Missouri,1939, the legislature saw fit to compel an alien to obtain a fish license, and, for that reason we believe that it was not the intention of the legislature in the Missouri Real Estate Commission Act to prohibit the issuing of a real estate salesman's license to an alien.

Section 41, Title 8, U. S. C. A. reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. Sec. 1977."

Under Section 10, of Article VIII of the Constitution of the State of Missouri, an alien is ineligible to hold public office, but the granting of a license to an alien to sell real estate under the Missouri Real Estate Commission Act is not a grant of office. It is also held, under Section 15230 R. S. Missouri, 1939, that an alien cannot hold real estate except by devise, descent or by reason of protection of a debt. After a careful search

we find no statute in Missouri that would prohibit an alien from obtaining a license to sell real estate.

CONCLUSION

Under the above authorities, it is the opinion of this department, that the Missouri Real Estate Commission may grant a license as a real estate salesman to an alien, but, cannot deny a license if the alien, applicant, can qualify under Section 7, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, Page 427.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI REAL ESTATE
COMMISSION: - Question of division of commissions

April 15, 1942

4-16

FILE
4-1

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your letter of April 10, in which you request an official opinion upon the following:

> "A licensee doing business in a Missouri border county to the State of Kansas has been approached by a citizen of the State of Kansas. He is not in the real estate business but has two prospective buyers for farms that the Missouri licensee has a sale of. Although he is not in the real estate business it entails time and expense for him to bring the prospective buyers to the Missouri licensee and he wants to be paid for his efforts. Can the Missouri licensee pay part of his commission to a citizen of some other State without violating the Missouri Real Estate License Law?"

The statute applicacable to the above question, is Section 15, of the Missouri Real Estate Commission Act, page 430, Laws of Missouri, 1941, which reads as follows:

> "No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any per-

son for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the State of Missouri."

Under the above section a real estate broker is prohibited from paying any part of a fee for any services rendered in the negotiation of the sale of property, unless the other person is a licensed real estate salesman, regularly associated with the broker or the other person is a licensed real estate broker, or if the other person is regularly engaged in the real estate brokerage business outside the State of Missouri.

Under the facts set out in your request, you state that the citizen of the State of Kansas is not in the real estate business.

Also, under Section 17 of the Missouri Real Estate Commission Act, a person who divides fees with another person out of the State, who is not in the real estate business is guilty of a misdemeanor and the penalty assessed may be a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment, and if a corporation, shall be punished by a fine of not more than One Thousand ($1,000.00) Dollars.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a licensee doing business in Missouri cannot pay any part of his fees to a non-resident who

is not in the real estate business, even though the non-resident aided in the consummation of the closing of the real estate deal.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI REAL ESTATE COMMISSION
ACT: -

1. Salesman's license cost cannot be transferred to broker's license.
2. Commission is bound by decision of court.

April 15, 1942

#16

FILE
41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your letter of April 6, 1942, in which you request an official opinion on the following questions:

I

"If a person applies and is granted a salesman's license and after working in a brokers office for a few months of the year the salesman decided to apply for an individual brokers license said applicant requests that the fee of $2.50 for the salesman's license which he has received and used for part of the year be applied to the fee of the individual brokers license which fee is $5.00 annually. The salesman's license serves one purpose namely, licensee is working for some one else however the brokers license demands more responsibility and allows licensee to employ others?

The section of the statute applicable to this question, is Section 9 of the Missouri Real Estate Commission Act, Page 428, Laws of Missouri, 1941, which reads as follows:

"The annual fee for a real estate broker's license shall be $5.00. When issued to a copartnership, association or corporation, there shall be an additional annual fee of $2.00 for each member or officer who actively participates in the real estate business. The annual fee for such real estate salesman's license shall be $2.50. Every license granted under this act and every renewal thereof shall expire on the 31st day of December in the year in which said license is issued. The commission shall issue a new license for each ensuing year in the absence of any reason or condition which might warrant the refusal of the granting of a license, upon receipt of the written application of the applicant and the renewal fee herein required."

Under the above section there is no provision made for the cancellation of the license and the repayment of the unused portion of the time for which the person is licensed. In some instances, where state licenses are issued under other acts, such as the Liquor Control Act, a provision is made for the repayment of the unused term of the license, when it is surrendered. We find no such provision in the Missouri Real Estate Commission Act.

CONCLUSION

It is, therefore, the opinion of this department that the real estate salesman's license cannot be applied as partial payment on a broker's license.

II

"If a licensee has been sued by a complainant in the civil courts in St. Louis or Kansas City and judgment was decided in favor of the licensee. The complainant then files a complaint with the Missouri Real Estate Commission requesting that an applicant or a licensee be denied a license or same revoked if he is already licensed --- Cannot the Commission inform the complainant that the matter had been tried in a civil court and judgment decided in favor of the applicant or licensee and therefore not a matter to be brought before the Missouri Real Estate Commission. ---- It is of course taken for granted that the applicant or licensee has met every requirement of the law in requesting or securing a license from the Commission."

The section applicable to the above question, is Section 11, of the Missouri Real Estate Commission Act, Page 429, Laws of Missouri, 1941, which partially reads as follows:

" * * * If the commission shall determine that any applicant is not qualified to receive a license, a license shall not be granted to said applicant, and if the commission shall determine that any licensee is guilty of violation of any of the provisions of this act, his or its license shall be suspended or revoked. The findings made by the commission acting within its power shall, in the absence of fraud, be conclusive but the cir-

> cuit court of the county in which said hearing is had or where such licensee or applicant resides shall have power to review said proceedings on writ of certiorari, or other proper proceedings, provided, that application is made by the aggrieved party within thirty days after the determination of the commission; or said hearing may be by mandamus brought in a court of competent jurisdiction and such court shall make such other orders in respect thereto as justice may require, and the return of the commission to any writ issued by said court shall be accompanied by a transcript of the papers filed and proceedings had before said commissioner duly certified. All expenses and costs of proceeding and hearing under this section shall be assessed and paid as costs are assessed and paid in any court of record."

Under the above partial section the determination of the Commission that any applicant is not qualified, may be certified by the applicant to a court of competent jurisdiction, providing the application is made within thirty days after the determination of the Commission. If the court of competent jurisdiction should grant the license on the review, the Commission is bound by the decision, but, after the license has been granted by the court of competent jurisdiction, the Commission has the power to suspend, or revoke, the license, under Section 10, of the Missouri Real Estate Commission Act, Page 428, Laws of Missouri, 1941, if the salesman or broker has violated any of the provisions therein, after he has been granted a license.

CONCLUSION

It is, therefore, the opinion of this department that if a license has been received by an applicant, by reason of a decision of a court of competent jurisdiction, this decision is binding upon the Missouri Real Estate Commission, but, if after the license has been granted by the court of competent jurisdiction, and the licensee commits any of the acts as set out in Section 10, of the Missouri Real Estate Commission Act, supra, then the Commission, upon a complaint, and by complying with Section 11 of the Missouri Real Estate Commission Act, may revoke, suspend, or deny, a license to the licensee.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI REAL ESTATE
COMMISSION: - Seven questions.

4-17

April 16, 1942

FILE
41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary

Gentlemen:

We are in receipt of your letter of April 13, 1942, requesting an official opinion on seven questions.

I

Your first question reads as follows:

> "Request ruling from Attorney General's office on the rights of the Commission to exercise discretion in refusing a broker's license to an applicant whose record, in the opinion of the Commission, justifies grounds for declining the application. (FOR EXAMPLE: Section 14 of the Act)."

The statute applicable to the above question is Section 11, of the Missouri Real Estate Commission Act, Page 429, Laws of Missouri, 1941, which reads as follows:

> "The commission may deny an application for a license, or suspend or revoke a li-

cense issued, only after a hearing, of which the applicant or licensee affected shall be given at least ten days' written notice specifying the reason for denying the applicant a license, or, in case of a suspension or revocation, the offense or offenses of which the licensee is charged. Such notice may be served as provided by law for the service of notices, or by mailing a copy by registered mail to the last known residence or business address of such applicant or licensee. The hearing on such charges shall be at such time and place as the commission may prescribe. If such applicant or licensee is a salesman, the commission shall also notify the broker with whom associated, or in whose association he is about to enter, by mailing a notice by registered mail to the broker's last known business address. The commission shall have the power to compel the production of records and papers bearing upon the complaint. The commission shall have the power to subpoena and bring before it any person in this state or take testimony of any such person by deposition with the same fees and mileage and in the same manner as prescribed by law in judicial procedure, before courts of this state in civil cases. Any party to such hearing shall have the right to the attendance of witnesses in his behalf upon designating to the commission the person or persons sought to be subpoenaed. The commission shall have the power to issue subpoenas under the seal of the commission and direct the service of the same. If the commission shall determine that any applicant is not qualified to receive a license, a

> license shall not be granted to said applicant, and if the commission shall determine that any licensee is guilty of violation of any of the provisions of this act, his or its license shall be suspended or revoked. The findings made by the commission acting within its power shall, in the absence of fraud, be conclusive but the circuit court of the county in which said hearing is had or where such licensee or applicant resides shall have power to review said proceedings on writ of certiorari, or other proper proceedings, provided, that application is made by the aggrieved party within thirty days after the determination of the commission; or said hearing may be by mandamus brought in a court of competent jurisdiction and such court shall make such other orders in respect thereto as justice may require, and the return of the commission to any writ issued by said court shall be accompanied by a transcript of the papers filed and proceedings had before said commissioner duly certified. All expenses and costs of proceeding and hearing under this section shall be assessed and paid as costs are assessed and paid in any court of record."

Under the above section the Commission may deny an application for a license only after a hearing, of which the applicant shall be given at least ten days written notice, specifying the reason for denying the application. The Commission, in its discretion may refuse a license to the applicant, under Section 7, of the Missouri Real Estate Commission Act, Page 427, Laws of Missouri, 1941, which reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

CONCLUSION

It is, therefore, the conclusion of this department that the Missouri Real Estate Commission can exercise its discretion in refusing a license to a broker whose record justifies grounds for declining the application in accordance with Section 7, of the Missouri Real Estate Commission Act.

II

Your second question reads as follows:

"Request a ruling from the Attorney's office on the rights of the Commission to exercise discretion in refusing broker's license to an applicant whose principal source of income is not derived from real estate. (FOR EXAMPLE: We have an application from an accountant employed by the Kansas City Power and Light Company,

> who states he uses his spare time, including some Saturday afternoons and Sundays, trying to sell real estate). (Another example is an attorney who is actively engaged in the practice of law, and who has become an expert on foreclosure; in fact, he follows foreclosure notices and solicits the mortgagor to permit him to file a bond for redemption. Many real estate offices and loan companies have had difficulty with him, as he files notices to redeem properties, posts bonds, collects his fee, and at the end of the redemption period the mortgagee secures possession. The only service he has rendered is possibly keeping the mortgagor in possession of the property for a number of months)."

As to the first part of this question in reference to an accountant employed by the Kansas City Power & Light Company, we refer you to Section 3, of the Missouri Real Estate Commission Act, Page 425, Laws of Missouri, 1941, which partially reads as follows:

> "A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a compensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buy or offers to buy, exchanges or offers to exchange the real estate of others; * * * ."

The second part of your question, which refers to an attorney, is covered by the same section, wherein it states:

> " * * * nor shall this act be construed to include in any way the service rendered by an attorney-at-law in the performance of his duties as such; * * * ."

Under the facts set out in the second part of your second question, even though it states that he has interfered with the rights of the mortgagor in obtaining possession of the property, yet, it is a legal proceeding and the attorney is not required to obtain a broker's or salesman's real estate license.

CONCLUSION

It is, therefore, the opinion of this department that under the facts stated in your second question the Missouri Real Estate Commission may exercise its discretion in refusing a broker's license to the accountant employed by the Kansas City Power & Light Company, by reason of Section 7 of the Missouri Real Estate Commission Act, Page 427, wherein it states:

> " * * * and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

We further hold that the Missouri Real Estate Commission may grant a license to the accountant, even though

he only uses his spare time trying to sell real estate.

It is further the opinion of this department that an attorney actually engaged in the practice of law, in following his profession, which includes real estate transactions, is not required to obtain a real estate license.

III

Your third question reads as follows:

> "Request a ruling from the Attorney General's office on the question of the rights of the Commission to exercise discretion in refusing broker's license to an applicant who has been convicted, served a sentence, and is on parole."

The statute applicable to the above question is Section 14, of the Missouri Real Estate Commission Act, Page 430, Laws of Missouri, 1941, which partially reads as follows:

> " * * * No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

The above partial section sets out specific crimes of which persons have been convicted, and specifically states that the Commission cannot grant a license to such a person.

If the crime of which the applicant has been convicted is not set out in Section 14, supra, then the Missouri Real Estate Commission, in its discretion, may refuse to grant a license to the person, by reason of Section 7 of the Missouri Real Estate Commission Act, which provides that the license shall be granted only to persons who bear good reputation for honesty, integrity and fair dealing.

CONCLUSION

It is, therefore, the opinion of this department, in answer to your third question, that the Missouri Real Estate Commission may exercise its discretion in refusing a broker's license to an applicant who has been convicted, served his sentence and is on parole.

IV

Your fourth question reads as follows:

> "Request a ruling from the Attorney General's office on the rights of the Commission to exercise discretion in refusing a license on the question of incompetency due to lack of training or experience of the applicant. We have an applicant who states

> he has not been in the real estate business but intends to engage in the business, having had no previous experience or training. Could we refuse, at least for a period of six or twelve months to allow this applicant to secure a license."

The statute applicable to the above question is Section 7, Missouri Real Estate Commission Act, Page 427, Laws of Missouri, 1941, which reads as follows:

> "A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

This section specifically states that the license shall only be granted to persons who are competent to transact the business of a real estate broker, or real estate salesman in such a manner as to safeguard the interests of persons whom they represent.

CONCLUSION

It is, therefore, the opinion of this department that the Missouri Real Estate Commission, may refuse a license to an applicant on the question of incompetency due to lack of

training or experience of the applicant.

It is further the opinion of this department that the Commission could refuse a real estate license to a broker, but must follow the procedure as set out in Section 11, of the Missouri Real Estate Commission Act.

V

Your fifth question reads as follows:

> "Request a ruling from the Attorney General's office on the rights of the Commission to deny an application for a broker's license to an applicant who does not have a place of business, but who attempts to carry on his business from a residence which may be zoned against business, or which in the title itself restricts the residence for private dwelling purposes."

After a careful search of the Missouri Real Estate Commission Act, as it appears at page 424, Laws of Missouri, 1941, we find no provision that specifically provides that the applicant must have a place of business before being granted a license, and for that reason we hold that it is not necessary that the applicant have a place of business. We further hold that the question of "zoning" is a matter for other authorities, and not the Missouri Real Estate Commission.

VI

Your sixth question reads as follows:

> "Request a ruling from the Attorney General's office on the rights of the Commission to refuse a license to an applicant who has been refused by some other Department of the State. (FOR EXAMPLE: We have an application from an applicant who is subject to a Missouri Securities Commission cease and desist order.)"

The statutes applicable to this question are sections 7 and 14 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941. Under Section 7 if the applicant does not bear a good reputation the application may be denied and it is in the discretion of the Missouri Real Estate Commission, also, under Section 14, if the applicant has been found guilty of any of the crimes therein included, to deny the application. That the applicant has been refused a license in other state departments does not, in itself, preclude the Commission from granting the license.

CONCLUSION

It is, therefore, the opinion of this department that the Missouri Real Estate Commission, in its discretion, under Sections 7 and 14 of the Missouri Real Estate Commission Act may refuse a license to an applicant, but not on the fact that he has been refused a license in some other state department.

VII

Your seventh question reads as follows:

> "Request a ruling from the Attorney General's office on how far the Commission can go to stop a person who advertises in the newspapers as an agent and broker, or who is listed in an office building tenancy list as an agent or real estate broker, and uses this designation on letterheads but refuses to apply for a license. Can the Commission stop such a party."

The section applicable to this question is Section 17, of the Missouri Real Estate Act, Page 431, Laws of Missouri, 1941, which reads as follows:

> "Any person or corporation violating any provision of this act shall be guilty of a misdemeanor, and, if a person, be punished by a fine of not more than $500 or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment, and if a corporation shall be punished by a fine of not more than $1,000. Any officer or agent of a corporation, or member or agent of a copartnership or association, who shall personally participate in or be an accessary

> to any violation of this act, shall be subject to the penalties herein prescribed for individuals. This law shall not be construed to release any person from civil liability or criminal prosecution under the general laws of this state. The commission may cause complaint to be filed for violation of Section 1 of this act in any court of competent jurisdiction, and perform such other act as may be necessary to enforce the provisions hereof."

As provided in the above section, the Commission may, under Section 1 of the Missouri Real Estate Commission Act, prosecute a person who acts as a real estate salesman or broker without a license.

CONCLUSION

It is, therefore, the opinion of this department that if any person or corporation violates any of the provisions of the Missouri Real Estate Commission Act, he, or it, may be prosecuted by the Commission.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION: AND REVENUE:
SOLDIERS AND SAILORS
DELINQUENT TAXES:

Penalty and interest on delinquent taxes of persons in Military Services.

April 23, 1942

5-1

FILE
41

Mr. W. A. Holloway
Chief Clerk
State Auditors Department
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the following statement of facts:

> "I would like an opinion on Section 11085 R. S. 1939. Collectors shall Collect Penalties. * * * Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, * * *.
>
> "Does the above apply to delinquent taxes as well as current taxes?"

Section 11085 R. S. Mo., 1939, provides in part as follows:

> "If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settle-

> ment with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year: * * * * * * *"

Section 11124 R. S. Mo., 1939, provides in part as follows:

> "Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 11110 and 11114, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year, and an additional annual ten per centum on taxes for each

> year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially: Provided, however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this law provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually. * * * * * * * * *"

By the provisions of said Section 11124 supra, the collector is required to make out what is designated as a delinquent tax book and to calculate penalty and interest on delinquent taxes as is therein prescribed.

On the question of whether or not the proviso clause in said section 11085 supra, that is the clause which provides that no interest shall be charged against persons who are in military service and absent from their homes, refers only to current taxes. We think the following rules would be applicable here. In Willhite v. Rathburn 61 S. W. (2d) 708, 711, the court makes the following statement:

> "* * * A lawmust not give to something already done a different effect from that which it had when it transpired. Squaw Creek Drainage District v. Turney, 235 Mo. 80, 138 S. W. 12. * * * * *"

And, in Drainage District v. Turney 235 Mo. 80, 92, the court said:

> "A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired."

To give the said proviso clause of section 11085 supra, a construction that it applies to taxes which became delinquent prior to the time the taxpayer enters military service would be in violation of the foregoing rule. In other words, we think the proviso clause of said section 11085 supra, would not relieve the taxpayer from taxes together with penalty and interest which accrued before he entered the service.

As to the interest or penalty on such taxes after the taxpayer enters military service, we refer to the Soldiers and Sailors Civil Relief Act of 1940. (This Act is set out in 130 A.L.R. 794.)

Subsections 1, 2, 3 and 4 of section 500 of Article 5, l.c.800 of this Act are as follows:

> "(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.
>
> "(2) When any person in military service, or any person in his behalf shall file with the collector of taxes, or other officer whose duty it is to enforece the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except

upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

It will be noted by subsection 4 supra, that such taxes shall bear interest at the rate of six per centum per annum. This is in lieu of the penalties and interest which may have been charged under statutes. It will also be noted by this subsection that Congress has provided that the delinquent tax shall bear interest at six per centum per annum and that no other interest or penalty shall be incurred by reason of the nonpayment of the tax. We think this section is a limitation on the Legislature as to the maximum amount of penalty or interest which may be imposed but it does not prohibit that body

from relieving the taxpayer who is in military service from any penalty and interest as has been done by the proviso clause in said section 11085 R.S. Mo. 1939.

The rule of construction of legislation for relief of soldiers and sailors is well stated in volume 130 A.L.R. page 776 as follows:

> "It has been held that it was not the legislative intent that the remedial purpose of the Soldiers' and Sailors' Civil Relief Act should be defeated by a narrow or technical construction of the language used. Thus, in Clark v. Mechanics' American Nat. Bank (1922; CCA 8th) 282 F. 589, it was held that a statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business. * * * * *"

It might be contended that interest or penalty on the current and delinquent taxes should be calculated at six per centum per annum after the taxpayer enters military service as is provided by subsection 4 supra. However, we think the purpose of the proviso clause in said section 11085 supra, was to relieve the person in military service from penalty or interest on taxes, both current and delinquent. We arrive at this conclusion by the application of the construction suggested in the A.L.R. citation supra: that is, that such a statute should be liberally construed in favor of the rights of the man engaged in military service.

In your request you also ask for a suggested form of affidavit which may be used by the taxpayer, or someone for him, in order that he may obtain the benefits of the Act. We suggest that there may be various forms of affidavits used, however, we refer you to subsection (2) of section 500 of article 5 of the Act, which is copied herein and if the affidavit follows the requirements stated therein, it should be sufficient to authorize the court to relieve the collector from proceeding to enforce the collection of the delinquent tax or from charging the statutory rate of interest or penalty.

CONCLUSION

It is, therefore, the opinion of this Department, that the person who is absent from his or her home and engaged in military service should not be charged penalty and interest on current taxes. We are further of the opinion that he should be charged penalty and interest on taxes which became delinquent prior to the time he entered such service.

It is further our opinion, that no penalty or interest on current or delinquent taxes for prior years, which accrue after he enters military service, should be charged against such person.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

MISSOURI REAL ESTATE COMMISSION: Agent who violates the Act may have his license revoked.

May 15, 1942

5-29

Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

FILE
41

Dear Sir:

We are in receipt of your letter of May 14, 1942, in which you request an official opinion, as follows:

> "The Commission is confronted with an inquiry from Kansas City that we would like to ask your office for an opinion and at the same time ask if we have jurisdiction over licensees and their actions in municipalities having restrictions in certain districts of the City.
>
> "The opinion desired is on the following:
>
> "'Negroes have been gradually encroaching on property in districts restricted against colored. They have recently taken practically the entire block on three streets. Negro agents are soliciting listings for sale to colored people from property owners in several blocks that are restricted against negroes, and are now attempting to negotiate a sale of a four apartment building in one block restricted against negroes.' 'The restrictions expired in 1928 and were automatically renewed for an additional 15 year period, on the property in question. One block expired in 1929 and was automatically renewed for an additional

> 15 year period in accordance with the provision contained in the original restrictions.'
>
> "Two negroes active in the above listings are licensed as brokers."

Section 10, paragraph (a) of the Missouri Real Estate Commission Act, Laws of 1941, page 428, reads as follows:

> "(a) Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others."

Under the above paragraph of Section 10 the Commission, upon its own motion, shall have the power to revoke any license where the agent makes substantial and false misrepresentations to obtain a sale such as, offering to make a sale that cannot be legally consumated.

Paragraph (g), Section 10 of the same law reads as follows:

> "(g) Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or demonstrates bad faith or gross incompetence."

Section 11 of the Missouri Real Estate Commission Act, as it appears on page 429, Laws of Missouri, 1941, reads as follows:

> "The commission may deny an application for a license, or suspend or revoke a license issued, only after a hearing of which the applicant or licensee affected shall be given at least ten days' written notice specifying the reason for denying the applicant a license, or, in case of a suspension or revocation, the offense or offenses of which the licensee is charged. Such notice may be served as provided by law for the service of notices, or by mailing a copy by registered mail to the last known residence or business address of such applicant or licensee. The hearing on such charges shall be at such ti e and place as the commission may prescribe. * * * * * * * * * * * * *."

Under the facts set out in your request, the negro real estate agents who have a license under your department, and who have made misrepresentations to prospective buyers of the property set out in your request, have violated only paragraph (a) and paragraph (g) of Section 10 of the Missouri Real Estate Commission Act, as set out in the Session Laws of 1941.

Under Section 11 of such act it would be necessary for the Commission to set out in a new notice the exact violation of the Missouri Real Estate Commission Act, and under paragraph (a) and paragraph (g) of Section 10 of the Missouri Real Estate Commission Act of 1941, it would be necessary to show that the person who holds a license under the Missouri Real Estate Commission Act knew that the property which they offered for sale should not be sold to negroes or people of the Ethiopian race.

CONCLUSION

It is, therefore, the conclusion of this Department, under the above authorities, that a person who holds a real estate license under the Missouri Real Estate Commission, who makes substantial misrepresentations in the conduct of his business or who makes representations under any conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, his license may be revoked under Section 11 of the Missouri Real Estate Commission Act which appears at page 424, Laws of Missouri, 1941.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WJB/rv

MISSOURI REAL ESTATE COMMISSION -

Missouri Real Estate Commission Act is not - and cannot be - retrospective to contracts entered into before January 1, 1942, as to real estate commissions.

June 1 , 1942

6-4

Missouri Real Estate Commission
Jefferson City, Missouri

FILE
41

Attention - Mr. J. W. Hobbs,
Secretary.

Gentlemen:

We are in receipt of your letter of May 25, 1942, in which you request an official opinion as follows:

"The Commission requests an opinion from your office on the following:

"'Prior to the first of January 1942 a salesman employed by a broker, the salesman made a lease on a certain piece of property. Under the lease the lessees were given an option to buy the premises any time during the term of the lease. The salesman left the employ of the broker in October 1941. A definite agreement was made at the time the salesman left the employ of the broker that if the lessee would exercise the option the salesman would receive the usual part of the commission based on the selling price. In April 1942 the parties exercised their option and a sale was consummated. Is the broker now liable to the salesman who has quit or withdrawn from the business? Would the broker be vio-

> lating the real estate license act if he paid the salesman who at this time has no license a part of the commission collected?'"

Section 1, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, reads as follows:

> "License must be procured. - After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Under the above section the Missouri Real Estate Commission Act did not become effective until January 1, 1942. We are assuming that the contract, to which you refer in your request, was consummated before January 1, 1942.

Section 15, of Article II of the Constitution of Missouri, reads as follows:

> "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

In view of the fact that the legislature set January 1, 1942, as the effective date, we believe that it was the intention of the legislature not to violate Section 15, of

Article II of the Constitution of Missouri, when it enacted Section 15, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 430, which reads as follows:

> "Fees shall not be paid to unlicensed persons. - No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the State of Missouri."

Section 15, of Article II of the Constitution of Missouri, prohibits the enactment of ex post facto laws, and laws which are retrospective in their operation. An ex post facto law is a law which is objectionable to penalties imposed, while the laws that are retrospective in their operation are laws applying to civil matters.

Under the facts set out in your request the contract for the lease with option to purchase, between the lessor and the lessee, was consummated before the effective date of the law, and before October 1941, at which time the salesman left the employ of the broker.

Under Section 15, of Article II of the Constitution of Missouri, supra, and also under Section 19 of Article XII of the Constitution of Missouri, the legislature cannot enact laws which are retrospective in their operation.

Section 19, of Article XII of the Constitution of Missouri, reads as follows:

> "The General Assembly shall pass no law for the benefit of a railroad or other corporations, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past."

Under this section the legislature cannot enact a law that would benefit the broker to the extent that he would not be liable to pay the commission due the salesman under his contract.

Section 15, of Article II and Section 19 of Article XII, of the Constitution of Missouri, were construed in the case of Gast Realty & Investment Co. v. Schneider, 246 S. W. 177, l. c. 178, where the court said:

> "Article 2, Sec. 15. 'Ex Post Facto Laws, etc., Prohibited. - That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly.'
>
> "Article 12, Sec. 19. 'Retrospective Laws in Aid of Corporations or Imposing New Liability on the People Forbidden.- The General Assembly shall pass no law for the benefit of a railroad or other corporations, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already past.'

"Sutherland speaks of retrospective statutes as those which 'relate to past acts and transactions,' and of retroactive statutes as those 'which operate on such acts and transactions and change their legal character or effect.' Lewis' Sutherland Statutory Construction (2d Ed.) Sec. 641.

"Sedgwick defines a retrospective law to be:

"'A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' Sedgwick on Construction of Statutory Constitutional Law (3d Ed.) p. 160.

"This definition was adopted by this court in Hope Mutual Insurance Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438, wherein Wagner, J., adds:

"'No new ground for the support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defence.'"

Also, in the case of Barton County v. Walser, 47 Mo. 189, l. c. 200, the court said:

"A statute which takes away any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability,

> in respect to transactions already past, is retrospective. (Hope Mutual Ins. Co. v. Flynn, 38 Mo. 483.) * * ."

And, in the case of Murphy et al v. Limpp, 147 S. W. (2d) 420, l. c. 423, the court said:

> "There is no escape from the conclusion that respondent was taxed for the year 1937 because he had in his employ eight or more employees in the year 1936. Analogous to the situation would be a law enacted in 1937, taxing an individual because in 1936 he had had an income sufficient to come within the law but did not have a taxable income in 1937. Such a law would clearly be retrospective and void. See Graham Paper Co. v. Gehner et al., 332 Mo. 155, 59 S. W. 2d 49; Smith v. Dirckx, 283 Mo. 188, loc. cit. 197, 198, 223 S. W. 104, loc. cit. 106, 11 A. L. R. 510. In the latter case the court quoted with approval Mr. Justice Story's definition of a retrospective law as follows: 'Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective.' * * * * "

In the case of Home Telephone Co. v. Sarcoxie Telephone Co., 236 Mo. 114, l. c. 132, the court said:

"* * * The amendment was subsequent to the contract, and therefore we should take the law in force at the date of the contract. Subsequent legislation cannot invalidate contracts lawful at the date of their making."

CONCLUSION

In view of the above authorities, it is the opinion of this department that a broker is liable to a former salesman for commissions agreed to on a contract consummated before January 1, 1942, even though at the present time the salesman is not now in the employ of the broker and is not a real estate salesman.

It is further the opinion of this department that a real estate broker would not be violating the real estate license act if he paid the salesman a part of the commission collected, although the salesman, at this time, has no real estate license.

APPROVED:

Respectfully submitted

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PRIMARY ELECTIONS: County clerk may accept the filing declarations of candidates to fill unexpired portion of term of county assessor volunteering for army services.

June 1, 1942

6-4

FILE 4-1

Honorable W. H. Holmes
Prosecuting Attorney
Vienna, Missouri

Dear Mr. Holmes:

Under date of May 28, 1942, you requested an opinion from this office on the following question:

> "I would like your opinion, for our County Clerk, upon the following situation, viz:--
>
> "Our County Assessor, some few months ago, after completing his assessment and books for 1941, appointed a Deputy and soon thereafter volunteered in the United States Army and is now and has been for the past few months in a training camp in the State of Texas.
>
> "Would this office be considered in such a situation that our County Clerk would be justified and properly doing his duty to accept filings for this office by candidates at the August primary, until the filing date closes?
>
> "Due to the fact that it is just a short time until the filings close, I would appreciate as speedy a reply as possible."

In your letter you state the County Assessor "volunteered in the United States Army." It is assumed from this statement the Assessor voluntarily enlisted and was not inducted under the provisions of the Selective Service Act.

Recently this office furnished to Governor Donnell an opinion on the status of a county officer who volunteered for service in the United States Navy and a copy of that opinion is enclosed.

Supplementing this opinion it is desired to call attention to the following brief passages from Corpus Juris, Volume 46, page 979, paragraphs 130 and 132:

> "It is generally held that a resignation may be conditional or prospective in character, although there is authority to the contrary. An undated resignation given with implied authority to fill in the date in case of future misconduct is effective upon its acceptance. A statement by an officer that he contemplates a resignation, or that his statement may be regarded as a resignation upon a certain contingency which does not occur, is without effect. A conditional resignation cannot be accepted except on the terms made by it, and, in the absence of a corrupt bargain, it is not unlawful for an officer to attach, as a condition of his resignation, the appointment of a certain other person as his successor."

* * * * * * * * *

> "A resignation of a public office, to be effective, must be made with the intention of relinquishing the office, accompanied by the act of relinquishment. It is not necessary that a resignation from a public office be couched in any particular words, it being only necessary that the incumbent evince a purpose to relinquish the office. Where no particular mode of resigning an office is provided by constitutional or statutory requirements, no formal method is necessary; it may be by parol, or it may be implied."

In the case of Howell v. Gillespie, 202 Ill. App. 447, it was held the turning in of jail keys and star by a police officer constituted an implied resignation. And in the case of Barbour v. U. S., 17 Court of Claims, Respondents, at page 149, and following, it was held a trustee in bankruptcy who absented himself from the place of performance of his duties and performed no duties had impliedly

resigned.

Attention is next directed to Section 18, Article II of the Constitution of Missouri which requires an officer to personally devote his time to the performance of the duties of the office. It is a matter of common knowledge that persons who have voluntarily enlisted in the Army have entered into an agreement to perform military duties and be subject to military duties and discipline. Inasmuch as this requires constant attention to the performance of the duties incident to service in the Army and such duties would be performed at places other than Maries County, possibly outside the territorial limits of the United States, it would seem that by voluntarily agreeing to enter the military service and absent himself from the place of performance of his civil duties for a long space of time this officer has impliedly resigned his office and has abandoned it. If this is correct, there is a vacancy in the office of the County Assessor.

This vacancy should be filled in accordance with the provisions of Section 11,509, Revised Statutes of Missouri 1909, which section is as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, how-

> ever, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

as there is no special law relating to filling a vacancy in the office of county assessor occasioned by resignation and abandonment.

It will be observed the appointment by the Governor should be for a period ending on the first Monday in January following the next ensuing general election, or when the term of office begins on some other date the appointee of the Governor shall hold until such other date.

By referring to Section 10,945, R. S. Missouri 1939, it is ascertained the County Assessor enters into the performances of his duties on the first day of June next after his election.

Following this an appointee appointed at this time would serve until the first of June, 1943, at the general election held in 1942, a person should be elected either for the unexpired portion of the term remaining after June 1, 1943, or for the new term starting at that date.

Section 11,550, R. S. Missouri 1939, authorizes the filing of a written declaration by a candidate for office and Section 11,553, subsection 2, directs that such declaration of candidacy for county office shall be filed in the office of the county clerk of the county.

CONCLUSION

It is, therefore, the conclusion of the writer that the county clerk could properly receive the declaration of any person desiring to be a candidate for the office of county assessor for the portion of the term remaining after June 1, 1943, or the new term starting at that time as the case may be.

Respectfully submitted

APPROVED:

W. O. JACKSON
Assistant Attorney General

ROY McKITTRICK
Attorney General

WOJ:DA

MISSOURI REAL ESTATE COMMISSION ACT;

Broker violates the Act by concealing the fact that property is restricted and need not make the misrepresentation.

June 12, 1942

6-17

FILE

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your request for an opinion, under date of June 8, 1942, in which you set out three questions in regard to the violation of the Missouri Real Estate Commission Act.

The law applicable to the three questions contained in your request, is Section 10, paragraphs (a) and (g) of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 428, - this partial section reads as follows:

> "(a) Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others."
>
> "(g) Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or demonstrates bad faith or gross incompetence."

Your first question reads as follows:

"1. If an owner of a restricted property solicits the services of a Negro real estate broker to sell such property to a Negro family for their occupancy, and a sale is consummated, there is no cause for action by the Commission unless it establishes as a fact that the broker represented the property to the buyer as being unrestricted, as a result of which the buyer suffered financial loss."

In this question you ask whether or not it is necessary for the broker to actually make a false representation to the buyer that the property is unrestricted. Fraud consists of two acts - one, actual fraud and acting fraud, and, second, passive fraud. Under this question if the broker knew that the property was restricted from sale to negross even though he did not represent that it was unrestricted he would be violating paragraph (g) of Section 10, supra.

In the case of Schrabauer v. Schneider Engraving Product, 25 S. W. (2d) 529, l. c. 533, Par. 7, the court, in defining "fraud", said:

"Now fraud may manifest itself in devious ways. It comprises all acts, omissions, and concealments involving a breach of legal or equitable duty, and resulting in damage to another. It may be either active or passive; and while it is true that ordinarily a distinction is to be drawn between mere silence and active concealment, yet mere silence

> alone will be held to be a fraud where the circumstances are such as to impose a duty upon one to speak, and he deliberately remains silent. 26 C. J. 1071."

Under the above holding, if the real estate agent, or broker, concealed the fact that the property was restricted from sale to negroes, even though he did not represent the property as being unrestricted, he, nevertheless, is guilty of fraud.

Your second question reads as follows:

> "2. If a broker seeks the listing for sale of a restricted property, representing to the owner that owners of neighboring properties intend to make sales of their holdings to Negroes, thereby changing the residential character of the block or neighborhood, which would shortly result in vitiating the entire effect of the restrictions in the neighborhood or block, the Commission might take action but only if the representations with respect to the other property holders were false."

The mere listing for sale of restricted property is not a violation of the Missouri Real Estate Commission Act, even though, at the time of the listing the agent, or broker, informed the owner of the restricted property that

he intended to sell the property to negroes. The mere listing is not the sale; but, if the said agent, or broker, falsely represented to the owner of the property that all other owners intended to sell to negroes, then he would be violating Par. (a) of Section 10, supra. In order to make a valid sale to a negro, of property, the sale of which was restricted from negroes, it would be necessary that all owners of fee in the restricted neighborhood join in a waiver of the restriction. If the agent, or broker, falsely misrepresented the facts, he is guilty of violating the Missouri Real Estate Commission Act.

"False pretenses" has been defined in the case of State v. Houchins, 46 S. W. (2d) 891, l. c. 894, where the court said:

> "In State v. De Lay, 93 Mo. 98, 5 S. W. 607, loc. cit. 609, 'pretense' is thus defined: 'The word "pretense" when used in a criminal statute is to be understood in its legal and technical sense, it having a well-defined as well as a peculiar and appropriate meaning in law. Rev. St. 1879, Sec. 3126. Its definition is thus given by Mr. Bishop: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 2 Bish. Crim. Law, Sec. 415.'"

Your third question reads as follows:

> "The Commission need not wait until a majority of owners in

> the restricted area bring injunction or other proceedings to stay the completion of a sale in violation of a restriction. In most covenants of restriction there is a provision that gives a single property owner the right to bring such an action on his own behalf and for the benefit of others who personally joined in the restrictive covenants. The Commission might initiate action against a licensee either on the filing of such an injunction and before the case is decided by the courts, or may take such action as the circumstances warrant, even though no injunction is ever filed."

It is not necessary that the covenant of restriction give a single property owner the right to bring an injunction where the restriction has been violated, for the reason that he has an easement over all of the restricted area with the right to bring an injunction, whether authorized by the restriction or not.

In the case of Porter et al v. Johnson et al., 115 S. W. (2d) 529, l. c. 534, the court, in stating that rule said:

> "'If no radical change in the condition and use of the restricted property occurs, the circumstances that there have been changes in the territory <u>surrounding</u> the covenanted area will not of itself be sufficient

to destroy the restrictions. Pierce v. St. Louis Union Trust Company, supra, 311 Mo. (262), loc. cit. 295, et seq., 278 S. W. (398), loc. cit. 408.' Rombauer v. Christian Church, 328 Mo. 1, loc. cit. 18, 40 S. W. 2d 545, 553. The fact that changed conditions render the restriction less valuable will not prevent their enforcement if the restrictions remain of substantial value. Rombauer v. Christian Church, supra. Nor will courts refuse to enforce restrictions even if the property be of more monetary value with restrictions removed. There are some rights more valuable than money. Noel v. Hill, 158 Mo. App. 426, loc. cit. 450, 138 S. W. 364. We do not agree with the contention of defendants that since Negroes live on property abutting this area on the rear, and live one-half block in front, facing another street, and that since vacant property across the street is offered for sale to Negroes for residential purposes, the restrictions are without value to plaintiffs. The vacant property across the street is not likely to be built up with Negro tenanted houses for many years to come, in view of the record of such building during the past 15 years. The same may be said of speculation as to future building on and occupancy of the corner lot adjoining the district on the south, it now being vacant. The one Negro occupied house on the north was so occupied before the area was re-

stricted, consequently its occupancy has not changed conditions at all.

"In the Rombauer Case, supra, the Supreme Court said that the defense of changed conditions is an affirmative defense, and that he who asserts it must prove three things, to wit: '(1) The radical change in condition; (2) that as a result enforcement of the restrictions will work undue hardship on him; (3) and will be of no substantial benefit to the plaintiff.' Argument as to whether or not Negroes may occupy property outside the district at some speculative future date does not tend to prove a present changed condition; nor does speculation as to what may occur in the next block south of the area, and outside of it, prove, or tend to prove, the ultimate facts. This case is not similar to one involving restrictions against business encroachment where the district thereafter becomes surrounded with industrial buildings on the outside, the smoke and fumes of which render the district wholly undesirable from a residential standpoint. Such a changed condition as that gives reason for an exception to the rule declared in Pierce v. St. Louis Union Trust Company, supra; but such is not this case. The evidence here fails to establish that conditions have so changed as to render the restrictions of no substantial value to plaintiffs."

Also, in the case of State v. Mulloy, 61 S. W. (2d) 741, l. c. 743, the court said:

> "The plaintiffs in the injunction suit (relators here) are owners of lots in University Heights subdivision. The defendant school district was proceeding to erect and use buildings and grounds in such subdivision for school purposes in violation of valid building restrictions excluding and prohibiting such use. It is the settled law of this state that where the deeds of conveyance impose valid restrictions on the lots within a given area, then each lot and the owner of same has an easement in each and all the other lots affected by the restrictions, which easement is a property right to be protected by injunction, at the owner's instance, restraining and preventing violations of the building restrictions. Such building restrictions and the rights arising therefrom are subordinate to the right of eminent domain and can be extinguished by condemnation proceedings. * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department that if an agent, or broker, conceals the fact that the property is restricted from sale to negroes, although he does not represent to the buyer of

the property that it is unrestricted, he, nevertheless has committed a fraud upon the buyer of the property.

It is further the opinion of this department that if a broker merely lists restricted property for sale to negroes and informs the owner of the property that it is his intention to sell to negroes he has not violated the Missouri Real Estate Commission Act until he has actually sold the restricted property to a negro. If he falsely represents that the other property owners intend to sell their property to negroes, he is guilty of violating the Act.

It is further the opinion of this department that the Commission need not wait until an injunction suit is brought to enforce the restrictions in the neighborhood before they could revoke the license of the broker, or salesman, who has violated the act by making the sale, knowing at the time that the property was restricted from the sale to negroes. The Commission might initiate action against a licensee at any time before the filing of such an injunction and need not wait until a suit is filed or judgment is had.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS: County court cannot appoint more than six judges in a precinct under any circumstances.

July 15, 1942

7-24

FILED
41

Honorable Lawrence Holman
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 13, 1942, which reads as follows:

> "Under Sections 11,499 and 11501 R. S. Mo. 1939, the County Court is authorized to appoint three judges from each of the dominant political parties in each precinct where two hundred or more votes were cast in the last preceding general election. Since the enactment of those Sections, the Legislature has repealed and re-enacted Section 11,607 laws 1941, page 363, requiring the election judges to paste a black sticker over the identifying number on each ballot. It is anticipated that this will increase the work of the election judges to the extent that they may need more help. The County Court of this County is considering appointing two more judges in each precinct, one from each of the political parties, in order to take care of these additional duties.
>
> "They have asked me to get an opinion from you as to whether or not they can legally appoint these additional judges."

Section 11499 R. S. Missouri, 1939, which applies to all counties in this State, requires that four judges of election shall be appointed by the county court for each election precinct.

Section 11501 R. S. Missouri, 1939, which applies to all precincts in this State that, at the last preceding general election, cast two hundred or more votes, provides that the county court may appoint two additional judges of election, which, in effect, means the appointment of six judges of election; three of which shall be taken from the political party that polled the largest number of votes at the last preceding general election, and three judges from the party that polled the next largest vote.

The two Sections, 11499 and 11501, supra, are the only sections which apply to the appointment of judges in the counties and precincts of this State. We find no other statutory authority providing for the appointment of more than six judges under any circumstances.

In your request you state that it will be necessary to appoint two additional judges by reason of the extra duties placed on the judges, in requiring them to place the black sticker on the ballots, as provided in Section 11607 Laws of Missouri, 1941, page 363.

Section 11607, Laws of Missouri, 1941, page 363, supra, which requires the extra duties, as above set out, does not provide for additional judges, and in no way repeals or amends the general law in reference to the appointment of judges. It can be presumed that the legislature at the time it enacted Section 11607, supra, knew and was aware that Section 11499 and Section 11501, supra, limited the number of judges to be appointed by the county court to six. It has been held in this State, in some cases, that where the number of judges appointed is less than those specified in Section 11499 and Section 11501, supra, it would not invalidate the election, or deprive the voters of their rights of suffrage, for the reason that the voters were not responsible for the negligence on the part of the election commissioners or election

officers.

In the case of Breuninger et al v. Hill et al., 210 S. W. 67, l. c. 71, the court said:

> "* * * Aside from this, the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted although the statute has not been strictly complied with. Sanders v. Lacks, 142 Mo. 255, 43 S. W. 653."

Section 11496 R. S. Missouri, 1939, sets out the compensation of judges and clerks of elections as being a sum which the county court may deem reasonable, not to exceed three dollars per day, to be paid out of the county treasury. We find no authority granted the county court to pay for additional judges, other than those set out in the two sections, 11499 and 11501, supra.

Under Section 2480 R. S. Missouri, 1939, the county court shall have control and management of the property of the county, and also is empowered to audit and settle all demands against the county. In construing this section, the Supreme Court of Missouri, in the case of Hillside Securities Co. v. Minter et al, 254 S. W. 188, par. 4, said:

> "Appellant cites section 2374, R. S. 1919, which provides that the county court shall have power to audit and settle all demands against the county. This, of course, means lawful demands against the county. It cannot be construed as giving authority to the county court to audit and

> settle claims against the county court arising under void contracts."

Section 2374 R. S. Missouri, 1919, as set out in the above quotation, is now Section 2480 R. S. Missouri, 1939.

County courts are not general agents of counties or states, but their powers are limited and defined by statute, and their acts outside of, and beyond, statutory authority are void. (Morris v. Karr, 114 S. W. (2d) 962, 342 Mo. 179.)

Also, in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, pars. 2-4, the court said:

> "County courts are courts of record, created and given jurisdiction to transact all county business, and to audit and settle all demands against the county. Article 6, Section 36, Constitution of Missouri, Mo. St. Ann.; Sec. 2078, p. 2658. The above statute providing for settling and auditing claims against the county applied only to lawful demands and does not authorize the county court to audit and settle claims arising on void contracts. Hillside Securities Co. v. Minter, 300 Mo. 380, 397, 254 S. W. 188, 193. * * * * * * * * * "

Also, in the case of State v. Jackson, 84 S. W. (2d) 988, par. 1, the court said:

> " * * * The answer to that question depends upon the statutory powers of the county court. Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common-law or equitable jurisdiction."

The same holding, as in the above cases, was held in the case of Jensen v. Wilson Township, Gentry County, 145 S. W. (2d) 372.

In view of the above cases, and in view of the limitation placed upon the county court, as to the number of judges to be appointed under Section 11499 and Section. 11501, supra, the county court will be prohibited from paying said unlawfully appointed additional judges the amount of money as set out in Section 11496 R. S. Missouri, 1939.

CONCLUSION

It is, therefore, the opinion of this department that the county court of Randolph County cannot appoint two additional judges in each precinct , other than those allowed under Section 11499 and 11501, supra, in order to take care of the additional duties of using the black sticker over the identifying number of each ballot.

It is further the opinion of this department that in all counties in this State four judges of election shall be appointed by the county court for each election precinct, but if any of the precincts in the county at the last preceding general election cast two hundred or more votes the county court may appoint

two additional judges of election, but in no event not more than six judges of election.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

VANE C. THURLO
(Acting) Attorney General

WJB:RW

REAL ESTATE COMMISSION - Approved information and violation of the Act.

October 21, 1942

10-29

FILED
41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs
Executive Secretary

Dear Sir:

Your request to this office for an official opinion, in reference to the citing of persons before your board, by a subpoena, and the procedure of prosecution of persons acting as real estate brokers and dealers, without a license, has been received.

I

Your first question reads as follows:

> "Does the Commission have the right to subpoena a Real Estate Broker to appear before the Commission and show cause why he should not be prosecuted for failure to apply to the Commission for a Real Estate License? The Commission in checking the names of persons known to be in the real estate business throughout the State discovered that many of them failed to apply for a license and although the Commission

> wrote them stating that a State Real Estate License was necessary for any person to operate a general real estate business they have ignored such letters and failed to apply for a license."

The statute applicable to this question is Section 11, Laws of Missouri, 1941, page 429, and is very lengthy. It provides the whole procedure for the granting, denying, revoking and suspension of a real estate broker's, dealer's or agent's license. That part of Section 11, supra, in reference to the powers of the Real Estate Commission to subpoena and bring before it any person in this State, to take his or her testimony, only applies where an application has been made for a license and there is a possibility that it may be denied, or, where the Commission is holding a hearing on the suspension, or revocation, of a license that has been granted. The particular part of said Section 11, supra, pertaining to subpoenas, reads as follows:

> " * * * The commission shall have the power to subpoena and bring before it any person in this state or take the testimony of any such person by deposition with the same fees and mileage and in the same manner as prescribed by law in judicial procedure, before courts of this state in civil cases. * * * * * * * * * * "

This power is an incidental power granted the Commission upon a hearing, as set out in Section 11, and is not a power which would permit the Commission to

promiscuously subpoena any person whom they suspect of acting as a real estate broker, dealer or salesman, who has not obtained a license, or has not made an application for a license, in order to determine whether or not they are acting in violation of the Missouri Real Estate Commission Act.

Such a procedure would compel a person to testify against himself, in case a criminal action is brought, for acting as a real estate broker without first obtaining a real estate license, as set out under the Missouri Real Estate Commission Act. It is prohibited by Section 23, Article II, of the Constitution of Missouri, which partially reads as follows:

> "That no person shall be compelled to testify against himself in a criminal cause, * * * * * * * * ."

The above partial section has been held to apply in any trial before any tribunal, or in any proceedings. (State ex rel v. Kearns, 264 S. W. 775.)

When a person applies for a license, or has received a license, he may be subpoenaed to testify, and it would not be a violation of Section 23, Article II of the Constitution of Missouri, for the reason that in accepting the license he has waived his constitutional immunity. In the case of an application for a license he may then refuse to testify to facts which would incriminate him, but would thereby empower the board to refuse the application.

CONCLUSION

It is, therefore, the conclusion of this department that the Missouri Real Estate Commission has no authority to subpoena a real estate broker to appear before the Commission and show cause why he should not be prosecuted for failure to apply to the Commission for a real estate license.

II

Your second question reads as follows:

> "What procedure is necessary and what information is required to prosecute a violator that operates without a State Real Estate License?
>
> "The Commission has received letters from various parts of the State that gives the names and in some cases newspaper advertisements of violators and the Commission is desirous of obtaining necessary instructions to prosecute some of these reported violators."

Section 1 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, reads as follows:

> "After January 1, 1942, it shall be unlawful for any person, co-partnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

This section consists of two specific law violations. The first violation is: "to act as a real estate broker or real estate salesman," without first having procured a license from the Missouri Real Estate Commission; the second violation is: "to advertise or assume to act" as a real estate broker, or real estate salesman, without first having procured a license from the Missouri Real Estate Commission.

The information must be drawn, if on one count only, on only one of the two violations, as above set out, but the information may be drawn under two counts, each consisting of one of the two violations above set out.

After the proof has been introduced, and before the cause is submitted to the court or jury, the State can elect on which count it desires to stand, but the election is not compulsory.

In the case of State v. Stark, 148 S. W. (2d) 82, par. 4, the court in holding that it is not compulsory to make such election, in a case where a person was being prosecuted for practicing medicine without a license, said:

> " * * * Neither did the court err in not requiring the state to elect upon which count it would try the defendant. The defendant was properly charged in separate counts and Counts 1 and 2 were properly submitted to the jury. State v. Young, Mo. App., 215 S. W. 499; State v. Kellmann, 343 Mo. 762, 123 S. W. 2d 70."

Under Section 17, of the Missouri Real Estate Commission Act, any person violating the provisions of the Act is guilty of a misdemeanor. Under Section 3783 R. S. Missouri, 1939, no criminal action can be prosecuted after one year from the commission of the crime, and the institution of the prosecution dates from the time of the filing of the information. (State v. Criddle, 259 S. W. 429.)

In a criminal prosecution under the Missouri Real Estate Commission Act; the complaint and information may be either filed in a justice court, in the township where the violation has been committed, or in the circuit court of the county in which the violation has been committed. (Section 3891 R. S. Missouri, 1939.)

The proper procedure is to have a complaining witness file an affidavit with the prosecuting attorney, as set out in Section 3895 R. S. Missouri, 1939. The prosecuting attorney may file an information on his information and belief, if he so desires, without an affidavit, and may file the information either before a justice of the peace in the township where the crime was committed, or in the circuit court of the county in which the crime was committed. Section 3895, supra, provides the affidavit can be filed in the office of the clerk of the circuit court, or with the prosecuting attorney, with the names of all witnesses to be used in the prosecution of the case. It then becomes the duty of

the prosecuting attorney to file an information, as set out in Section 3894 R. S. Missouri, 1939. The information must be verified by the prosecuting attorney.

In the prosecution of a continuing misdemeanor, such as practicing medicine, dentistry, osteopathy and acting as real estate broker, dealer, or salesman, without first having obtained a license from the proper board, it is better to frame the information as to the continuing dates, and it is not necessary that a specific date of an act be set out in a misdemeanor information. The misdemeanor should show a continuing act from one date to another, but the dates mentioned in the information should be within the statute of limitations of one year before the filing of the information.

It was so held in the case of The State v. Bennett, 102 Mo. 356, l. c. 368, where the court said:

> "The offense as charged is but single, and only one punishment could be applied on the information as now framed. State v. Stubblefield, 32 Mo. 563. The pith of it is the prosecution of the business of private detective without license. Whether it was essential (in order to bring the case within the statute) to allege that defendant acted as a detective to the extent of making it a business need not be discussed since that allegation was in fact made. The state's evidence was directed chiefly toward showing that defendant engaged in that business.
>
> "It went to show that defendant, within the period mentioned, kept a business office the sign at which was 'C. D. Bennett,

Detective Agency;' that he advertised 'all kinds of detective business promptly attended to' with his name and location of office, in one of the city papers, and one witness (an attorney) also testified that he employed and paid defendant to render him services in searching for information to utilize in connection with a case he had in hand. These facts fairly tended to support the charge preferred.

"An allegation that one conducts or prosecutes a certain general avocation or business falls within the rule that where a misdemeanor (merely statutory) is made up of a series of transactions or acts, indicating a general design, which cannot be enumerated on the record without unnecessary prolixity and danger of variance, they ought not to be required to be stated where the charge as formulated is fairly informative of the case to be met. United States v. Gooding (1827), 12 Wheat. 460. The allegation that a particular business was carried on without a license belongs to this class. Sterne v. State (1852), 20 Ala. 43; State v. Myers, supra; State v. Little, supra; State v. Sprinkle (1846), 7 Humph. 36; Commonwealth v. Pray (1832), 13 Pick. 362. Considering the whole record, we, therefore hold the information was sufficiently definite and certain to support the proceedings."

Also, in the case of State v. Randolph, 139 Mo. App. 311, l. c. 313, where the court said:

> "It is next contended that the information having been filed August 15, 1907, charging the sale of liquor to have occurred on the ___ day of June, 1906, that the information shows on its face that the offense was barred by the Statute of Limitations and will not support a conviction.
>
> "The offense charged is a misdemanor, and time is not of the essence of the offense; hence, its commission could be shown on any day within a year before the filing of the information, and the allegation as to date in the information is wholly immaterial under our statute. (Revised Statutes of 1899, section 2535.) All that is required in cases in which time is not of the essence of the offense is that the proof of the commission of the offense shall be within the period of the Statute of Limitations, which, in this case, would be one year.
>
> "By an examination of the transcript in this case we learn that the evidence shows the sale to have occurred in September, 1906. This information having been filed on August 15, 1907, the proof shows the sale to be within one year prior to the filing of the information, and is sufficient."

We are herein setting out an approved form of affidavit to be made by a complaining witness, either before the circuit clerk of the county, or the prosecuting attorney of the county:

"IN THE

_____
(Name the Court)

"STATE OF MISSOURI,
Plaintiff,

vs

_____,
"(Name Defendant)
Defendant.

"COMPLAINT

"Comes now _____ and
(Name of Affiant)
being first duly sworn on his oath states:

"That _____,
(Name of Defendant)
in the County of _____,
(Name of County)
and State of Missouri, on the ___ day of _____, 1942, and on divers other days and times prior thereto, between said date and the ____ day of _____(within one year before the filing of the complaint) did then and

there wilfully, wrongfully and unlawfully act as a (real estate broker) or (real estate salesman) or (to advertise as a real estate broker) or (real estate salesman) or (to assume to act as a real estate broker or real estate salesman) without then and there having a license from the Missouri Real Estate Commission of the State of Missouri.

_____

"Subscribed and sworn to before me this ___ day of _____, 19__.

_____
(Officer taking oath.)"

The above is simply a copy of an affidavit to be filed by the person designated as the complaining witness. This complaint should also have all of the necessary witnesses then known, who are to testify in the case.

Upon the filing of the above complaint before the prosecuting attorney, it becomes the duty of the prosecuting attorney to file an information. We are herein setting out an approved form of the information to be filed by the prosecuting attorney, either directly in the circuit court, or before some justice of the peace, in the township where the Missouri Real Estate Commission Act has been violated:

"IN THE

"_____
(Name of the Court)

"STATE OF MISSOURI,

Plaintiff

vs.

"_____,
(Name of Defendant)

Defendant.

"INFORMATION

"Now comes _____, Prosecuting Attorney, for the State of Missouri, in and for the body of the County of _____, and upon his oath informs the court that _____, whose
(Name of Defendant)
christian name in full is unknown to said Prosecuting Attorney, late of the county aforesaid, on the ____ day of _____, 1942, at the County of _____, State of Missouri, and on divers other days and times prior thereto between said date and the _____ day of _____, 1941, did then and there wilfully, wrongfully and unlawfully act as a real estate broker without then and there having a license from the Missouri Real Estate Commission of the State of Missouri; against the peace and dignity of the State.

" _____
Prosecuting Attorney

"STATE OF MISSOURI,)
SS
COUNTY OF _____)

"_____, Prosecuting Attorney, in and for _____ County, Missouri, makes oath and says that the facts set forth in the foregoing information are true, according to his best information and belief.

_____

"Subscribed and sworn to before me this ____ day of _____ 19____.

_____
(Officer taking acknowledgment.)"

This information has been approved in State v. Bennett, 102 Mo. 356, and State v. Stark, 148 S. W. (2d) 82.

The above information may be drawn under two counts, that is, acting as a real estate broker under one count, and assuming to act as a real estate broker under the second count. We consider it advisable though that only one count should be contained in the information, that is, "acting as a real estate broker without a proper license."

In filing the complaint or information the Missouri Real Estate Commission should take into consideration a part of Section 3, of the Missouri Real Estate Commission Act, which, in a way, takes the teeth out of the Act. That part which we refer to in Section 3, reads as follows:

> " * * * nor shall this act apply to any person who does not advertise or hold himself out to the public as a licensed real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell of offer to sell, or rent or least or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate."

Under the above exception to the Missouri Real Estate Commission Act, it almost becomes necessary that unless a person fraudulently represents himself to be the holder of a Missouri Real Estate license, any person may act as a real estate broker, or salesman occasionally. It would be a question of fact in the trial of the case as to what might be considered "occasionally" performing the duties, as set out in the above partial section. So, in view of that fact, in order to obtain a conviction that would be affirmed, it would be almost necessary that the information set out that the person charged has been acting as a real estate broker for several months, and there should be evidence to substantiate the charge.

It is not necessary to negative the exceptions set out in Section 3, of the Act, when a prosecution has begun under Section 1 of the Act. It was so held in State v. Smith, 233 Mo. 242, l. c. 254, where the court said:

> "This court has held it to be the sound rule in this State that where the exception is contained in a subsequent section to the one which defines the offense, such exception

need not be negatived in the information. (State v. Bockstruck, 136 Mo. 1. c. 352.)"

The following evidence is suggested in the prosecution of brokers or others who come within the powers of the Missouri Real Estate Commission Act:

First - The best witness would be a witness who has dealt personally with the defendant, and can testify that he either stated that he had a Missouri Real Estate Commission license, or that he had been selling, buying or dealing otherwise, in property, or loaning or offering to loan money secured by real estate for some time continuously, or, any contracts, applications for loans, etc., used in the transaction between the defendant and the complaining witness would be admissible;

second - in case the defendant had advertised certain properties for sale which were not owned by the defendant, and for the sale of which he was to receive a commission, the newspaper advertisements, including many of those inserted prior to the date alleged in the information can be used in evidence, provided that it can be shown, either by the representatives of the newspaper or by other witnesses that the defendant inserted the advertisement or made admissions that he had inserted the advertisement;

third - other proper evidence which could be admitted would be stationery of the defendant showing that he is a real estate dealer, or dealt in the loaning of money which is secured by real estate;

fourth - in case the defendant has an office, and has a window display or signs that designate the defendant as a real estate broker, or other person who is covered by the Missouri Real Estate Commission Act, photographs of the advertisements on the windows would be proper evidence in court to show that he assumed to be a real estate broker, or other person covered by the Act;

fifth - in a prosecution under an information for a misdemanor, such as the information herein set out time is not an essence of the crime, except that it must be evidence of a fact that the crime was committed within one year before the filing of the misdemeanor. Under such a procedure other transactions are admissible to show that he was dealing in real estate or performing other duties under the Missouri Real Estate Commission Act, with different persons at different times, for the reason that the gist of the prosecution is acting as broker, and other duties in violation of the Missouri Real Estate Commission Act;

sixth - the best evidence would be letters or communications between the defendant and customers, or prospective customers, in which letters, or communications, he offered to sell property which he did not own, or offered to buy property;

seventh - in some cities and townships real estate brokers and other persons coming within the Act, are compelled to obtain

occupation license for their office. A certified copy of the application for the real estate license in the city, township, or other municipality would be proper evidence in the trial set out under the above information that he was acting as a broker or other person coming within the Missouri Real Estate Commission Act, without a proper license;

eight - some real estate boards of different cities require that an application be made and his qualifications passed upon before a person can become a member of the real estate board. The said real estate boards are composed of only members who are acting as real estate brokers, or performing other duties coming under the Missouri Real Estate Commission Act. In such case the written application would be an admission that the defendant is acting as a broker or performing other duties coming within the Act, and would be admissible to show that if he had no license he has violated the Act. This is especially so in associations known as "realtors";

nine - other evidence admissible would be in case of a client who has paid the defendant a commission for the sale or purchase of real estate, and has given a check payable to the defendant for said commission, the check may be used as evidence in the trial of the cause.

Under the above procedure and evidence suggested, it is necessary that the evidence must show that the defendant has falsely advertised or held himself out to the public as a real estate broker or dealer, and that he

is not occasionally buying or offering to buy, selling or offering to sell, renting or leasing, or offering to rent or lease, any real estate, or loaning or offering to loan money secured by real estate.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

REAL ESTATE COMMISSION: - Corporation loaning own funds is not required to obtain real estate license.

October 29, 1942

11-5

FILED

41

Mr. J. W. Hobbs
Executive Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

Your request for an opinion, as to whether or not the Industrial Bank and Trust Company of St. Louis, organized under the Laws of the State of Missouri, is required to have a real estate license, has been received.

The facts upon which we base our opinion read as follows:

> " * * Industrial Bank and Trust Company is a trust company organized under the laws of the State of Missouri. In the course of its business as a trust company, it lends its own funds upon security of real estate, taking deed of trust or mortgages. Upon occasion, such loans are sold by it to other institutions. Such sales are not negotiated or arranged in advance of the making of the loans. The loans are made by Industrial on its own behalf and not for others. Industrial does not hold itself out to the public as a licensed real estate broker or dealer."

Section 3 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, partially reads as follows:

> "A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a compensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. * * This act shall not apply to any person, copartnership, association or corporation who as owner or lessor performs any of the acts aforesaid, with reference to property owned or leased by them, nor to their employees in the regular course of the ownership and management of such property; * * *."

We presume the contention is over the sentence contained in the above partial section, which reads as follows:

> " * * * who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. * * * * * * * * * * * * *."

The main question is: What was the intention of the legislature in using the word, "or offers to negotiate a loan?"

The word "negotiate" is defined in the case of Carter v. Butler, 174 S. W. 399, l. c. 402, where the court said:

> " * * The word 'negotiate' is derived from the word 'negotiable' and when both words are used in connection with the same subject, they partake of the same meaning. Abbot, in his Law Dictionary, under the title 'negotiate,' defines it as follows:
>
> "'To transfer under commercial law, an evidence of debt or an instrument for the payment of money, so that the holder's title is independent of any equities existing against the transferror - to transfer by indorsement.'
>
> "The learned author adds that 'negotiable' and 'negotiability' include this meaning only. Mr. Bouvier, in his dictionary, says that:
>
> "'Negotiation, as used by writers on mercantile law, means the act by which a bill of exchange or promissory note is put in circulation, by being passed by one of the original parties to another person. Walker v. Ocean Bank, 19 Ind. 247.'"

This is termed a strict definition of the word negotiate.

In Lowrie v. Zunkel, 49 Mo. App. 153, 156, the court said:

> "'Negotiated,' when applied to a note, means more than indorsement merely, and includes delivery."

The above construction is to the effect that the word "negotiated," means the transfer, by endorsement, of a note.

In the case of Northrup v. Diggs, 106 S. W. 1123, 1125, 128 Mo. App. 217, the court held:

> "The word 'negotiate,' as used in a petition, which alleges that defendant authorized plaintiff to negotiate a sale of a lease for defendant, should be construed to mean conversation in arranging the terms of a contract."

The above definition defines the word "negotiate" as meaning an arrangement of the terms of a contract.

In the case of State ex rel. Carrollton School Dist. v. Gordon, 133 S. W. 44, 47, 231 Mo. 547, in quoting and adopting definitions in Webster's New Unabridged Dict. and Black's Law Dict., the court held:

> "'Negotiated,' in the usual technical and legal sense used by law-writers in speaking of commercial paper, means

> to transfer for a valuable consideration under rules of commercial law. The term is sometimes used as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction; also, to sell or discount negotiable paper, or assign or transfer it by indorsement or delivery. The term as used in Rev. St. 1909, Sec. 1275, which provides that before a school bond shall be negotiated it shall first be presented to the State Auditor for registry, means the selling and putting in circulation by delivery in consummation of the sale.)" (Underscoring ours.)

In the case of State ex rel. Carrollton School Dist. No. 1, Tp. 53, R. 23, v. Gordon, 133 S. W. 44, 47, 231 Mo. 547, the court held:

> "Rev. St. 1909, Sec. 1275, provides that before any school bond 'shall obtain validity or be negotiated, such bond shall first be presented to the State Auditor, who shall register the same,' etc. Held, that the term 'obtain validity' meant to become clothed with validity as a present and subsisting obligation, and the term 'negotiated' meant that the bonds should have been sold and put in circulation by delivery in consummation of the sale; and officers of a school district, after

> bonds have been voted, may advertise for bids and accept a bid for bonds before they have been registered by the State Auditor; and hence such acts of the officers furnish no reason for refusing registration."

In the case of National Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank, 128 N. W. 522, 523, 87 Neb. 841, the court held:

> "Under the provisions of the negotiable instruments law, Comp. St. 1909, c. 41, that every person negotiating an instrument by delivery warrants that it is genuine, and that he has good title, and article 3, sec. 30, of such law, providing that an instrument is negotiated when it is transferred to another so as to make the transferee the holder, the word 'negotiating' means putting into circulation by assignment of a claim, by indorsement, to dispose of by sale, and in 5 Words and Phrases, First Series, p. 4771, it is said: 'To "negotiate" means to conclude by a bargain, treaty, or agreement, to transfer, to sell; and the power to negotiate a bill or note is said to be the power to indorse and deliver it to another, so that the right of action shall also pass, and negotiation means the act by which a bill of exchange or note is put into circulation by being passed by one of the original parties to another person.'"

In the above case the court defined the word "negotiated," to be also the preliminary of a business transaction.

It is very noticeable that Section 3, supra, in describing a real estate broker, sets out first, one who actually loans money for others, and, second, one who offers to negotiate a loan. In other words, it was the intention in so framing the sentence to define a broker as one who actually loans money for others or offers to loan money for others where the loan is secured by real estate. It cannot be said that the word "negotiate" means the strict definition such as endorsing the note. The section does not say negotiating the "note", but says, "loans." Under the facts set out in the above statement, the Industrial loans its own money and in some cases sells the notes secured by real estate. As one who negotiates a note is not a broker, it would terminate in absurd results, for the reason that it would prevent the owner from negotiating his own note without first obtaining a broker's license.

In the case of State v. Irvine, 72 S. W. 2d 96, 335 Mo. 261, 93 A. L. R. 232, the court held that a statute will not be so construed as to require impossibilities, or lead to absurd results, if susceptible of reasonable interpretation. By reason of the clause in Section 3, which exempts from the Act a corporation which as an owner performs any of the acts prohibited, it was clearly the intention that "offer to negotiate loans secured by real estate" meant "for others."

In reading all of Section 3, supra, it clearly is shown that the intent and purpose of the whole Act was to protect the money and property of others from acts of agents and brokers, and the legislature was not interested in the way the owner handled their property or negotiated their own loans.

The legislative intent must be determined from the statute as a whole, and all of its provisions harmonized if reasonably possible, and particular words may be given a broader or a more restricted meaning than the dictionary definition, and, in extreme cases, words may be stricken out of the statute in order to harmonize it, since the reason of the law prevails over its letter. (State ex rel. Bess v. Schult, 143 S. W. 2d 486.)

Under the above holding the words "for others," might be interpreted to refer also to the offering to negotiate loans.

In construing an act, the true intention of the framers must be followed, and where necessary the strict letter of the act must yield to the manifest intent of the Legislature. (State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 115 S. W. 2d 816, 342 Mo. 365.)

CONCLUSION

It is, therefore, the opinion of this department that the Industrial Bank and Trust Company is not required to obtain a real estate license, for the reason that it is the owner of the funds which are loaned upon security of real estate.

It is further the opinion of this department that it is not required to obtain a real estate license for selling its own loans which were made with its own funds.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

REAL ESTATE COMMISSION:: Broker or agent may represent seller or buyer in the sale of restricted property, where the buyer is informed that the property is subject to certain restrictions.

November 27, 1942

11-30

FILED
41

Missouri Real Estate Commission
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs,
Executive Secretary

Dear Sir:

Your request for an opinion submitted in response to a letter from Carl Roman Johnson of Kansas City, Missouri, has been received.

Mr. Johnson's letter reads as follows:

> "In the light of your previous rulings on the sale of restrictive property to members of the Negro race, and in view of what has been represented to be the understanding of certain dealers in the light of your rulings, will you be kind enough to advise whether or not the following statement or clause in a real estate sales contract will remove the objection to sales in restricted areas:
>
> "'It is agreed and understood by both buyer and seller of the above described property that there is a purported restrictive covenant on said property which prohibits the sale and conveyance of said property

> to Negroes and persons of African descent and this sale is being promoted and consummated with full knowledge of this purported restriction.'
>
> "I have in mind that above clause can be inserted between owners and agents and could also be made a part of the real estate contracts in the event one is signed or negotiated."

In some instances restrictions as to the sale or conveyance of property to negroes and persons of African descent may not be enforced. As a general rule, such a restrictive covenant is enforceable, but in case of changes in the neighborhood of the property, which changes are so radical as to practically destroy the essential objects and purposes of the restrictive covenant, then such a covenant may not be enforced. It was so held in the case of Hall et al v. Koehler et al, 148 S. W. (2d) 489, pars. 3-5, where the court said:

> "Rombauer et al. v. Compton Heights Christian Church et al., 328 Mo. 1, 40 S. W. 2d 545, was to enjoin violation of restrictive covenants. In that case it was said (40 S. W. 2d loc. cit. 553): 'No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement. Thus an urban tract may be dedicated to residential use under certain restrictions indicating an intention to establish a secluded district

> for high-class homes. It is inevitable that with the lapse of time the march of progress and the shifting and growth of the city the forces of disintegration will be at work, the houses architecturally and otherwise will become more and more out of date, other residential districts still more pretentious may be laid out, and changes may crowd about, outside. But the parties must be deemed to have anticipated these things and to have intended to combat them as far as possible. And so, if later the necessity of invoking the restrictive covenants arises, the mere fact that, because of changed conditions, the restrictions are less valuable than they once were, will not prevent their enforcement if the district still retains its essential character and the restrictions remain of substantial value.'
>
> "The above excerpt from the Rombauer case is, we think, applicable to the present case. It may be that, because of changed conditions, the restriction as to the use of and kind of buildings in the Hinkle Place addition, is less valuable to lot owners in the addition than formerly, but, under the record here, there is no escape from the conclusion that the addition itself 'still retains its essential character (of a residential district) and the restrictions remain of substantial value.'"

Also, the same holding was had in the case of Porter v. Pryor, 164 S. W. (2d) 353, par. 1, where the court said:

> "There was no contention made in the present case that the restrictive agreement was contrary to public policy. The contention is made as was in the Johnson case that conditions have so changed in the last few years respecting negro occupancy in the general neighborhood of the restricted area as to make the enforcement of the restrictive agreement inequitable and unjust. No hard and fast rule can be laid down as to when changed conditions may defeat the purpose of restrictions, 'but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the (restrictive) agreement.' Hall et al. v. Koehler et al., 347 Mo. 658, 148 S. W. 2d 489, loc. cit. 492."

The question as to whether or not changed conditions may destroy the restrictive agreement is a question of facts in each particular case. For that reason, the fact that the real estate is subject to a restrictive agreement is not entirely conclusive. In the letter above set out, the real estate agent, or broker, is merely carrying out the orders of his client, and since such a clause is included in the contract of sale there could be no fraud. Such a sale could be had between the owner without the intervening actions of a real estate broker or agent. It may or may not result in a lawsuit. Sec. 10, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 428, sets out eleven causes for the suspension or revocation of a license. In reading these eleven causes, we find no cause that would prohibit the real estate broker or agent from representing a client, whose property is under the restrictive covenant as to Negroes, in selling the same to a Negro, provided such a clause as set out in the letter is inserted in the contract of sale.

CONCLUSION

It is, therefore, the opinion of this department that the license of a broker, or agent is not subject to suspension or revocation if he acts as broker or agent in the sale of property restricted against Negroes, if he, in the sale conveys the property to a Negro, where the buyer is informed in a written contract that the property is restricted against sale to Negroes, or persons of African descent.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ROADS AND BRIDGES: Road district under township organization cannot repair roads in cities.

TOWNSHIP ORG.:

March 3, 1942

3-14

Hon. Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri

FILE
42

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"I should like the opinion of your department as to the following situation:

"Linn County, Missouri, operates under township organization. Locust Creek Township, acting under the provisions of Section 8609, Revised Statutes of Missouri 1939, and subsequent sections, has heretofore voted a $50,000 bond issue for road purposes.

"The township board now desires to apply a part of the proceeds derived from the sale of these township road bonds to improve certain streets in the city of Linneus, a city of the fourth class, located within Locust Creek Township. The streets to be improved are necessary to connect certain township roads with each other and with state highways. The city of Linneus had previously voted a $25,000 bond issue for street improvement, and the streets were graveled with this money, but they

are now in bad condition.

"Can the township legally apply a part of the proceeds of township road bonds to the improvement of streets within the corporate limits of a city included in the township, and if so must such improvement be confined to roads and streets within the city necessary to connect up the township roads?

"If township road bond money can not be used for such a purpose, is it the duty of the Prosecuting Attorney to intervene, and if so, what is the proper type of action?"

Section 8609 R. S. Missouri, 1939, empowers the Commissioners of a road district under township organization to issue bonds.

Section 10, Article X of the Constitution of Missouri, reads as follows:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The above section of the Constitution does not prohibit a special road district under township organization from

taxing cities for the payment of bonds issued by the township. It was so held in Elting v. Hickman, 172 Mo. 237; State ex rel v. Burton, 266 Mo. 711, and State ex rel v. Gordon, 268 Mo. 713.

The holding in the above cases was to the effect that although money obtained by a bond issue could not be used for roads in a municipal corporation, the taxation of the property in a municipal corporation was of benefit to the municipal corporation, for the reason that the money was obtained for the establishment and improvement of roads surrounding the municipal corporation.

Section 46, of Article IV of the Constitution of Missouri, reads as follows:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 47, of Article IV, of the Constitution of Missouri, partially reads as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to be-

> come a stockholder in such corporation, association or company: * * "

Under the above sections the road district under township organization is prohibited from giving aid to a municipal corporation.

We find no statutory authority empowering a road district, under township organization, to change the prohibition as set out in Section 10, of Article 10, of the Constitution of Missouri, or Sections 46 and 47 of Article 4 of the Constitution. We are aware of Section 8673 R. S. Missouri, 1939, which only applies to special road districts known as the "Eight Mile" special road district.

A taxpayer who has any interest in the subject of any action may bring an action to protect that interest, where the principal is doing an illegal act or refuses to bring an action to protect the taxpayer.

It was so held in St. Paul & Kansas City Short Line R. Co. et al v. United States Fidelity & Guaranty Co., 105 S. W. (2d) 14, l. c. 20, where the court said:

> "Moreover, it must be borne in mind that this is a suit in equity and that the rule in reference to such suits is that every person having any material interest, legal or beneficial, in the subject matter is properly made a party. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119.
>
> "It is provided by section 700, Revised Statutes of 1929 (Mo. St. Ann. Sec. 700, p. 909): 'All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined

as plaintiffs, except as otherwise provided in this article.'"

Also, in the case of Smith et al v. Hendricks, 136 S. W. (2d) 449, l. c. 453, the court said:

"It is a familiar principle of equity that if A. has a cause of action at law, which he alone can assert, but in which B. has an interest, and A. refuses to bring the suit at law, B., by alleging a proper demand and a refusal of A. to bring the suit, can successfully maintain an action in equity to recover for A., because B. is interested in the recovery and it is A.'s duty to bring the suit."

In that case the court, at page 456, held:

"In State ex rel. Buchanan County v. Fulks, 296 Mo. 614, loc. cit. 635, 247 S. W. 129, loc. cit. 135, it is again said: 'In 7 R. C. L. 965, it is said: "If a county has a plain cause of action for an injury done to it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, in some jurisdictions any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. And like-

wise where an unjust and illegal burden is being imposed on the taxpayers by a county, or the money or property of the county, to replace which taxation must be levied, is being wasted or squandered, a taxpayer has such a direct interest that a bill to enjoin the threatened burden will lie." Newmeyer v. Missouri & M. R. Co., 52 Mo. 81, 14 Am. Rep. 394; Carson v. Sullivan, 284 Mo. 353, 361, 223 S. W. 571; Harris v. Langford, 277 Mo. 527, 533, 211 S. W. 19.'

"In Castilo v. State Highway Commission, 312 Mo. 244, loc. cit. 262, 279 S. W. 673, loc. cit. 675, en banc, it was held that the plaintiffs, as taxpayers could maintain the suit if the State Highway Commission was acting unlawfully, and, concerning this question, said: ' * * * If plaintiffs are resident taxpaying citizens, the cost of constructing highways authorized by law will be paid, not by the entire public, but by the taxpaying class of which plaintiffs are members, and which they here represent. If funds be raised by taxation, and expressly set apart by law for the construction of certain highways designated by statute, are expended upon other and different highways not authorized by law, as plaintiffs specifically plead, the necessary conclusion from the facts pleaded is that the burden of taxation on resident taxpaying citizens will be increased. The roads lawfully designated will have to be constructed and maintained out of additional funds raised to replace money unlawfully di-

> verted. Failure to allege the ultimate fact that plaintiffs' taxes will be increased when this conclusion necessarily arises from facts sufficiently pleaded, is not material. * * * '"

CONCLUSION

In view of the above authorities it is the opinion of this department that Locust Creek Township cannot improve certain streets, in the city of Linneus, out of the bond money.

It is also the opinion of this department that it is not the duty of the Prosecuting Attorney of Linn County to file any proceeding, for the reason that any action, if brought, cannot be brought by the county, but must be brought by the township.

It is further the opinion of this department that any taxpayer in Locust Creek Township may file a proceeding to restrain the township board from giving aid to the city of Linneus.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION :
SCHOOL LANDS:

The holder of a certificate of purchase of school lands is liable for taxes during the time of the ownership of such certificate.

February 4, 1942

2-6

FILE 43

Hon. Frank S. Huffhines
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Huffhines:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the question of whether or not the holder of a certificate of purchase of school lands (16th section) is liable for taxes thereon during such ownership.

Under article 4 of Chapter 81, R. S. Mo., 1939, the sixteenth section of each congressional township is sold for the use and benefit of school funds. Under section 12722 of said article the purchaser in cases where he is not able to pay for such land at the time of sale executions is bound for payment of same.

Under section 12723 of said article, a certificate of purchase is issued by the sheriff to the purchaser, in which the lands are described the amount of the purchase and the manner in which the payment is secured is stated. After the payment is made, then the purchaser is entitled to a patent to the lands purchased. In the question which you have submitted, it seems that the purchaser has defaulted in the payment of the lands which have been purchased under these sections.

Now the question is, would the County Court have authority to tax these lands during the time the certificate of purchase was outstanding and before any patent has been issued. In the case of State ex rel. v. Baumann, 153 S. W. (2d) 31, 34, the court in speaking of the relationship which exists between the parties when a contract of sale has been entered into said:

> "We find the general rule in equity where a contract for the sale of real estate has been entered into, thus creating the relationship of vendor and purchaser, that as to private persons the purchaser is regarded as the owner and the vendor as holding the legal title in trust for him.* * *"

Applying this rule here, it would seem that the owner of the certificate of purchase is the owner of the land and that the county is holding the legal title in trust for the owner of the certificate of purchase.

In the case of Savings Trust Company of St. Louis, v. Skain, 131 S.W. (2d) 566, 570, the court had before it the question of the relationship which exists between the person who had entered into a contract with the commissioner of finance for the purchase of certain properties held by him as such commissioner. And in speaking of this relationship the court said:

> "The relation of vendor and purchaser exists as soon as a contract for the sale and purchase of land is entered into. Equity regards the purchaser as the owner and the vendor as holding the legal title in trust for him:* * *" (Citing cases)

Following the rule announced in these two cases the holder of the certificate of purchase is the owner of these school lands and the county is holding the legal title in trust for him. Section 10940 R. S. Mo., 1939, provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

CONCLUSION.

From the foregoing, it is the opinion of this department that if a person owns a certificate of purchase for

school lands (16th section) on the first day of June and on the date that the levy is made for such taxes, then such person shall be liable for the taxes thereon for the ensuing year.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:AW

PETIT JURORS: When order to appear for adjourned term of court
COST: entitled to mileage from home to court and return.



April 2, 1942

Honorable M. J. Huffman
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 25, requesting an official opinion from this Department, which reads as follows:

> "For many years, in this county, it has been the custom to pay members of the regular Petit Jury, mileage for two trips from their home when the jury was ordered back at an adjourned Term of Circuit Court. However, a controversy has arisen as to that procedure being proper, some members of the county court taking the position that such jurors are only entitled to one mileage.
>
> "In this county, our regular term of Circuit Court convened on February 23, 1942. The jury was present some four days and was ordered by the court to report back for duty on March 11, 1942, at an adjourned term of said court. The jury did return at that time and was here for some four days at said adjourned term. The question is, were those jurors entitled to mileage for both trips to the county

> seat, or were they only entitled to mileage on the first trip to the regular term of said Circuit Court."

Section 714, R. S. Missouri 1939, provides compensation for members of the petit jury and further provides that they shall receive five cents for every mile that they may necessarily travel going from their place of residence to the courthouse and returning to the same, and reads:

> "Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

Section 715, R. S. Missouri 1939, requires the clerk of the court to keep a record of the number of days such juror shall have served and the number of miles necessarily traveled in obedience of the summons to serve as juror.

> "The clerk of the court shall keep a book in which he shall enter, upon the application of each juror, the number of days such juror shall have served, and the number of miles necessarily traveled, in obedience to the summons to serve on the jury, and such entry shall be verified by the oath of such juror."

It is well established that the primary rule of construction is to ascertain and give effect to the lawmakers' intent and this should be done from words used, considering the language honestly and faithfully. In City of St. Louis vs. Senter

Commission Co., 85 S. W. (2) 21, l. c. 24; 37 Missouri 238; the court said:

> "* * * * The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent. Meyering v. Miller, 330 Mo. 885, 51 S. W. (2) 65; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2) 920. This should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. * * *

regular term, when so ordered by the court in term time, the order being entered in its record."

In Fannon vs. Plummer et al., 30 Missouri Appeal 25, l. c. 27, the court, in holding that when a court in session is adjourned to a specified day prior to the next ensuing term, the sitting thus adjourned to is a continuance of the term adjourned from and not a special or different term, said:

"We see no error in this. The plaintiff's whole argument proceeds on the premise that the adjourned term was a separate term from the term at which the default and final judgment were entered; but we are of opinion that it was merely a continuance of the same term.

"The statute provides: 'Special or adjourned sessions of any court may be held in pursuance of such proclamation or in continuation of the regular term, when so ordered by the court, in term time, the order being entered in its records.' Rev. Stat., sec. 1044. We see no reason why this so-called 'adjourned term' should not be regarded as a continuation of the regular term. The circuit court of Ozark county meets on the third Mondays in April and October. Rev. Stat., sec. 1157. The date to which the special judge adjourned the term was within the period during which the regular term might have been continued by adjournments from day to day, or for any longer or shorter interval. The order of adjournment does not describe the time to which the adjournment was had, as a special term or even as an adjourned term. It was nothing more than an ordinary order of adjournment, such as might have been made according to the exigencies of

the case, for any longer or shorter period of time prior to the commencement of the next regular term."

If the court orders an adjourned term and requests the jury to return on a certain day during the same regular term of court, we think it will be conceded that the jurors have no discretion in the matter and must report back for jury service on the specified date set by the court. The jurors receive no compensation whatsoever during the interim and to hold that said jurors by reason of the order of the court, and not by any act of their own, shall not be entitled to mileage for their return trip to court and home the second time would certainly be most unreasonable. In many instances it is a saving to all concerned for the jurors to go home and return at an adjourned term of court and pay for mileage covering said trips rather than to remain in court on per diem until such time for them to serve. We must not lose sight of the fact that it is each and every citizen's duty to serve when summoned for jury service but the lawmakers never contemplated they shall serve without compensation and expenses. Section 714, supra, provides that jurors shall receive five cents for every mile they may <u>necessarily travel</u> going from their places of residence to the courthouse and returning to same. In view of the fact that the jurors have no discretion in the matter but are acting upon the orders of the court and are subject to contempt of court if they shall fail to return on the date set for the adjourned term of court, it cannot be denied but that such mileage traveled by said jurors does constitute <u>necessary</u> travel.

In case of an adjourned term of court, under the law it is not necessary that said jurors shall be served with a summons a second time. They are still acting under the original summons and subject to the order of the court. Persons acting as jurors are required to leave their homes and business for such jury service and fees for such services, in many cases, constitute only a very small part of their average daily income which they would receive if they were not serving as jurors. We must not lose sight of the fact that the court in ordering an adjourned term of court has in mind the interest of the state, taxpayers, and party litigants, as well as the jurors, in that the court endeavors to keep down the costs and permit the jurors to return to their families and homes as soon as possible.

In Corpus Juris, Volume 70, Section 94, page 79, it is held that witnesses may be entitled to double mileage for serving in response to summons or subpoena.

> "Under a statute allowing mileage for each mile necessarily and actually traveled by a witness, the witness who, on postponement of the trial, is directed by the parties to return to his home and come again to the court when called for is entitled to recover for mileage for every trip back and forth he makes under such conditions, and, a fortiori, the same rule applies where witnesses are permitted or directed by the court to return home during postponement and to be in attendance on the later day; but in such case permission of the court is necessary and must be entered of record, and it has also been held that, where postponement is by agreement of the parties, and not by order of the court, except to carry the agreement into effect, the witnesses will not be allowed another travel unless it was a part of the agreement, but their continued attendance until discharged will be allowed in such case. In some cases a second allowance for mileage in case of adjournment for a longer period than over night is within the discretion of the court; and in a federal court double mileage may be allowed during adjournment where less than the per diem would have been, if the witness had remained in attendance. *"

In Richards et al., vs. Silveria, 275 Pacific 478,l. c. 480, the District Court of Appeals, Third District, California, had before it the question of allowance of mileage to a witness who had been ordered to return at a later date for trial of the

case and the court in holding that said witness was entitled to mileage for both trips said:

> "* * * * * There was no error in the allowance as costs of mileage paid to witnesses. The trial commenced September 29, 1925. On the next day a continuance was ordered to October 8, 1925, and the court directed the witnesses to appear at that time or at any subsequent time to which the case might be continued. The trial was resumed October 20, 1925. Witnesses were properly allowed mileage for their first attendance and also for their return at the time to which the case was continued. United States v. Venable Const. Co. (C. C.) 158 F. 833. * * * * * * * * * * * * * * * * *"

At the time the above opinion of the California court was rendered California had the following law in respect to witnesses' fees: (Deerings Consolidated Supp. 817, Section 4300g.)

> "For each days actual attendance when legally required to attend upon the superior courts, per day $2.00 in civil cases, and $1.50 in criminal cases. Mileage actually traveled, one way only, per mile, 10 cents."

In Pennsylvania County Court Reports, Volume 29, page 81, l. c. 81, in the case of Commonwealth vs. McQuiston, the court had before it the question of allowance of double mileage to witnesses and the court in holding that the lower court had a certain amount of control and inherent power over such matters properly held that they were entitled to double mileage.

"The most important question raised by prosecutor is in the third exception which raises the question as to whether witnesses who are in attendance upon court, and the case is put over until a later date and not called until the following week, and they go to their homes in the meantime and return at a later date, can charge double mileage as was allowed by the clerk. * * * *

* *

"It seems to us that the latter take the more consistent view, in a case where, by consent or direction of court, the case has been continued to or set for a later date and the parties and witnesses are directed to be present at that time. Such was the fact in this case, and we distinctly recollect that this postponement was at the suggestion or request of the prosecutor.

"Were this method not permitted the witnesses might have remained in attendance upon court for more than a week and drawn their per diem fees. This would have had the appearance and effect of oppression, and the court has control of such matters. We feel, therefore, that we have some control over the matter here presented, and where the witnesses have so acted as to make the expense of their attendance upon court less than another method they might have legally adopted, it seems that we should approve of their act, and that the double mileage should be allowed."

At the time that the above decision was rendered the law of the State of Pennsylvania in reference to fees as witnesses

and their return was as follows:

> "The fees to be received by witnesses shall be as follows: namely: each day's attendance at court, one dollar. Each mile circular in traveling to and from such court, three cents." Brightly's Purdom's Digest Supp., 1885, 1891, p. 2508.

The language of the California and Pennsylvania statutes herein above quoted on the question of mileage for witnesses is somewhat similar to the language used by the Missouri lawmakers when our statutes pertaining to mileage for petit jurors, Sections 714 and 715, supra, were enacted. In the case of Commonwealth vs. Smith, Pennsylvania County Court Reports, 321, l. c. 327, the court discussed at length the same question and said:

> "Fourth exception. The fee bill for witnesses says: 'Mileage, each mile circular in traveling to and from.' There is nothing in the bill about double mileage. The practice is to only allow single mileage at each session of the court. In Chester county such seems to be the general rule. I am of opinion that it would be to the interest of suitors, including defendants in criminal cases, that there should be some exceptions. It so often becomes apparent in the fore part of the week that certain cases cannot be tried during that week, owing to the amount of business before the court, and that to keep the witnesses in attendance until the next week would be to materially and unnecessarily enhance the costs and expenses of the trial. When, therefore, for sufficient cause, a case is continued before the last day of the week until the following week, and the witnesses are excused by the court from attend-

ance during the remainder of the week, but to return the following week, it would often be less expensive to allow them mileage for going and returning than to allow them pay for remaining in attendance at the court. There should, however, be special permission by the court. In the present case, if the witnesses had remained over one day, their fees would have amounted to more than their mileage. If the case had been continued at an earlier day of the week than Friday, the fees of the witnesses for remaining would have amounted to much more. Such would probably be the result in all cases where the witnesses reside in the county and have but a short distance to travel. As stated, in all cases of the continuance of cases from week to week, where the witnesses are permitted to leave the court, there ought to be permission entered of record. The court might not grant such permission in a case where the mileage for going and returning would amount to more than the daily pay of the witnesses, if they remained in attendance at court. If a witness residing in Philadelphia or Erie was allowed mileage for going and returning, it would, in this county, amount to more than a few days' pay for attendance at court, and the court would not grant the permission so as to allow double mileage. It seems to me that this would be a convenient, just and equitable rule to adopt. Witnesses are often very poor, and they must either be allowed their daily pay for remaining at court, or mileage for going and returning. I will adopt this rule until I am convinced that it is unjust or oppressive. In the present case, the defendant saved money even by the allowance of the mileage of the witnesses. Their fees for remaining

would have been $1.50 per day each. The mileage for going and returning amounted to $1.20 each. Had the case been continued earlier in the week the saving would have been still more. Ordinarily, only single mileage can be allowed, and double mileage never, except where, under the circumstances, the witnesses have the permission of the court to return home and come back again, with the understanding that they are to be paid their traveling fees allowed by the fee bill, in lieu of their pay for remaining in attendance at court until the case can be tried at the time to which it has been continued. To hold that, where a case is continued, say, at the beginning or at any time before the last day of the week, until the following week, the witnesses must go home and return without being paid their mileage, would be unjust. The subpoena holds them for the term, and they need not be subpoenaed over. If they are allowed to remain at the county seat in attendance at court from the time of the continuance of the case until the time fixed for the trial, I can see no good reason why they are not entitled to their pay for the days they so remain. If this is so, then certainly the rule we have adopted is for the interest of all parties, defendants in criminal cases included."

Therefore, in view of the foregoing authorities under similar statutes authorizing mileage for witnesses when required at an adjourned term of court to Sections 714 and 715, supra, and in view of the fact that such mileage is necessary under orders of the court, it is the opinion of this Department that to place any other interpretation on Sections 714 and 715, supra, than to hold that said jurors are entitled to mileage from their residence to court and return for an ad-

journed term of court during the regular term of court would be an absurdity and something that was never contemplated by the lawmakers at the time said provisions were enacted.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:EAW

CRIMINAL LAW: A plea of guilty is not a final conviction which requires the revocation of a driver's license for driving while intoxicated.

May 2, 1942.

5-7

FILE 43

Mr. M. J. Huffman
Prosecuting Attorney
Hartville, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of March 25, 1942, as follows:

> "Section 9156, Revised Statutes of Missouri, 1939, provides in part, that after a conviction, or a plea of guilty, the courts and boards of parole named in said Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation.
>
> "Section 8460, of said Revised Statutes, provides in part, that the commissioner shall forthwith revoke the license of any operator upon receiving a record of such operator's conviction of the offense of driving a motor vehicle while intoxicated, when such conviction has become final. And, Section 8459, of said Revised Statutes, provides in part that whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's license of such person by the commissioner, the Court in which such conviction is had shall require the surrender to it of all operator's licenses then held by the person so convicted and the court shall thereupon forward the same

> together with a record of such conviction to the commissioner.
>
> "My reason for setting out the parts of the Statutes named above, is to ascertain in what status the operator's license is, when the defendant enters a plea of guilty to driving a motor vehicle when intoxicated, and pays all costs, including the Prosecuting Attorney's fee for conviction of the defendant; the court suspends imposition of sentence and the cause continued. Upon such state of facts, should the operator's license be revoked or is the convicted person entitled to operate his automobile after entering a plea of guilty to driving a motor vehicle while intoxicated?"

Since receipt of the above opinion request we have been advised that your request concerns only the abstract proposition set out therein and is not in relation to any cause now pending in any of the courts of this state.

The first question to be considered is whether a plea of guilty constitutes a "conviction" within the meaning of Section 8460, R. S. Mo. 1939.

A reference to Volume 9 of Words and Phrases, Permanent Edition, page 610, reveals that there is a wide disagreement as to whether a plea of guilty constitutes a conviction. We also find decisions in Missouri which may be interpreted as ruling both ways. The section which you mention in your request (Section 9156, R. S. Mo. 1939) contains the following language: "After a conviction, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence * * *," which strongly indicates that in the contemplation of the Legislature at least a plea of guilty was not the equivalent of a "conviction." The widespread application of the term, we think, is properly explained in the quotation from Doughty v. De Amorell, 22 R. I. 158, found in Vol. 9, Words and Phrases, page 611:

> "In the strictest sense, a 'conviction' is not complete until it has become a judgment of the court by a sentence, since before that time a verdict may be set aside or a new trial granted for various causes. The term is commonly used, however, to denote the finding of fact that the accused is guilty."

On the same page is found also the following quotation from Ex parte Tanner, 88 P. 301, 49 Or. 31, which appears to be the proper rule:

> "While in common parlance and for many purposes the word 'conviction,' when used in a statute, means the judicial ascertainment of guilt by a plea or verdict, when it is made the ground of some disability or penalty, it has been held that a final adjudication by judgment is essential, * * *."

The Supreme Court of Missouri in State v. Jonagan, 311 Mo. 540, has laid down the rule that the trial court is vested with discretion in permitting the withdrawal of a plea of guilty before judgment is entered on the plea.

Operator's, chauffeur's and driver's licenses or certificates are not revoked by the courts, but under the provisions of Section 8459, R. S. Mo. 1939, the court must require the surrender of the licenses or certificates by the defendant, and shall forward them to the commissioner of motor vehicles together with the record of the conviction of the defendant.

Section 8460, R. S. Mo. 1939, requires the revocation of driver's licenses upon <u>final conviction</u> in the following language:

> "The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

"3. Any felony in the commission of which a motor vehicle is used."

We believe that the words "when such conviction has become final," as used in the foregoing section, refer to a judgment and sentence entered on a verdict or a plea of guilty to an indictment or information, and not to a plea or verdict prior to sentence.

We do not regard the payment of costs by a defendant as bearing on the question at hand since a proper payment of costs by a defendant can be made only under judgment of the court before whom the cause is pending.

CONCLUSION

It is the conclusion of this department that it is mandatory on the commissioner of motor vehicles, under Section 8460, R. S. Mo. 1939, to revoke an operator's or chauffeur's license on receipt of the record of final conviction of a defendant for driving a motor vehicle while intoxicated, and that such final conviction applies only to a judgment and sentence entered on a verdict or plea of guilty, and not a verdict or plea prior to judgment and sentence.

Respectfully submitted

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

PUBLIC BUILDINGS: May be used for meetings of general public interest when such use does not interfere with regular activities.

April 3, 1942

Mr. T. L. Ingle
Board of Managers
Missouri School for the Deaf
Fulton, Missouri

FILE
44

Dear Sir:

This will acknowledge receipt of your request for an opinion from this department, which reads as follows:

> "The Board of Managers of the Missouri School for the Deaf at Fulton, Missouri, has been requested to make available the auditorium of that school under the following conditions:
>
> "The Federal Government has been conducting schools for the training of air raid wardens throughout the United States. The Missouri State Council of Defense has sent representatives to certain of those schools to obtain the training in order that it may be passed to the local air raid wardens which may be selected in the various municipalities in the State of Missouri. We have been requested by the State Council of Defense to furnish our auditorium for a period of three days, during which time the local air raid wardens may receive this instruction. We have also been requested to furnish our facilities for several days to the American Legion for the annual event known as 'Boys' State.'

> "The use of our buildings for the above purposes will not interfere in any way with the usual routine at the school, and no expense whatever is involved on the part of the State. The Board is of the opinion that both proposed meetings are of general public interest, and we desire an opinion from your department as to whether this Board has the power to permit the use of the buildings."

All real and personal property of the Missouri School for the Deaf is vested in the Board of Managers of that school by Section 10864, R. S. Mo. 1939, which is as follows:

> "The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

The power of the Board appears to be all-inclusive except that it may not sell or dispose of the property, that right being retained by the General Assembly.

We have been unable to find a case in which the right of public officers in control of public buildings belonging to the State to permit the temporary use of such

buildings for public purposes has been questioned, although we have found many cases in which such use of the property was made. We have, therefore, resorted to cases involving the right of public officers in cities or counties to permit the use of public buildings under similar conditions.

In Meredith v. Fullerton, a case by the New Hampshire Supreme Court, 139 Atl. 359, 63 A.L.R., l. c. 619, we find the following:

> "A town has the power to let its town hall for private use, for a reasonable period, when such use will not unreasonably interfere with municipal needs. Curtis v. Portsmouth (1893) 67 N. H. 506, 508, 39 Atl. 439; Worden v. New Bedford (1881) 131 Mass. 23, 24, 41 Am. Rep. 185; 3 Dill. Mun. Corp. 5th ed. sec. 997. The determination of the question as to whether the public requirements permit such letting, as well as the term for which the property may be spared for private use, is vested in the town. Bates v. Bassett (1888) 60 Vt. 530, 1 L.R.A. 166, 15 Atl. 200; French v. Quincy (1861) 3 Allen (Mass.) 9, 12; Jones v. Sanford (1877) 66 Me. 585, 591; Blood v. Manchester Electric Light Co. (1895) 68 N. H. 540, 542, 39 Atl. 535."

Under a California statute authorizing counties to erect memorial buildings for the use of patriotic associations such as veteran soldiers, sailors, and marines who had served the United States in any of its wars, the court in Captain Charles V. Gridley Camp v. Butte County, 277 Pac. 500, held that there was nothing in the statute excluding the power of the board of supervisors to permit, either free of charge or for a stated consideration, the use of any such building for other purposes, when the same did not interfere with the ordinary use of such building by veterans' organizations.

In 63 A.L.R. 617, we find the general rule as follows:

> "Municipal corporations which own municipal buildings, built in good faith and used for municipal purposes, ordinarily have the right to rent or permit such buildings or parts thereof to be used incidentally for other purposes by private persons." (A long list of authorities is cited.)

In Jackson v. Ball, 211 Ala. 275, 100 So. 327, it was decided that under a statute giving county commissioners control of county property, the commissioners might lease county buildings which were not actually needed for county purposes. The power to make the lease was said to be derived from the use of the word "control" in the powers granted to the commissioners.

In this connection, we wish to point out also the intention of the Legislature under similar circumstances as expressed in Section 10337, R. S. Mo. 1939, under "Laws applicable to all classes of schools." That section is in part as follows:

> "The board of directors or board of education shall have the care and keeping of all property belonging to the district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. * * * The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted:

> Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. * * *"

We do not contend that this section is applicable to the case at hand because the Board of Managers of the Missouri School for the Deaf has far greater power with regard to the control of the buildings connected with that school than that possessed by the ordinary board of directors in the public school system. The control of the former is absolute so long as there is no abuse of discretion or diversion of the property from the use for which it was intended.

CONCLUSION

In view of the foregoing authorities, it is the conclusion of this department that the Board of Managers of the Missouri School for the Deaf may permit the use of its buildings for meetings which are of general public interest, where no expense to the State is involved and where such use does not interfere with the occupancy or training of the regular students of such school and the purposes for which it was created.

Respectfully submitted

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

TAXATION: Tax deeds to trustee must be executed only on tract or tracts of land described in each publication.

January 14, 1942

FILE 45

Mr. Frank W. Jenny
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Jenny:

I desire to acknowledge your request for an opinion, dated January 8, 1942, relating to the Jones-Munger law, and also your explanatory letter of January 10, 1942, relating to the same subject which is as follows:

"In reply to your letter of January 9th, kindly be advised that we are interested in the making of the conveyance by the Collector to the Trustee and it is those deeds that I was particularly interested in.

"The situation which has arisen is: Some years since the Assessor placed upon the books a great many assessments of mineral rights which were held by persons other than the owner of the fee. The facts are that many of these mineral rights have no actual value and taxes thereon have never been paid.

"From time to time they have been advertised for sale with no bidders and the Court has appointed a Trustee to purchase them on behalf of the County. There are many of these tracts and the county will probably never recover the amount of costs and expenses already accrued.

"Now if in each instance a separate deed is made by the Collector with a fee of $1.50 and recorded by the Recorder for a fee of $1.75,

it will cost the county a very substantial additional sum of money with comparatively little prospect of a recovery and if all of the property purchased by the Trustee can be placed in one conveyance it will result in a very material saving to the county at a time when economy is almost a necessity."

Section 11150 Revised Statutes of Missouri, 1939, sets out the form of deed to be executed and delivered by the collector in the sale of real estate for delinquent taxes thereon.

Section 11151 thereof, providing for variations from the above form is as follows:

"In case circumstances should exist requiring any variation from the foregoing form, in the recital part thereof, the necessary change shall be made by the county collector executing such deed, and the same shall not be vitiated by any such change, provided the substance be retained. The county collector shall be entitled to demand and receive from the person applying therefor, for each tax deed, one dollar and fifty cents, which shall include the acknowledgment."

Section 11149 thereof (Laws 1933, p. 425, Sec. 9957), is in part as follows:

"In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

Section 11131 thereof, (Laws of Missouri, 1939, page 850, Section 9953-b) was passed in order that a county might bid "to protect taxes and prevent loss", and is as follows:

> "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties

> and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees: Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots." (Underscoring ours).

In making such purpose effectual, the Legislature provided for the appointment of a trustee to bid at sales of lands or lots sold for delinquent taxes where no bids were made by other person or persons for the total sums due.

No form for deeds to trustees was prescribed by the Legislature. The prescribed deed, even with the variations of form permitted under Section 11151, supra, would be inadequate for conveyance to the trustee under the provisions of Section 11131, supra.

The prescribed deed conveying lands or lots under a third sale is the final action of the collector in foreclosure of the lien of the state for delinquent taxes. The conveyance to the trustee is the final action of the collector, but thereafter the supplementary scheme provided in Section 11131, supra, provides for the realization of such taxes by acts of the county court and its appointed trustee. The first conveyance must be by deed; the last by a conveyance in the nature of a trust, even though it is called a deed. It is a conveyance to the trustee and the trust is for the taxing authorities named in the instrument in the amount due each on the lands or lots so sold.

Thus each conveyance by the collector to the trustee is an individual trust for such taxing authorities and represents taxes due such authorities based upon an assessment on surface, and, in some instances, on granite, coal, oil, and other subsurface interests in realty, which must be separately assessed. Such taxing authorities may differ in different assessments. The commingling of such interests of such varied parties in and to such varied properties in one conveyance could not have been intended by the Legislature.

While, in Section 11149, supra, the Legislature provided that when "the same person or persons shall in any wise become the owner of the certificates thereof, all of such parcels shall be included in one deed" it had reference only to person or persons obtaining deeds and not conveyance in trust.

Therefore, the 1933 Legislature which passed the Jones-Munger law could not have anticipated the passage of Section 11131, supra--which is a radical departure from any scheme heretofore devised for the collection of taxes on real estate--and intended that the said section come within the purview of Section 11149, with respect to the inclusion in one deed of all parcels of land sold to the same person under certificates of sale.

CONCLUSION

Therefore, it is the opinion of this Department that in making sales of lands for delinquent taxes on real estate to a trustee appointed under Section 11131, supra, the collector must execute and deliver an individual deed for individual tract or tracts of lands described in each publication for sale.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

SVM/mc

SCHOOLS: Where districts combine temporarily for educational purposes, the teachers' funds of such districts can be used to pay the salary of the teacher or teachers of such combination of districts.

October 27, 1942

11-5

FILED
45

Mr. A. G. Jannopoulo
Attorney at Law
Ambassador Building
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of October 22, 1942, in which you submit the following for an opinion:

> "I represent the Washington Park School District No. 48, located in St. Louis County, Missouri, which school district is a common school district. In 1940 this school district lost control of its school buildings by reason of the extension of the city limits of Webster Groves to include a portion of the Washington Park School District, on which portion the school houses were located. Since that time, children of school age in the remaining portion of the Washington Park School District have been receiving their education from an adjoining school district, namely, the Affton School District. We have been billed for tuition for these school children, and have funds in our 'Teachers' Fund'. We would like a ruling from your office as to whether we could use these funds now in the 'Teachers' Fund' to pay this tuition inasmuch as the Washington Park School Dis-

> trict No. 48 has no teachers, owes no teachers, and has not had any teachers since 1940, and furthermore, has no school buildings.
>
> "We are not attempting to transfer all or any part of the 'Teachers' Fund' to the 'Incidental Fund', but wish to pay this tuition by issuing a warrant direct to the Affton School District."

Section 10366, R. S. Missouri, 1939, provides in part as follows:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected. * * * * *
>
> "The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund', except money apportioned for free text books, which shall be credited to the 'Free Text Book Fund'. * * * * *"

By the foregoing section the law limits the use to which school moneys may be put to the purposes for which such moneys were collected. Moneys collected for teachers' funds must be used to pay teachers.

We have ascertained from the State Department of Education that Washington Park School District and the Affton School District have combined temporarily for educational purposes, under the provisions of Section 10457, R. S. Missouri, 1939. Said section reads as follows:

> "Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: Provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

By the latter section two or more districts are authorized to combine temporarily for educational purposes. In other words, such districts may "pool" their efforts and jointly provide for the instruction of their pupils. In such a combination it certainly is not contemplated that each district shall furnish a teacher, but the purpose of the combination manifestly is to conserve on expenses. The statute clearly contemplates that under such combination there would be a combined teaching force and all districts in the combination would share the expense of paying the teacher or teachers. The share of the salary of a teacher or teachers for the combination of districts which each district bears could properly be paid out of the teachers' fund because it would be used to pay teachers' salaries. The teacher of such combination of districts is as well the teacher of one district as he is the teacher of another district of the combination. In the case about which you inquire the teacher is as much the employee of Washington Park District as he is of the Affton District, and the mere fact that he actually does his teaching in the Affton District schoolhouse does not change the situation.

From the foregoing we think that the share of the salary of the teacher or teachers who are instructing the pupils of Washington Park District at the Affton District

schoolhouse is not "tuition." Tuition is the fee or charge which is made for permission for a pupil to attend a school which he is not entitled to attend as a matter of right. In other words, where a pupil of one district desires to attend the school of another district, he is required to pay a fee, which is called tuition, but in such case the district attended is furnishing the school and its facilities. In the case of a combination of districts, under Section 10457, supra, no one district is furnishing the facilities of the school entirely, but all the districts affected are jointly furnishing the school facilities, including instruction.

It should be noted that said Section 10457 provides that each district of the combination receives the same apportionment from the state school fund as it would were it maintaining its own school. By Section 10566, supra, money received by a district from the state school fund goes into the teachers' fund. There would be no reason for the state allowing such a district money for a teachers' fund when there was to be no teacher in that district, unless it was contemplated that such money so apportioned could be used to help pay the salary of the teacher or teachers of the combination of districts.

CONCLUSION

It is, therefore, the opinion of this department that where two or more districts combine temporarily for educational purposes, under the provisions of Section 10457, R. S. Missouri, 1939, the salary of the teacher or teachers who teach the pupils of all districts in the combination can be paid from the teachers' funds of the various districts in the combination.

Respectfully submitted

APPROVED:

HARRY H. KAY
Assistant Attorney General

ROY McKITTRICK
Attorney General

HHK:HR

ELEEMOSYNARY INSTITUTIONS: Buildings to house inmates must comply with statutory requirements as to fire escapes.

January 2, 1942

46

FILE
46

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

We are in receipt of your letter of December 30th, 1941, wherein you state as follows:

> "The last legislature turned over to the Board of Managers, Eleemosynary Institutions, the School for Children at Carrollton, Missouri, to be used as State School #2 for feeble-minded.
>
> "At this place there is one frame building that is not fire proof. Just when the building was built, I do not know. Is it possible for us to house inmates of the Missouri State School #2 in this building, in view of the fact it is a frame building and not fire proof?"

You have orally advised us that the building at Carrollton, to which you refer, is a two-story frame building.

Laws of Missouri, 1941, Sections 9634 and 9635, both found on page 320, provide respectively as follows:

> "Section 9634. There is hereby established an institution at Carrollton, Missouri, to be known as Missouri State School Number Two and to be used in connection with and as a part of the Missouri State School at Marshall,

> Missouri, as a colony for feeble-minded and epileptic in accordance with the provisions of Article 6 of Chapter 51 of the Revised Statutes of Missouri, 1939, which institution shall be under the control, management and supervision of the Board of Managers of State Eleemosynary Institutions."
>
> "Section 9635. The control and management of all the lands and other properties now used by what is known and designated by law as the 'State Home for Children' at Carrollton, Missouri, is hereby transferred to the Board of Managers of the State Eleemosynary Institutions for the use of said Missouri State School Number Two."

The above sections set out your authority to convert and use the State Home for Children at Carrollton, Missouri, as a part of the Missouri State School at Marshall, Missouri. You inform us that the building at Carrollton, Missouri, is not fire proof and inquire whether it may be used under such circumstances to house inmates.

Section 14950, R. S. Mo. 1939, provides as follows:

> "It shall be the duty of the owner, proprietor, lessee, trustee, or keeper of every hotel, boarding and lodging house, tenement house, schoolhouse, opera house, theater, music hall, factory, office building, except fire proof office buildings in which all structural parts are wholly of brick, stone, tile, concrete, reinforced concrete, iron, steel or incombustible material, and which are not used for lodging purposes in the state of Missouri, and every building therein where people congregate or which is used for a business place or for public or private assemblages, which has a height of three or more stories, to provide said structure with iron

> or steel stair fire escapes attached to the exterior of said building and by staircases located in the interior of said building. The fire escapes shall extend from the upper story to the ground, pavement or sidewalk with iron or steel ladder from the upper story to the roof: Provided, however, that such fire escapes, if not continued to the ground, pavement or sidewalk, shall be equipped with a counter-balance device attachment, appliance or apparatus which shall extend from the floor level of the second story to the ground, pavement or sidewalk. School buildings, opera houses, theaters and church buildings, also hospitals, blind and lunatic asylums and seminaries, shall each have a stair fire escape built solid to the ground. In no case shall a fire escape run past a window where it is practicable to avoid it. All fire escapes required by this article, except as hereinbefore provided, must be of the kind known as stationary fire escapes. All buildings heretofore erected shall be made to conform to the provisions of this article." (Underscoring ours)

Under the above section certain buildings having a height of three or more stories, wherein people congregate for public and private assemblages and which are not used for lodging purposes, must provide a specific type of fire escape. Whereas, a lunatic asylum, regardless of the height of the building, must have a stair fire escape built solid to the ground.

Section 9387, R. S. Mo. 1939, provides that:

> "There shall be established in this state a colony for feeble-minded and epileptics, to be known as the Missouri state school."

It is quite obvious that the Missouri State School would come within the meaning of a lunatic asylum.

From the foregoing we are of the opinion that if the frame building at Carrollton, Missouri, proposed to be used to house inmates of the Missouri State School No. 2, does not meet the statutory requirements with respect to fire escapes as provided for in Section 14950, R. S. Mo. 1939, then said building should not be used to house said inmates.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

MW:EG

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

County Budget Act: Warrants for pauper patients confined in state insane asylums by the court are to be paid from class one. Warrants for children confined in the State Home at Marshall and Carrollton are to be paid out of funds in class five.

January 16, 1942

1-17

FILE 46

Mr. Ira A. Jones, President,
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of January 9, 1942, wherein you make the following inquiry:

> "Some time last year the state auditor instructed all county clerks to pay the State School at Marshall and the Mount Vernon Sanatorium out of Class 5 Warrants, ruling that these two institutions were not insane institutions and could not be paid with Class 1 warrants.
>
> "Under your ruling of January 2nd, on another opinion you have said that the State School at Marshall 'was a lunatic asylum.' If this is true, and in my opinion it is, shouldn't we be paid out of Class 1 warrants for the Missouri State School at Marshall and School #2 at Carrollton?"

We have considered our opinion of January 2, 1942, which appears to refer to an entirely different matter than the question you present. In that opinion Sections 9634 and 9635, Laws of Missouri, 1941, page 320, were considered from the viewpoint of whether or not the Missouri State School at Carrollton meets the requirements in so far as fireproof buildings were concerned under Section 14950, R. S. Missouri, 1939.

The instant question which you present will have to be considered from the standpoint of the county budget act, as amended by the 1941 General Assembly, Laws of Missouri, page 650. Section 10911, Laws of Missouri, 1941, page 651, contains a provision with reference to Class 1, which is as follows:

> "The court shall classify proposed expenditures in the following order:
>
> "Class 1. The County court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Section 10914, Laws of Missouri, 1941, page 652, referred to as the Class 1, which is as follows:

> "The court shall show the estimated expenditures for the year by classes as follows:
>
> "Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals)."

Sections 9634 and 9635, as amended by the Legislature in 1941, page 320, refer to the Home for Feeble-minded and epileptic for children and places the institution at Carrollton and Marshall under the Board of Managers of the State Eleemosynary Institutions.

We are of the opinion that the state auditor was correct in instructing the county clerks to pay the warrants for children confined in the Homes at Marshall and Mount Vernon, likewise Carrollton, from warrants out of Class 5, as clearly under the budget act the care and upkeep of patients in insane

asylum, under Class 1, refers to the institutions so designated for that purpose, and refers further to such pauper patients as have been declared insane by the county court.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

OWN/rv

ELEEMOSYNARY INSTITUTIONS:) Pay patient committed by probate court
INSANE PERSONS:) must post bond.

February 4, 1942

2-16

FILE
4-6

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "Will you please give me your official opinion upon the following question:
>
> "Is a pay patient, committed to a state hospital for the insane by an order of the probate court, required to give a bond?"

Section 497, R. S. Mo. 1939, provides as follows:

> "If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of

such person as the circumstances of the case shall require."

Section 498, R. S. Mo. 1939, provides:

"If any such person of unsound mind, as in the last preceding section is specified, shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Under the authority of the above sections it is well settled in Missouri that a judge of the probate court may order an insane person to be confined in some suitable place, which includes a state hospital. In re Moynihan, 62 S. W. (2d) 410, 332 Mo. 1022.

Section 501, R. S. Mo. 1939, which is in the same article as Sections 497 and 498, supra, provides as follows:

"If any insane person be admitted into the state lunatic asylum as a patient, the guardian shall pay for his support and expenses at such asylum, out of the estate of such ward; and if such insane person shall, at any time, come under the class of 'insane poor persons,' as specified in the law for the government of the state lunatic asylum and care of the insane, such person shall be supported and maintained at such asylum by the county in the manner provided by such law."

Chapter 51, Article 2, of the Revised Statutes of Missouri, 1939, deals with the admission of patients to the state hospitals. The statutes in this article, which will be noticed later, provide for the admission of two classes of persons, "pay patients" and "county patients." This distinction is recognized in Section 501, supra.

In 59 C. J., page 1047, it is said:

> "The endeavor should be made by tracing the history of legislation on the subject to ascertain the uniform and consistent purposes of the Legislature."

A review of the history of the legislation relating to insane persons in Missouri, discloses that while even under the territorial laws provisions were made for the control of insane persons by the courts of this State (1 Mo. Territorial Laws, p. 507), still it was not until 1835 that a comprehensive law dealing with this matter was enacted in this State. In that year the General Assembly enacted what are now Sections 497 and 498, and other sections of what is now Article 18, of Chapter 1, which deals with "insane persons," (Revised Statutes of Missouri, 1835, page 155). It was not until 1855, however, that Section 501, providing for the expenses of insane persons, was passed (R. S. Mo. 1855, page 863). At the time what is now Section 501was enacted, there were provisions providing under what conditions pay patients could be admitted to the "State Lunatic Asylum" and also providing for the admission of the indigent insane at the expense of the county. One of the provisions, before a pay patient could be admitted, was that a bond must be posted. This requirement is found in our present day law, in Section 9323, R. S. Mo. 1939, which is found in Article 2 of Chapter 51, and is as follows:

> "* * *Before any private patient shall be received into the hospital, there shall be produced * * * a sufficient bond to said treasurer, conditioned that the obligor or obligors will secure the payment of charges incurred

> in behalf and on account of said patient; said bond, with satisfactory securities, shall be of the form and contain the provisions as provided in section 9326. * * * * *"

Therefore, while the probate court may order an insane person confined in a suitable place, still, since 1855 our Legislature has recognized the requirement that if said person is confined in a state institution and able to pay for his care, that he must do so, and the State may, as said in Rice v. Gray, 34 S. W. (2d) 567 "prescribe the procedure for pay patients in asylums, subject to the citizen's constitutional rights."

Our General Assembly has provided that every pay patient must post a bond before being admitted, and we believe that this rule must be complied with, even though the patient is sent to the state institution under an order of the probate court. This is a logical and reasonable interpretation of these statutes, especially in view of that rule of statutory construction that all statutes relating to the same subject should be read in connection with each other, as together, constituting one law. State ex rel. Shartel v. Westhues, 9 S. W. (2d) 612, 320 Mo. 1093; Trust Company v. Elzea, 286 S. W. 371, 315 Mo. 485.

Conclusion

It is, therefore, the opinion of this Department that an insane person committed by order of the probate court to a state hospital as a pay patient, is required to post a "sufficient bond" required under Section 9323, R. S. Mo. 1939.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:EG

Blind Pensions: Blind pension shall terminate on the date Commission makes finding that such person is not qualified.

February 13, 1942

2-23

FILE 46

Missouri Commission for the Blind
Jefferson City, Missouri

Attention: Mrs. Lee Johnston, Chief Investigator

Gentlemen:

We are in receipt of your request for an official opinion from this department, which request reads as follows:

"In striking a pensioner from the pension rolls, should the effective date be the date of examination when the pensioner was found to be ineligible as to vision, income, maintenance, or for any other reason, or should it be the date on which the Board of the Commission for the Blind met and approved that said person be stricken from the rolls?

"It has always been the custom to use as the effective date, the date of examination or investigation, even though that was a prior date to the date of the monthly Board meeting. The Auditor and pensioner were so advised after the approval of the Board of the Commission for the Blind had been voted at the Meeting."

Section 9454, R. S. Mo. 1939, provides in part as follows:

"* * * * * And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll: * * * *"

Section 9453, R. S. Mo. 1939, provides as follows:

> "The state auditor shall place the names of all persons certified to him for a pension under this article upon a record to be kept in his office to be know as the 'blind pension roll' which shall contain also the residence, postoffice address, date upon which the application for pension was filed with the judge of the probate court or commission for the blind, and the date the certificate was received by the state auditor; and the name of any person appearing upon the said blind pension roll shall be prima facie evidence of the right of such person to the pension herein provided." (Underscoring ours)

In the case of State ex rel Smearing v. Thompson, 45 S. W. (2d) 1078, l. c. 1079, the court, in construing the above section, supra, said:

> "Section 8893 (Revision of 1929) provides that an adult blind person having the qualifications therein prescribed 'shall be entitled to receive, when enrolled under the provision of this article, an annual pension,' etc. One is 'enrolled under the provision of this article' when his name is placed on the blind pension roll by the state auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An applicant's name is placed on the blind pension roll upon certification by the commission for the blind; it is stricken from the roll upon a like certification when the commission, after notice and hearing, determines that the pensioner is no longer qualified to receive a pension."

It will be noted from the reading of the excerpt from the above case, that the court has construed Section 9454, supra, to mean that in order to strike a pensioner from the roll after he or she has once been placed upon the roll, it is necessary to give a notice to such person by mail, directed to his or her last residence address. Further, a hearing must be had before the Commission. At this hearing, or course, evidence should be introduced on the part of the Commission, and the person to whom a

notice has been given would have the right to also produce evidence substantiating his or her contention that he or she was eligible, and from the whole evidence produced at the hearing the Commission should make a finding as to whether or not such person has sufficient qualifications to be entitled to a blind pension. After this determination has been made, if the Commission has found that such person is not entitled to a pension, they should immediately certify such fact to the State Auditor, and such named person should be immediately stricken from the blind pension roll.

It is our view, from the reading of Sections 9454 and 9458 and the case of Smearing v. Thompson, supra, that a person whose name is on the blind pension roll is presumed to have the necessary qualifications until the finding and judgment is made by the Commission. Upon the rendition of the finding and judgment, if such finding and judgment is that such person is ineligible, then he or she shall immediately thereafter not be entitled to a pension.

We also wish to call attention to the case of State ex rel Fitzgerald v. The State Social Security Commission, 48 S. W. (2d) 872. The court, after quoting from Section 9454, supra, had this to say:

> "* * * At that time the commission for the blind certified to the state auditor that Fitzgerald was 'no longer qualified to receive a pension,' and his name was stricken from the 'blind pension roll.' Of course, payment of the pension was discontinued. We assume the commission acted on reasonable notice to Fitzgerald for the proceeding is not questioned for failure of notice."
>
> *
>
> "It will be noted that defendant in error grounds his right to relief on the judgment of the circuit court. He does not claim t at the judgment is final on the question of his qualifications for a pension, but contends that, if the commission had knowledge that he was no longer qualified to receive a pension, it should have moved in the circuit court to modify the judgment, alleging disqualification and proving facts which established disqualification.
>
> *

> "The commission does not agree to this contention. It contends that the procedure is fixed by section 8896, Rev. St. 1929, which in part follows: (This portion appears on page 1 of this opinion) * * * * * * * * * * Defendant in error argues that this provision applies only to enrollments of pensioners on a finding and certificate of the commission. It is not so written in the statute. Moreover, a judgment of qualification by the circuit court on appeal is of no more force and effect than a finding and certificate of qualification by the commission. The judgment of either that petitioner is qualified authorizes an enrollment and payment of the pension."

We wish to point out that the case above had to do with a different situation than the one described in your opinion request, however, it will be noted from a reading of the excerpt from the Fitzgerald case, supra, that the court states that the Commission must make a finding and also uses the word "judgement". As we interpret it, the finding and judgment are one and the same.

Undoubtedly, the Missouri Commission for the Blind is an executive governmental agent and any decision of the Commission is like a judgment in a court of law, in this: First, the Commission must, from the evidence produced, determine the facts in the case. Secondly, it must conclude from the constitutive facts so found certain legal consequences follow, to-wit: that the applicant is or is not entitled to assistance -- a determination of law. Howlet v. State Social Security Commission, 149 S. W. (2d) 806, l. c. 809, and other cases cited in said opinion.

CONCLUSION

We are of the opinion, therefore, that in order to strike a person from the blind pension roll, he or she must be given notice in writing, addressed to his or her last known residence address, and a hearing had wherein evidence may be produced by the pensioner as well as the Commission. From the evidence produced, the Commission shall make a finding and judgment, and if the Commission finds the pensioner to be ineligible, such fact

shall be certified to the State Auditor and the name of such person shall be immediately stricken from the blind pension roll.

We are further of the opinion that the effective date upon which a blind pension shall end is the date that the Commission renders its finding and judgment that such person is no longer qualified to receive the blind pension and makes its order that such person's name shall be stricken from the roll.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

ELEEMOSYNARY INSTITUTIONS:)
INSANE:)

Superintendent of State hospital should not admit person when order of commitment does not find that the patient is insane.

February 13, 1942

216

FILE
46

Mr. Ira A. Jones
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "Enclosed is copy of a letter received from State Hospital #3, Nevada. Also, enclosed is certified copy of the order of commitment for this patient.
>
> "Will you please give us an opinion on the admittance of cases of this type?"

The enclosed letter from Dr. Ralf Hanks, Superintendent of State Hospital No. 3, at Nevada, Missouri, reads in part as follows:

> "I am in receipt of an order of commitment from Greene County. The commitment is the request of the patient for treatment of Neurosyphilis. Apparently, however, the patient does not have a mental condition at the present time, and the order of commitment does not state that the patient is insane."

The order of commitment of the County Court of Greene County is as follows:

> "Now at this day comes on to be heard the petition and request of Belle Rutledge, 1603 N. Robberson, Springfield, Missouri, for an order admitting herself to State Hospital Number Three for treatment as a County patient, and
>
> "It appearing to the Court that the said Belle Rutledge has filed a petition and request in which the filing of information, notice of hearing, or hearing before the County Court for admission to said State Hospital has been waived, and,
>
> "It is, therefore, ordered by the Court that there is hereby made an order requesting the Superintendent of State Hospital Number Three to admit the said Belle Rutledge as a county patient for treatment.
>
> "It is further ordered by the Court that a certified copy of this order be transmitted to the Superintendent of State Hospital Number Three with a Treasurer's check in the amount of $36.00 for care of the said Belle Rutledge for the ensuing six months."

Your request deals entirely with the question of who may be admitted to a State hospital as a patient, and we are not concerned in this opinion with the right of the superintendent of a State hospital to discharge a person whom he, in his discretion, decides is not insane.

Section 9335, R. S. Mo. 1939, provides that in order for a county court patient to be admitted that some

citizens residing within the county must file with the clerk of the county court a verified statement in which it is stated that said proposed patient is insane and has not sufficient estate to support him at a State hospital. Section 9338, R. S. Mo., 1939, provides that the county court shall examine witnesses upon the question of the sanity of the alleged insane person.

Section 9339, provides as follows:

> "If after such examination, the court, or the jury, if one shall have been employed, shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record, upon their own decision, or, where the verdict of the jury has been rendered, upon the verdict. And such order shall further set forth that the person found to be insane is a fit subject to be sent to a state hospital (naming the particular hospital), to undergo treatment therein; and shall further require the medical witness forthwith to make out such a detailed history of the case as is required by section 9332; and, also, that the costs of this examination be paid out of the treasury of the county; and, also, that the clerk of the court forthwith forward a certified copy of said order of court to the superintendent of the hospital, accompanying the same with a request of admission of the person found to be insane to the hospital."

A reading of the order of the county court discloses that the court did not find that the person was insane. The effect of such an omission was considered in the case of Ex parte McLaughlin, 105 S. W. (2d) 1020, in

which the court said (l. c. 1022):

> "Section 8647, R. S. 1929 (Mo. St. Ann. Sec. 8647, p. 7745), provides that if after the examination of an alleged insane person the court shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record. 'And such order shall further set forth that the person found to be insane is a fit subject to be sent to a state hospital (naming the particular hospital), to undergo treatment therein; and shall further require the medical witness forthwith to make out such a detailed history of the case as is required by section 8640; and, also, that the costs of this examination be paid out of the treasury of the county; and, also, that the clerk of the court forthwith forward a certified copy of said order of court to the superintendent of the hospital.' The order or judgment of June 8 does not 'set forth' that the petitioner was 'a fit subject to be sent to a hospital'; nor does it order the clerk to 'forthwith forward' a certified copy thereof to the superintendent of the hospital at St. Joseph, Mo. It is plain, we think, the order does not 'follow strictly' nor substantially the mandatory provisions of the statute. * * *"

The holding of the above case was that since the county court had not followed the statute in making its order of confinement that such order did not comply with the statute and was of no effect. We believe this is authority in the instant case.

Conclusion

It is, therefore, the opinion of this Department that when a county court in committing an insane person to a State hospital, fails to set forth in its order that such person is insane, as required by Section 9339, R. S. Mo., 1939, that said order is of no effect and that the superintendent of the State hospital to which the order is directed, should refuse to admit the patient.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:EG

ELEEMOSYNARY INSTITUTIONS: Lease for five years is void.

- -

February 24, 1942

2-16

FILE 46

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, which reads as follows:

> "Enclosed is a lease made before I became President of the Board. A letter from State Hospital #1, Fulton, says that we lose approximately $600.00 per year on this farm.
>
> "Is it possible for us to break this lease and, if so, how do we do it?"

The lease accompanying your request provides that the Northwestern Mutual Life Insurance Company leases to George Blowers, State Purchasing Agent for the use and benefit of State Hospital #1, certain properties for a period of five years for cash rent of $3500.00; said rent to be paid in semi-annual installments of $350.00 each. The lease was entered into March 1st, 1940, and is to expire February 28, 1945.

Section 9265, R. S. Mo. 1939, provides:

> "If the curators, managers, trustees or other officers having control of

> any educational, eleemosynary or other public institutions belonging to the state, or any executive committee, by whatever name called, having subordinate control under such curators, managers, trustees or other officers, as aforesaid, or any president, superintendent, steward, or other officer in immediate charge of any such institution, or any person having the business management of any such institution, shall contract, in the name or for the use of such institution, any debt for which there shall not be at the time an adequate appropriation, every such curator, manager, trustee or other officer in control, as aforesaid, and every such committeeman, and every such president, superintendent, steward or other officer in immediate charge, as aforesaid, and any person having the business management of any such institution as aforesaid, shall be personally liable for such debt to the person with whom such is contracted, or the assignee thereof, and, in addition, shall, on conviction, be deemed guilty of a misdemeanor: Provided, that no such curator, manager, trustee or officer in control or committeeman, as aforesaid, shall be so liable, as aforesaid, or be deemed guilty, as aforesaid, if at the time of incurring such debt he shall require the ayes and noes to be taken and recorded on the question of incurring such debt, and shall himself vote against incurring such debt: Provided further, that nothing herein shall prohibit such managers of any such institutions from incurring debts for the necessary support of such institutions from January first of the years the general assembly meets, until the appropriations for such institutions are made, when the funds of such institutions are exhausted."

No debt can be contracted, under the above section, "for which there shall not be at the time an adequate appropriation." It is well settled in this State that an appropriation is for only two years. Article X, Section 19, Constitution of Missouri.

In Ebert v. Jackson Co., 70 S. W. (2d) 918, the Supreme Court had before it a lease for four years entered into by Jackson County. The Constitution provides that no county should be allowed to become indebted in any manner or in any amount exceeding in any year the amount of the income and revenue for such year. In the above case it was stated:

> "In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff $4,320 for the use of the room for four years, beginning August 1, 1925, payable $90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.
>
> "The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

We believe the above ruling is authority in the instant case and that the lease for five years is contracting a debt for which at the time there was not an adequate appropriation and is therefore void.

As to the effect of a void contract, it has been held in Missouri that such a contract may be disregarded by either party. Metropolitan Paving Co. v. Brown-Crummer Investment Co. 274 S. W. 815, 309 Mo. 638; Och v. M.K. & T. R. Co. 31 S. W. 962, 130 Mo. 27.

As was aptly stated in 12 Am. Jur. 507: "A void contract is no contract at all. It binds no one and is a mere nullity." A void contract need not be rescinded. Lindsay v. Sonora Goldmining Co., 196 S. W. 764.

CONCLUSION.

It is, therefore, the opinion of this department that a lease entered into between an owner of land and a State Hospital for five years, payments to be made semi-annually, is void because Section 9265, R. S. Mo. 1939, provides that no officer of an institution shall contract any debt for which there shall not be at the time an adequate appropriation. Since said lease is void it is further the opinion of this department that it does not have to be rescinded.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

BLIND COMMISSION: May require applicant to submit to operation or treatment.

- -

March 11, 1942

3-14

Hon. Ira A. Jones, President
Board of Managers
Eleemosynary Institutions
Capitol Building
Jefferson City, Missouri

FILE
46

Dear Mr. Jones:

Under date of February 20, 1942, you wrote this office requesting an opinion, as follows:

> "Can the Blind Commission make an order that anyone who has a reasonable chance of having their sight restored by an operation must be operated on if there are available funds from private sources for the hospitalization of the patient and for the operation expenses?
>
> "We know there is such a law provided there is funds to take care of it by the State, but the thing that bothers me is that there is no State funds to take care of such cases.
>
> "We understand the Lions Club of the State has raised such a fund. Now they want the Commission for the Blind to force people who are on the blind pension rolls to have such an operation."

In Section 9456, R. S. Mo. 1939, is the only provision in the statutes relating to operations for the purpose of relieving blindness. This section, after authorizing the Commission to make regulations concerning examination of applicants, fixing a maximum fee which may be paid for exam-

inations and providing for other details in connection with applicants, contains the following:

> "* * * No person shall be entitled to the benefits of this article who shall refuse to submit to treatment or operation to effect a cure when recommended by the examining oculist and approved by the commission; but upon submission to such treatment or operation the pension of applicant, otherwise entitled thereto, shall be paid as in other cases: Provided further, that no applicant who is more than seventy-five years of age, shall be required to submit to an operation to restore his or her vision in order to come under the provisions of this article, but may voluntarily submit to operation."

Under an opinion previously furnished by this office, which opinion was written by Aubrey R. Hammett, Jr., it was ruled the above provision did not require applicants to pay for their own operations; that the intention of the lawmakers in enacting the above quoted portion of the statutes was to require persons to submit to operation when the operation was furnished.

We have been unable to find any adjudicated case construing the foregoing language from Section 9456, or similar language. The solution of the question involves the construction of the statutes under the recognized rules of statutory construction and in connection with any other statutes which may be pertinent to the question.

It is desired to call attention to the following portion of Section 655, Article 2, Chapter 4, R. S. Mo. 1939:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute:

> First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * * * * *."

All of the words in the portion of Section 9456 quoted herein are words in common use and words having no technical meaning. From these words in common use we must determine the intention of the lawmakers in enacting the law.

In City of St. Louis v. Pope, 126 S. W. (2d) 1201, l. c. 1210, the court said:

> "In the Senter Commission Company Case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W. 2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.' * * * * * *"

Apparently the intention was to prevent the placing on the pension rolls and the keeping there of persons whose unfortunate condition might be remedied by treatment or operation, when treatment or operation were made available for such persons.

Persons recommended for treatment or operation cannot be required to pay for their own treatment or operation and there is no appropriation out of which payment could be made by the State. However, your letter states that the Lions Club of the State has funds which it has made available for this purpose.

At this point we wish to refer to the statutes pertaining to the Commission for the Blind, referring particularly to Sections 9447 and 9448, as follows:

"Sec. 9447. Duties of commission. The duties of said commission shall be to prepare and maintain a complete register of the blind persons within this state and to collate information concerning their physical condition, cause of blindness and such additional information as may be useful to the commission in the performance of its other duties as herein enumerated, and to investigate and report to the general assembly from time to time the condition of the blind within this state, with its recommendations concerning the best method of relief for the blind; to adopt such measures as the commission may deem expedient for the prevention and cure of blindness; to establish and maintain at such places within this state as the commission may deem expedient shops and workrooms for the employment of blind persons capable of useful labor, and to provide superintendence and other assistance therefor and instruction therein; to compensate the persons so employed in the manner and to the extent that the commission shall deem proper; to provide such means for the sale of the products of the blind as the commission shall deem expedient; to act as a bureau of information for the purpose of securing employment for the blind of this state elsewhere than in the shops and workrooms of the commission, and to this end the commission is authorized to procure and furnish materials and tools and to furnish aid and assistance to blind persons engaged in home industries and to buy and sell the products of the

> blind wherever and however produced within this state; to provide for the temporary cost of the food, raiment and shelter of deserving blind persons engaged in useful labor; to ameliorate the condition of the blind by such means consistent with the provisions of this article as the commission may deem expedient: Provided, however, that no part of the funds appropriated by the state shall be used for solely charitable purposes; the object and purpose of this article being to encourage capable blind persons in the pursuit of useful labor and to provide for the prevention and cure of blindness.
>
> "Sec. 9448. Commission authorized to receive and expend donations and bequests. Said commission is authorized to receive and use for the purposes hereinbefore enumerated, or any of them, donations and bequests, and is authorized to expend such donations and bequests in such manner as it may deem proper within the limitations imposed by the donors thereof."

Summing up, the Commission for the Blind has the duty of adopting measures which it may deem expedient for the prevention of blindness; the Commission is further authorized to accept donations and it has the power to approve or reject the suggestion of the examining doctor in regard to an operation or treatment.

CONCLUSION

The conclusion follows, if the Commission wishes to accept the donation from the Lions Club of hospital expenses

for persons needing treatment or operation, and further approves the recommendation of the examining doctor for treatment or operation, the Commission may require the applicant to submit to treatment or operation in accordance with Section 9456, R. S. Mo. 1939.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

Roy McKittrick
Attorney-General

WOJ:CP

ELEEMOSYNARY INSTITUTIONS: Board of Managers may "write off" uncollectible accounts, but so doing does not relieve responsible persons from payment.
PATIENTS:
ACCOUNTS:

March 30, 1942

3-31

FILE 46

Mr. Ira A. Jones
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

This is to acknowledge receipt of your letter of recent date wherein you request an opinion of this department. Your letter is as follows:

> "We have in some of our hospitals old accounts due on private patients that seem to be uncollectable. The patient has either been discharged or died. An honest attempt has been made by the steward to collect most of them that have no bond, and all of them are accounts that were due before this administration came in office.
>
> "Do we have a right as a Board to write off these accounts as uncollectable? "

Section 9322, R. S. Mo. 1939, under Article 2, Chapter 51, with relation to state eleemosynary institutions provides as follows:

> "Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

Section 9323, R. S. Mo. 1939, provides how pay patients may be admitted to the state hospitals, with a provision as to the payment for the care of said patients, as follows:

> "* * * * Before any private patient shall be received into the hospital, there shall be produced to the superintendent a receipt

> from the treasurer of the hospital, acknowledging the payment to him of at least thirty days' charges in advance, and a sufficient bond to said treasurer, conditioned that the obligor or obligors will secure the payment of charges incurred in behalf and on account of said patient; said bond with satisfactory securities, shall be of the form and contain the provisions as provided in section 9326. No part of said thirty days' payment shall be refunded if the patient making such payment shall be taken away within that period uncured and against the consent of the superintendent."

Section 9324 provides a form for admission of such patients to the state hospital and Section 9325 provides a form to be filled out by two physicians certifying that the patient is insane and a proper patient to be sent to a state hospital. And, under Section 9326, a form of bond is provided to be signed and executed by persons taking the private patient to the state hospital.

No doubt in the administration of the respective state hospitals that you have numerous accounts for pay patients that have become worthless and uncollectible, for various reasons. If the Board of Managers of the State Eleemosynary Institutions have exhausted every reasonable and legal method to collect these old accounts and there is, in the judgment of the Board, no possible chance of realizing on said accounts, we can see no objection to classifying same as uncollectible accounts as a matter of bookkeeping. By this we do not mean that the Board of Managers should not continue, after so classifying said accounts, to use their best efforts to collect the accounts. Neither does it in any way relieve those who are responsible for the payment of same from liability thereunder.

CONCLUSION

It is our opinion that the Board of Managers of the State Eleemosynary Institutions may "write off" the above

accounts in the manner and in the way suggested above, but should continue their efforts to collect same.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:NS

ELEEMOSYNARY INSTITUTIONS: Providing room and board for employee is within the discretion of superintendent. Employee if not allowed board should be charged for same.

- -

April 8, 1942

4-15

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

FILE
46

Dear Sir:

This department is in receipt of your request for an opinion, which reads as follows:

> "In employing some employees at our institutions we furnish room and meals as a part of their compensation. Other employees are not furnished quarters and are given more compensation.
>
> "Where we furnish maintenance, could we pay out of Personal Service the full amount and then have the employee pay the hospital for his maintenance and use the money that the employee pays to buy food with?"

Section 9320 R. S. Mo. 1939, provides as follows:

> "The board may, by order entered of record, provide any employee board and living quarters in addition to salary, or wages, when such board finds it is for the best interest of the institutions under its care so to do."

The above statute provides that the board "may" provide any employee board and living quarters. It is a well established rule of statutory construction that when the word "may" is used in a statute that it is permissive only and not mandatory. State ex inf. McKittrick v. Wymore, 119 S. W. (2d) 941, 343 Mo. 98. Therefore, it is left to the sound discretion of the board whether, in addition to salary, an employee in any of the state eleemosynary institutions shall receive board and living quarters.

Section 9283, R. S. Mo. 1939, provides as follows:

> "All nurses, attendants and other employees necessary to the economic administration of the several institutions shall be employed by the superintendent thereof and the compensation therefor shall be fixed by the superintendent with the approval of the board. The superintendent shall from time to time furnish to the board of managers a list of the several persons employed in the institution under his care, together with the salary paid such employee, and the board of managers shall have power and authority to reduce the number of employees and to reduce the salary of any of the employees therein."

Under the above section the amount of compensation received by any employee is fixed by the superintendent with the approval of the board and if the superintendent decides to give an employee increased compensation in place of room and board we believe this is a matter entirely within his discretion.

Section 9296 R. S. Mo. 1939, provides as follows:

"Any purchase of food, other than the usual quality purchased for the inmates thereof, to be used by or for anyone other than the inmates of said institution shall be charged directly to the individual responsible for said purchase."

Section 9365, R. S. Mo. 1939, provides as follows:

"Hereafter, whenever, under any law of this state, or any rule or regulation made under the authority of any law of this state, any county, municipality, guardian, trustee or person is required to pay any sum or sums of money for the support of any person confined in any penal institution, or in any state hospital, reform, industrial or other eleemosynary institution belonging to this state, or established or maintained by this state, or is required to pay any sum for the maintenance, use or benefit of any such institution, the same shall be paid, as may be now or hereafter provided by law, into the treasury of the institution entitled thereto."

We believe under the above sections that the state when it provides food to an employee whom the board has not by order declared to be entitled to such food in addition to his salary, should charge said employee for such food and the money received therefrom should go into the treasury of the institution. Section 9366, R. S. Mo. 1939, provides that all moneys received under Section 9365, supra, should be forwarded to the State Treasurer.

CONCLUSION

It is, therefore, the opinion of this department that it is within the discretion of the board of managers of the eleemosynary institutions whether any employee shall receive in addition to his salary board and living quarters.

It is further the opinion of this department that the compensation received by the employees of the eleemosynary institutions is a matter entirely within the discretion of the superintendent of the institution, which amount, however, must be approved by the board of managers. An employee who is not entitled to board should be charged by the state if he receives meals from the state and the money so received should be placed in the treasury of the institution and forwarded to the State Treasurer.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

BLIND PENSION LAW: Defining the word "Maintain."

- -

April 24, 1942 4-30

Mrs. Lee Johnston
Missouri Commission for the Blind
Capitol Building
Jefferson City, Missouri

FILE 46

Dear Mrs. Johnston:

Receipt is acknowledged of your letter of April 15, 1942, in which you request the opinion of this office upon the following question:

> "Will you kindly render an opinion as to the eligibility of a person for a blind pension, who is living as a paid-up guest in a memorial home, an institution providing 'room, board, medical attention, nursing attention, laundry, and all services but no clothing, for an entry fee of $1000.00 for life, in addition to burial if guest is unable to provide same.'
>
> "Since the recipient has paid $1000.00 for her room and board for life, and will not, therefore, be living on charity until such time as it would reasonably be supposed that the $1000.00 had expired, would she be eligible to continue to receive the blind pension, which was granted to her while she was an inmate in this home?"

Section 9451, Article 1, Chapter 54, R. S. Mo. 1939, sets out what persons are eligible to receive a blind pension from the State of Missouri. This section contains among its

provisions:

> "* * * and provided further, that blind persons who are maintained in either public, private, or endowed institutions, or by private persons who would otherwise be entitled to a pension under this article, shall not be entitled to the benefits of this article; * *."

Your question calls for construing this clause and defining the word "maintained" as used therein. An examination of the reported cases fails to reveal a case in which the word "maintained" as used in this section has been defined.

It is an elementary rule of statutory construction that in construing statutes the intention of the lawmakers should be ascertained from the words used in the law. And by Section 655, R. S. Mo. 1939, words in ordinary usage are to be given their ordinary meaning. The words used in the section are all words in ordinary use and the intention of the Legislature is quite apparent. To provide assistance by the State for certain blind persons who are in need of assistance and to exclude from such assistance certain excepted persons who are not in need of assistance.

The word "maintained" is the past tense of the transitive verb "maintain" and the word "maintain" has numerous definitions, among those definitions is the following:

> "To bear the expense of; to support; as, to maintain a family."

In the Missouri case of State v. Tieman, 253 S. W. 453, a case involving the failure to support children under the criminal laws, the words maintain and provide were said to be synonomous.

The word has been defined in cases in other states where in its use it relates to persons, and there are here set out several of such definitions:

> "'Maintain' means 'to support; to supply with means of support; provide for; sustain; keep up.'"
>
> State v. Board of Trust of Vanderbilt University, 164 S. W. 1151, 1170, 129 Tenn. 279.
>
> "'Maintain' means to bear the expense of; to support; to keep up; to supply with what is needed."
>
> Alexander v. Parker, 33 N. E. 183, 184, 144 Ill. 355, 19 L. R. A. 187, citing Webst. Dict.

Also, there are copied here definitions of the word "maintenance":

> "'Maintenance' means sustenance, support by means of supplies of food, clothing, and other conveniences."
>
> Wall v. Williams, 93 N. C. 327, 330, 53 Am. Rep. 458; Winthrop Co. v. Clinton, 46 A. 435, 437, 196 Pa. 472, 79 Am. St. Rep. 729; Alexander v. Parker, 33 N. E. 183, 184, 144 Ill. 355, 19 L. R. A. 187, citing Webst. Dict.
>
> "'Maintenance' is the act of maintaining, keeping up, supporting; livelihood; means of sustenance; and, as applied to a person, it refers to the supplying of the necessaries of life, the furnishing by one

person to another, for his support, of the means of living, or food, or shelter, clothing, etc."

Federal Land Bank of St. Louis v. Miller, 42 S. W. (2d) 564, 184 Ark. 415.

Under the foregoing the word "maintained" as used in Section 9451, R. S. Mo. 1939, it is believed, means provided with the necessities of life. Under the laws, customs and habits, and in this climate, clothing is considered a necessity.

It is the conclusion of the writer that a person who receives food, shelter, nursing attention, and all attention except clothing is not being maintained under the foregoing definition.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

Roy McKittrick
Attorney-General

WOJ:CP

ELEEMOSYNARY INSTITUTIONS: Superintendent cannot return ~~xpaxx~~ patients to county because of inadequacy of appropriation.

April 27, 1942

H-20

Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

FILE
46

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "A letter signed by Miss Margaret M. Cobb, Assistant Budget Director, calls attention to the following:
>
> "'No expenditures shall be made and no obligation incurred by any department without the certificate of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same.' * * * 'Any officer or employee of the state who shall make any expenditure or incur any obligation from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation.'
>
> "Miss Cobb further quotes you, as Attorney General:
>
> "'It is our further opinion that a contract for printing to be furnished the Grain Inspection and Weighing De-

partment in excess of the appropriation for that purpose, * * * would be without express authority of law, and therefore void, and the Legislature under the provisions of Section 48 of Article IV of the Constitution of Missouri, would be prohibited from paying or authorizing the payment of any such claim.'

"Due to the financial condition of the Operations account at certain hospitals, we find that a deficit will definitely occur, as a result of increased cost of food prices, if the present population of these hospitals is maintained at its present level.

"The only alternative, in view of the above facts, that we can see is to reduce the patient population at these hospitals where these conditions occur.

"We would like an answer to the following two specific questions:

"Do the superintendent and his staff have the right to discharge or parole from the hospital, due to lack of funds for proper food and drugs, any patient even though such patient may, in the opinion of the superintendent and his staff, have not recovered and may be definitely psychotic and possibly will be a menace to the community?

"If the superintendent and his staff have the right to discharge any patient under the foregoing conditions and the counties and relatives refuse to take such patient, what procedure has the superintendent to follow?"

Section 9321, R. S. Mo. 1939, provides as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."
>
> (Underlining ours.)

Section 9369, R. S. Mo. 1939, provides in part as follows:

> "* * * * * * * * * * * * Provided, that whenever any person has been received as an inmate of any such institution, and thereafter the county, municipality, guardian, trustee or person responsible for the support of such inmate shall neglect or refuse to pay, within the time and in the manner required by law or the rules and regulations of such institution, any installment required to be paid for the support of such inmate, it shall be the duty of the superintendent or the chief officer of such institution to return such inmate to the sheriff of such county or municipality, or to the guardian, trustee or person responsible for the payment of such installment, and at the expense of such county, municipality, guardian, trustee or person: * * * * *."

In Rice v. Gray, 34 S. W. (2d) 567, it is said:

> "The state is charged with the duty of caring for the insane within its borders."

However, as pointed out in Smoot's "Law of Insanity", page 115:

> "While the individual primarily has the right to restrain and care for insane members of society, yet the paramount duty to do so rests upon organized government in the proper exercise of its function of looking after the welfare of its citizens, to secure the well being of those within its protection. * * * * * * This duty rests primarily upon the state, especially if the retention is in a state institution. * * * As between the state and county or township the duty of care for its indigent insane rests upon the state in the first instance, but may look to the county or township for reimbursement. Liability in such cases, is, as a rule, fixed by local statutes."

The underlined portion in Section 9321, supra, is ambiguous in so far as it provides when a patient may be discharged or paroled by the superintendent. It is a rule of statutory construction that in order to determine the legislative intent in the case of ambiguity resort may be had to the history of the statute. State v. Forest, 162 S. W. 706, 59 C. J. 1017.

Under the territorial government and in the early days of statehood the burden of caring for the indigent insane

was placed upon the respective counties. Territorial Laws of 1817, Chapter 191, Section 1, Revised Statutes of Missouri 1825, page 434. It was not until 1855 that a state asylum for the insane was provided for by our legislature. Laws of Missouri 1854-1855, page 142. Section 11 of that act provided as follows:

> "Persons afflicted with any form of insanity may be admitted into the asylum when the superintendent deems it probable that their condition can be improved by the care and treatment of the institution and any patient may be discharged by the superintendent whenever he may believe that the condition of such patient cannot be improved by a longer stay in the asylum."

Under this original law the cost of the care and treatment of the indigent insane was paid by the state. This fact probably accounts for Section 3 of Article 2 of this Act, which section is the same as Section 9330, R. S. Mo. 1939. This law provides as follows:

> "The indigent insane of this state shall always have the preference over those who have the ability to pay for their support in a state hospital; and if there are not provisions in the state hospitals for the accommodation of all the insane persons in the state, then recent cases of insanity, by which term are meant cases of less than one year's standing, shall have preference over cases of more than one year's standing: Provided, no county shall have in the institution more than its just proportion, according to its insane population."

It will be seen, therefore, that the state asylum for the insane was inaugurated for the treatment and improvement of the condition of the insane of the state and was intended to be a hospital rather than a place of confinement. The

superintendent was to admit only those whose condition could be improved and could discharge those whose condition he believed could not be improved by a longer stay. The duty of the county to provide for the care of the indigent insane was not abrogated by this law, as a reading of what is now Section 9330 discloses that the state insane asylum was not intended to provide for all the insane persons in the state.

Later in 1855, however, the cost of the maintenance of the indigent insane in the state hospital was transferred to the respective counties (Revised Statutes of Missouri 1855, Chapter 11, Article 3), but the requirements for admission and discharge remained the same.

In 1895 the General Assembly amended the law relating to admission and discharge of patients (Laws of Missouri 1895, page 42), and provided as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane, and any patient may be discharged by the superintendent whenever, in his opinion, the reason of such person is fully restored: Provided, that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital; and provided further, that county courts are hereby prohibited from removing from the hospital any indigent insane persons, except as herein provided."

This statute remained the law until 1937 when it was again amended (Laws of Missouri 1937, page 513), to read as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment

> of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

In 1909 what is now Section 9369, R. S. Mo. 1939, which provides that patients may be returned to the county on the failure of the county to pay for their maintenance, was passed (Laws of Missouri 1909, page 572).

It will be seen, therefore, that since the establishment of the first state insane asylum or hospital that the word "discharge" in Section 9321, supra, was used in the sense of releasing a patient because his mental condition was such that he should be discharged.

From 1855 to 1895 a patient could be discharged only when no further improvement in his mental condition could be brought about. From 1895 to 1937 the patient could only be discharged when his reason had been restored. We believe that the 1937 General Assembly, in providing that a patient could be discharged "whenever in the judgment of the superintendent and his staff such persons should be discharged", intended not to give carte blanche power to the superintendent to release the patient for any reason or no reason, but intended to continue the procedure that had been in effect the previous eighty-five years, that is, of discharging the patient when his mental condition was such that it was beneficial to such patient that he should be released. The 1937 General Assembly, realizing that in certain cases while a patient might not be fully restored to reason, still if he was cured to such an extent that he could be discharged, gave to the superintendent wide discretion in determining this fact. That the word "discharge" should be given this interpretation we believe is borne out by the fact that in providing for the release of patients for other than psychotic reasons the Legislature has specifically provided by statute

that in case the county or person liable for the cost of the maintenance of the patient in the asylum did not make such payments the patient could be returned to the county or person.

The duty imposed upon the superintendent of state hospitals, as stated in Section 9321, supra, is that he "shall" admit to the hospital persons who are insane "for the care and treatment of the same." The question arises whether a superintendent of a state hospital can refuse to do his duty of caring for and treating the insane because his appropriation is not sufficient to enable him to continue throughout to the end of the biennium. In State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98, our Supreme Court said:

> "A public official holds his office cum onere with all responsibilities attached."

In that case the sheriff of Jackson County attempted to excuse his failure to suppress gambling and vice because he had not sufficient staff for proper enforcement. Our Supreme Court held that this did not excuse his failure to perform such duties. The case of Commonwealth ex rel. School District v. Tice, 282 Pa. 595, 128 Atl. 506, is cited in the Williams case, supra, and in that case it is said:

> "The office being held cum onere the only course open to the official is performance or resignation."

In the recent case of Crane v. Frohmiller, 45 Pac. (2d) 955, the Supreme Court of Arizona had before it the question of whether an officer could refuse to perform his duty because of the insufficiency of his appropriation. The court, through Judge Lockwood, said:

> "If it be necessary, * * * * * * * to exhaust the appropriation for that purpose, so that other matters arising at a later date cannot properly be taken care of, he should perform the instant

> duty with the utmost economy consistent with efficient service, and leave to the proper authorities of the state, to wit, the Governor and the Legislature, to determine whether it is necessary at a later time to provide him with additional funds.
> * * * * * * * * * * * * * * * * * * *"
> (Underlining ours.)

In Wiggins v. Kerby, 38 Pac. (2d) 315, an earlier decision by the same court, it is said:

> "* * * * * * * * * * * * * * * * * * *
> When there are charges fixed by general law against an appropriation of this kind, such, for instance, as the salary of the head of an office or department, they should be deducted from the total and the balance used to pay the legal and necessary obligations of the office as they arise until the appropriation is exhausted. In planning how the appropriation should be spent he should, of course, use his best efforts to reduce the expenses of administering his office to such a point that the appropriation will cover the cost of all the necessary duties thereof, but in any event the obligations so incurred must be paid from the appropriation in the order in which they arise, no matter what effect such action may have in exhausting the appropriation.'"

The ruling in the above cases is that a public official cannot refuse to perform his duty because his appropriation would be depleted to such extent that he would not be able to function for the entire period covered by the appropriation, and this rule, we believe, applies in the instant case.

We are aware that in the case of State ex rel. Breen v. Vanjord, 92 Pac. (2d) 273, 108 Mont. 447, the Supreme Court of Montana held that the State Board of Public Welfare could reduce the payments to old age pensioners below the sum fixed by the statute because of the inadequacy of the appropriation to cover payments for the whole biennium. A reading of that opinion discloses that the three judges who concurred in the majority opinion did so because the payments from the Federal government were to be made quarterly and, therefore, since the State aid was to conform with the Federal requirements that it was intended that a payment should be made every quarter of the year. It will be noted that a strong dissent was filed by two judges in this case. It therefore appears to us that since the duty imposed upon the superintendent of the state hospital is to provide for the care and treatment of insane patients and since he can discharge said patients only for a reason connected with their mental condition, that the fact that there is not sufficient appropriation to feed and maintain said patients for the entire biennium is no reason to discharge any of said patients, but that he must provide for their maintenance as long as the appropriation lasts.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

AO'K:CP APPROVED:

_____
Attorney-General

COUNTY BUDGET LAW: County court in counties not under township organization can purchase road machinery and pay for construction and maintenance of roads out of Class 6 under certain conditions.

April 28, 1942.

H-30

Honorable Alvin H. Juergensmeyer
Prosecuting Attorney
Warrenton, Missouri

FILE 46

Dear Sir:

This will acknowledge receipt of your letter which reads as follows:

> "Some time ago I wrote you concerning an opinion as to whether money out of the general revenue fund could be used for maintenance of roads. On February 23d I received a letter from John E. Taylor, Assistant Attorney-General, enclosing copy of an opinion written to Leo J. Harned, Prosecuting Attorney of Pettis County, Missouri, holding that the County Court would not have authority to expend money out of Class 6 for road and bridge in special road district.
>
> "I am inclined to concur with the opinion relating to special road districts, but under our budget law money may be expended out of Class 6 for any legal purposes.
>
> "Our County Court has about $10,000.00 on hand after supplying the needs of classes 1 to 5 inclusive, which was placed in Class 6. Our question is:
> 1. May the County Court expend money out of Class 6 for road equipment?
> 2. May the County Court expend money out of Class 6 for maintenance of roads?
> 3. May the County Court expend money out of Class 6 for construction of new roads?"

What is said in this opinion is not intended to apply to counties under township organization nor to roads in special road districts.

Section 10911 of the County Budget Law as amended at page 650, Laws of Missouri, 1941, reads in part as follows:

> "Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

From your letter we understand that your county court has provided for the first five classes of expenses called for by the budget law and that there is actually cash on hand sufficient to pay all claims in said five classes. That being true, the surplus in Class 6, under the foregoing provision of the budget law, may be spent for any lawful purpose. To answer your inquiry therefore we must determine whether the purposes for which your county court is contemplating expenditure of money from Class 6, are lawful purposes. In other words, is it lawful for the county court to purchase road equipment, to maintain roads and to construct new roads? We turn to the statutes for the answers.

Section 8475, R. S. Mo. 1939, provides how the expenses for establishing a new road shall be paid. It provides in part as follows:

> "* * * If the court finds it necessary to establish said road at the expense of the county, or if it be found necessary to establish same

> either wholly or partly at the expense of the petitioners and said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands, then, in either event, the court shall make an order directing the county highway engineer, within sixty days thereafter, to view, mark out and survey such road, take all relinquishments of the right of way of those who will give the same, and take the names of all owners of land, through which said road may run, and who have not given or will not give the right of way, and the amount of damages claimed by each one separately, together with a description by section and subdivision thereof of the lands of each owner sought to be taken, and also the engineer's estimate of the cost of bridges, culverts and grading that may be necessary upon such road, and shall report his proceeding in the premises, together with his survey and plat of said road, to the court within the time last above provided. If it shall appear form said report that the right of way has been secured, and deeds therefor filed, or that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners as aforesaid, or both, the court shall order the road established. * * * * *."

Section 8478, R. S. Mo. 1939, reads as follows:

> "If none of the parties in interest file exceptions to the report of the commissioners within the time fixed by the next preceding section, the county court shall retain jurisdiction of the

> cause, and at its first sitting thereafter the court shall pay the damages awarded, or if the court refuses to pay them, and the petitioners pay them, the court shall order the road established, and said order and the report of the highway engineer thereon shall be recorded by the clerk of the county court in a book to be provided and kept for that purpose."

Section 8486, R. S. Mo. 1939, gives the right of eminent domain to counties to condemn private property for public road purpose, including land, earth, stone, timber, rock quarries or gravel pits. Said section also provides a method of ascertaining and determining the amount of the compensation to be paid the property owner in the event the county court and the property owner are unable to agree on the amount of damages.

From the foregoing sections we believe it is clear that the law authorizes county courts to pay for the establishment of public roads and therefore the establishment of public roads is a lawful purpose for which county funds may be expended.

Article 3, Chapter 46, R. S. Mo. 1939, provides for the maintenance of public roads. The maintenance so provided is through road overseers who are appointed by the county court and who report to the county court as to their work. Section 8526 of said article authorizes the county court to levy a tax for a road and bridge fund, which said revenue is also by Section 8513 directed to be used by the county court "for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for as well as all other roads and bridges in such county." Likewise, Section 8527 of said Article 3 provides a special tax, the revenue from which (outside of special road districts) is directed to be placed to the credit of the county road and bridge fund and to be used "in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; * * *."

Article 9 of Chapter 46, R. S. Mo. 1939, sets out the duties of the county highway engineer. A reading of this article clearly shows that the county courts have the supervision over the maintenance of public roads of the county. Section 8681 of said article also clearly contemplates that the county will purchase tools, material and machinery for the maintenance of such roads. Furthermore, it is well established that where power is granted to an officer of the state to do a certain thing, by implication all authority that is necessary to make such powers effective is conferred. The rule was stated as follows in the case of State ex rel. v. Hackmann, 276 Mo., l. c. 116:

> "* * But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication. (Hannibal, etc., Railroad v. Marion Co., 36 Mo. 303; Walker v. Linn Co., 72 Mo. 650; Sheidley v. Lynch, 95 Mo. 487.) * * "

It must follow therefore that since the statutes authorize the county courts to construct and maintain roads, such courts have by implication authority to purchase whatever tools and machinery are necessary to construct and maintain such roads.

From all of the above we conclude that the construction and maintenance of roads and the purchase of equipment to accomplish said purposes are all lawful functions of the county court whenever there are available funds for said purposes.

Conclusion

It is, therefore, the opinion of this Department that where a county court has provided for the first five

classes of expenses called for under the budget law and actually has on hand sufficient cash to pay all claims in said five classes, such county court may expend from Class 6 of the budget money for the purchase of road equipment and for the expenses of constructing and maintaining roads (outside of special road districts and in counties not under township organization).

Yours very truly

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:EG

BLIND PENSIONS: Eligibility for pension determined as of date of hearing.

- -

May 26, 1942

6-2

Mrs. Lee Johnston
Chief Investigator
Missouri Commission for the Blind
102 State Capitol Building
Jefferson City, Missouri

FILE
46

Dear Mrs. Johnston:

Under date of May 14, 1942, you wrote this office requesting an opinion upon the following question:

> "Kindly render an opinion on the following question. In a case where an application for a blind pension was made more than a year ago, and the income for the twelve months prior to the date of application was less than Six Hundred Dollars ($600.00), but for a period of twelve months since application was made, income has been more than Six Hundred Dollars ($600.00), would the applicant be eligible to receive a pension for a period after date of application when income had not reached Six Hundred Dollars ($600.00) per year, and, therefore, be stricken as of the date that income did reach this amount?"

The answer to the question seems to be supplied by the case of Dahlin v. Missouri Commission for the Blind, reported in Vol. 262 S. W. at page 420 and following. In this case the Springfield Court of Appeals had before it the question of the time at which the vision of the pension

applicant should be determined. In ruling upon the question the court spoke as follows, at l. c. 421:

> "Having disposed of the question of jurisdiction, we are brought to the merits. The question is raised as to the time at which the extent of vision of the applicant is to be determined. Is it the day of filing the application, or the date of the examination by the oculist, or the date the application is passed on by the commission, or the date of the trial in the circuit court on appeal from the commission? The first authoritative determination of the facts is made when the commission passes on the application. We see no reason why the commission should be bound to any date prior to the date of its determination. While the statute provides that the beginning of the pension shall be from the filing of the application, it is apparent that changes in the condition of the applicant as to any of the qualifications necessary to entitle a party to a pension might take place after the filing of the application which change might prevent its allowance.
>
> "In addition to the question of the degree of sight possessed by the applicant, there are property and other qualifications. An applicant might not be subject to any of these disabilities when the application was filed, or when examined by the oculist, but might be subject thereto when the application is passed on by the commission. In that event, the commission ought, and we think could, under the law, re-

ject the application. Some one or more of these disabilities might be present when the application is filed, but not present when passed upon by the commission. In that event, it would seem that as to the commission the condition at the time of the hearing before the commission should be the proper date at which to determine the facts as to the eligibility of the applicant. Suppose, on the evidence sent to the commission by the probate judge, it should appear that the applicant was eligible, but the commission should learn of other testimony which would show the applicant not eligible. We think that on proper notice to the applicant the commission could secure the attendance of witnesses, and hear further testimony, or, if they should think it advisable, require further examination by approved oculists before passing upon the application. We see no reason why the circuit court could not follow the same course. Our conclusion is that the condition of the applicant at the time of the hearing is to govern, and this applies to both the commission and the circuit court."

(Underscoring ours.)

In the case about which you inquire, the applicant apparently did not have an income in excess of $600.00 for the twelve months preceding the date of the application. However, your letter indicates that for the twelve months prior to the passing upon the application by the Commission the income of the applicant had been in excess of $600.00. Section 9451, R. S. Mo. 1939, provides that no person who has an income, or, is the recipient, of $600.00 or more per annum shall be entitled to receive a blind pension.

CONCLUSION

Inasmuch as the applicant had an income in excess of $600.00 for the twelve months preceding the date of action by the Commission for the Blind, under the rule announced in the Dahlin case, supra, the applicant would not be entitled to a pension for any portion of the time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

BLIND PENSIONS: Money received by applicant in settlement of fire insurance, life insurance or Workmen's Compensation claims should be considered as property instead of income.

June 9, 1942

6-10

Mrs. Lee Johnson
Chief Investigator
Missouri Commission for the Blind
162 Capitol Building
Jefferson City, Missouri

FILE 46

Dear Mrs. Johnson:

Under date of May 27, 1942, you wrote this office requesting an opinion as follows:

> "Is money received in an insurance settlement to be considered as income or property?"

There are so many different varieties of insurance, and the field covered by your question is so broad, it is exceedinly difficult ro furnish an opinion on the subject. There is fire insurance, life insurance, workmen's compensation insurance, health insurance, accident insurance and unemployment insurance. This opinion will be written to treat of fire insurance, life insurance and workmen's compensation insurance as these are, in all probability, the form of insurance payments with which you will be confronted. In the event a question arises as to the settlement of any other type of insurance, it is suggested this office be asked for an opinion setting out the facts in each case.

As you are aware, Section 9451, R. S. Missouri, 1939, which contains the income proviso does not define income. This office, in a previous opinion, has undertaken to define income as used in this section as net income which may be used for the support of the applicant.

No case has been found wherein the question has been determined as to whether insurance proceeds should be con-

sidered as income or capital, where the word income is used, as in Section 9451. There have been numerous decisions on the question for income tax purposes. But, in the income statutes specific provision is made for deducting the proceeds of certain types of insurance. For example, the Missouri income tax statute, Section 11348, is in part as follows:

> "The following income shall be exempt from the provisions of this article: (1) the proceeds of life insurance policies paid to the individual beneficiaries upon the death of the insured, (2) the amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term of at the maturity of the term mentioned in the contract or upon the surrender of the contract; any amount received under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, * * * * * * * * * * * * * * * * *."

The Federal income tax law also authorizes deducting certain types of insurance payments from income to be taxed. The following brief quotation is quite interesting, it is copied from the case of United States v. Supplee-Biddle Hardware Co., 265 U. S. 189, 68 L. Ed. 970, l. c. 974:

> "It is earnestly pressed upon us that proceeds of life insurance paid on the death of the insured are in fact capital, and cannot be taxed as income under the 16th Amendment. Eisner v. Macomber, 252 U. S. 189, 207, 64 L. ed. 521, 528, 9 A.L.

R. 1570, 40 Sup. Ct. Rep. 189; Merchants' Loan & T. Co. v. Smietanka, 255 U. S. 509, 518, 65 L. Ed. 751, 755, 15. A.L.R. 1305, 41 Sup. Ct. Rep. 386. We are not required to meet this question. It is enought to sustain our construction of the act to say that proceeds of a life insurance policy paid on the death of the insured are not usually classed as income.

"Life insurance in such a case as the one before us is valid, and is not a wagering contract. There was certainly an insurable interest on the part of the company in the life of Biddle. Mutual L. Ins. Co. v. Board, A. & Co., 115 Va. 836, L.R.A. 1915F, 979, 80 S. E. 565; Keckley v. Coshocton Glass Co., 86 Ohio St. 213, 99 N. E. 299, Ann. Cas. 1913D, 607; Mechanics Nat. Bank v. Commins, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191; United Security L. Ins. & T. Co. v. Brown, 270 Pa. 264, 113 Atl. 445. Life insurance in such a case is like that of fire and marine insurance, -- a contract of indemnity. Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. Ed. 370, 9 Sup. Ct. Rep. 41. The benefit to be gained by death has no periodicity. It is a substitution of money value for something permanently lost, either in a house, a ship or a life. Assuming, without deciding, that Congress could call the proceeds of such indemnity income, and validly tax it as such, we think that, in view of the popular conception of the life insurance as resulting in a single addition of a total sum to the resources of the beneficiary, and not in a periodical return,

such a purpose on its part should be express, as it certainly is not here."

Section 9451, R. S. Missouri, 1939, referred to above, is in part as follows:

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand ($5,000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property to the value of five thousand ($5,000.00) dollars or more, * * * * * * * * * * *."

This section recognizes a distinction between income and property or capital.

In the case of State ex rel. v. Revelle, 257 Mo. 529, the Supreme Court approved the following language concerning a contract of insurance at l. c. 535:

> "The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss. (1 May on Insurance, secs. 1, 2, and 43; Duff v. Fire Ass'n., 129 Mo. l. c. 465; State v. Phelan, 66 Mo. App. l. c. 558.) * * * * * * * * * *."

In Funk & Wagnall's New Standard Dictionary is found the following definition of the word "indemnify."

> "(1) To compensate for loss or damage;"

In the case of Phoenix Ins. Co. 27 N. W. Reporter, the following definition of a fire insurance contract is found:

> "A policy of fire insurance is a contract of indemnity. By such a contract the insurer agrees to compensate the assured for losses by fire of certain property for a given time. The existence of such contract gives the insurer an insurable interest in the property insured, coextensive with its liability. * * * * *."

In the case of In Re Thompson's Estate, supra, is the following brief definition of both fire and life insurance, l. c. 535:

> "'Insurance,' as generally understood, is agreement to indemnify against loss in case property is damaged or destroyed by fire, or to pay specified sum on the death of the insured, or on his reaching a certain age. * * * * * * * * * * *."

And, under the Workmen's Compensation Act, of Missouri, in the case of Graf v. National Steel Products Co., 225 Mo. App., 702, we find the following brief statement of what the compensation is based on, l. c. 703-04:

> "If our law is to be given the construction contended for by defendants, then the cases cited by them might be in point. But defendants misconstrue the theory of our law, which is based upon disability due to the loss of a member or part of a member or function and not upon dimunition of earning power by reason of the loss of function. (Lynch v. Gleaner Combine Harvester Corp., 17 S. W. (2d) 554, 556; Betz v. Columbia Telephone Co., 24 S. W. (2d) 224.) * * * * * * * * * * *."

Each one of these three types of insurance, then, is to compensate for a loss.

In the case of Diefendorf v. Gallet, 10 Pac. 307, is the following definition of income:

> "'Income' is defined as something derived from property, labor, skill, ingenuity, or sound judgment, or from two or more of them in combination. Diefendorf v. Gallet (Idaho) 10 P. (2d) 307, 310."

While the proceeds of an insurance claim in any of the three above types of insurance would be money coming in and under the broad definition of income, as everything which comes in, might be considered as income. Yet, they merely compensate the person for the loss of something of value. The fire insurance payment pays for the lost home or furniture; the life insurance pays for the loss of life of some person in whom the beneficiary had an insurable interest; and the compensation insurance pays for the loss of a member or loss of ability to function.

CONCLUSION

It is, therefore, the opinion of the writer that the proceeds of the three types of insurance, when paid in a lump sum, should be considered as property and not income for the purpose of determining the eligibility of a person for a blind pension. Further, in this connection, it is suggested, if, in the future, a question arises as to the eligibility of an applicant for a pension, due to receipt of an insurance settlement, all the facts be laid before this office, as there are so many different types of insurance and such a variety of insurance contracts.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

WOJ/rv

BLIND PENSIONS: Combined income of blind applicant and sighted spouse in excess of $600.00 does not destroy eligibility of applicant where neither has income in excess of $600.00 per annum.

- - - - - - - - - - - - - June 9, 1942 - - - - - - - - - - - - - - - - -

6-10

Mrs. Lee Johnson
Chief Investigator
Missouri Commission for the Blind
102 Capitol Building
Jefferson City, Missouri

FILE 46

Dear Mrs. Johnson:

Under date of May 14, 1942, you wrote this office requesting an opinion as follows:

> "Kindly render an opinion on the following question. In investigating the amount of income received by the blind pensioner or applicant or his sighted spouse, should a total of Six Hundred Dollars ($600.00) or more as joint income, be the basis for disallowing or striking a person from the rolls, or should the blind pensioner and his spouse each be entitled to an income up to Six Hundred Dollars ($600.00)?"

It is our understanding the question relates to the total combined income of the blind person and the sighted spouse, and this opinion is written on that assumption.

Section 9451, R. S. Missouri, 1939, contains the income limitation referred to in your letter. This section is in part as follows:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten

> consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provisions of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand ($5,000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property or an interest in property to the value of five thousand ($5,000.00) dollars or more, * * * * * * * * * * *."

It will be observed the statute makes no mention of the combined income of a blind applicant and a sighted spouse. And from this section of the statute the answer to your question must be determined.

It is a primary rule of statutory construction that the intention of the Legislature should be sought for and given effect. Graves v. Purcell, 85 S. W. (2d) 543, and this should be done from the words used, if possible, unless the intention is in conflict with the Constitution. In re Costello's Estate, 92 S. W. (2d) 723. The Constitution, Article IV, Section 47, merely authorizes the Legislature to provide pensions for deserving blind persons. So the

entire matter is left to the Legislature. State ex rel. v. Thompson, 317 Mo. 903.

In Section 9451, supra, there appears to be some conflict. It authorizes the payment of a pension to certain blind persons, it next, by a proviso, limits the payment to persons who have an income in excess of Six Hundred Dollars ($600.00) per annum. This would indicate it was apparent - by the thought of the lawmakers - that six hundred dollars ($600.00) per annum at least would be required to adequately maintain one person. This is followed by a further proviso which prohibits the payment of a pension to a blind person living with a sighted spouse, when the sighted spouse has an income in excess of six hundred dollars ($600.00) per annum. At no place is the combined income of a blind person and a sighted spouse mentioned.

By Section 655, R. S. Missouri, 1939, in interpreting statutes, words in ordinary usage, are to be given their ordinary meaning. The words used in this section are all words in common use, and no assistance can be derived from any technical words used in the section.

Another rule of statutory construction to which attention is directed is the object and purpose of the statute must be kept in mind. White v. Greenlee, 85 S. W. (2d) 21. The object and purpose of this section under the constitutional grant of authority is to grant to deserving blind persons a pension or gratuity from the state in order that they may be properly maintained.

A further rule of interpretation is that laws are presumably passed in a spirit of justice and for the welfare of the community and that they should be interpreted to further that purpose and attain that end. City of St. Louis v. Brandis Coal Co., 137 S. W. (2d) 668.

Also, in construing a statute, the court will adopt the meaning most in accord with the purpose of the statute. O'Malley v. Continental Life, 75 S. W. (2d) 837.

The intention and object of the law was to grant to blind persons, without sufficient means, assistance from the state, in order that they might be adequately maintained; the amount granted is small, Twenty-five Dollars ($25.00) per month; and at no place is there contained any provision prohibiting the giving of a pension to a blind person otherwise qualified when the combined income of such blind person and the sighted spouse exceeds Six Hundred Dollars ($600.00) per annum, and neither alone has an income in excess of this amount. Had it been the intention of the Legislature to prohibit the payment of a pension under such a condition, a further proviso could have been included quite easily when the law was passed.

CONCLUSION

From the foregoing it is the conclusion of the writer that a blind person living with a sighted spouse, if neither the blind person nor the sighted spouse has an income in excess of Six hundred Dollars ($600.00) per annum, although the combined income of the couple would exceed the sum of Six Hundred Dollars ($600.00) per annum, would be eligible to receive a blind pension.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ/rv

ADMINISTRATION: Creditor of deceased person may make application for refusal of letters of administration when the amount of deceased's estate does not exceed $100.00.

June 24, 1942

6-75

FILED
46

Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

Your letter of June 22, 1942, requesting an opinion from this office has been assigned to me. Your letter, omitting caption and signature, reads as follows:

> "At the State School at Marshall, Missouri, we had an employee named Oscar Trower, who became sick on the night of May 30th and died on May 31st. His check for the month of May, dated June 1st, reached the School a few days later. Undoubtedly the man earned his full month's salary for May. He seems to have no immediate relatives, and the undertaker wants the Steward to turn this $45.00 check over to him. We see no way this can be done without a court order. The undertaker says the Probate Court has given him an order refusing administration.
>
> "Just what is our procedure?"

For the purposes of this opinion we are assuming that there are not any other debts of the decedent except that of the undertaker and that there are no immediate relatives, as you stated, claiming the check which was the property of Oscar Trower.

In dealing with matters of this kind Section 2 of House Bill 465 of the Laws of Missouri, 1941, at page 289, provides as follows:

> "Letters Not Granted--When--The Probate court, or judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration in the following cases: first, when the estate of the deceased is not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years: second, when the estate of the deceased does not exceed one hundred ($100.00) dollars and there is no widower, widow or children under the age of eighteen years, any creditor of the estate may apply for refusal of letters by giving bond in the sum of one hundred ($100.00) dollars, said bond to be approved by the probate court or judge thereof in vacation, conditioned upon such creditor obligating himself to pay, so far as the assets of the estate will permit, the debts of the deceased in the order of their preference. Proof may be allowed by or on behalf of such widower, widow, minor children or creditor before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, or that the estate does not exceed one hundred ($100.00) dollars when application is made by a creditor, the court or judge may order that no letters of administration shall be issued on such estate, unless, upon the application of other creditors or parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow, minor

> children or creditor shall be authorized to collect and sue for all the property belonging to such estate; if a widower, widow or creditor, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suit; provided also, that the widower, widow or minor children under the age of eighteen years may retain the property belonging to such estate and the creditor shall apply the proceeds thereof to debts of the estate in the order in which demands against the estate of deceased persons are now classified and preferred by law. Provided further, that any person who has paid the funeral expenses or other debts of deceased shall be deemed a creditor for the purpose of making application for the refusal of letters of administration under this section and be subrogated to the rights of such original creditor."

As can be seen from the above section, where a person dies leaving no widow or minor children under the age of eighteen, any person who has paid the funeral expenses of the decedent may make application for the refusal of letters of administration. There is a further provision that if a person makes such application that before the refusal of the letters of administration is made it is necessary that the creditor give bond in the sum of One Hundred Dollars where the estate of the decedent does not exceed that amount.

From your letter it appears that the only estate that the deceased, Oscar Trower, had was a Forty-five Dollar check payable to him from the State. If the creditor or undertaker has made application for the refusal of letters

of administration and in conformity to the statute has posted a bond in the sum of One Hundred Dollars and the court has granted a refusal of letters of administration to him, it is our opinion that the check in the amount of Forty-five Dollars should be turned over to such undertaker or creditor. Further, we feel that the order of the Probate Court granting a refusal of letters of administration is a "court order" and that the steward is authorized under such court order to turn the Forty-five Dollar check over to the said undertaker or creditor.

Conclusion

It is the conclusion of this Department that any creditor who obtains a refusal of letters of administration in an estate not exceeding One Hundred Dollars and who posts a bond in the amount of One Hundred Dollars, is entitled to the assets of the decedent's estate where there is no widow or minor children under the age of eighteen years.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

BLIND PENSIONERS: Applicant not living with spouse who has income in excess of six hundred ($600.00) dollars is entitled to pension.

July 8, 1942

7-10

FILED
46

Mrs. Lee Johnston
Missouri Commission for the Blind
102 State Capitol Bldg.
Jefferson City, Missouri

Dear Mrs. Johnston:

This will acknowledge receipt of your letter of June 13, 1942, in which you request an opinion as follows:

> "Kindly render an opinion on the following question. We have a situation in St. Louis of a blind applicant who is separated from his wife. They have two children who are being cared for at the Farmington Orphans' Home, and for whom the brothers pay expenses.
>
> "This applicant has a wife, from whom he is separated, who is employed as a teacher for $80.00 per month in Womack, Missouri, for eight months of the year. She lists her two children as partial dependents, and states that she is unable to maintain her blind husband because of debt.
>
> "Does having a separated wife, who is earning more than $600.00 per year, render an applicant ineligible from the standpoint of income? We have her statement that she is not maintaining him.
>
> "This applicant is employed at the Industrial Aid for the Blind, and was maintained in the Jewish Hospital in St. Louis from August, 1940, to December 26, 1940, receiving free care

while there. His application was filed on November 20, 1940. I understand that according to the law, should his eligibility be proven, he would be ineligible from November 20, 1940, to December 26, 1940, while he was being maintained in this institution."

In Section 9451, Article 1, Chapter 54, R. S. Mo., 1939, the class of persons who are eligible to receive a blind pension is defined. This Section also contains the following proviso:

"* * * * * Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand ($5,000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property or an interest in property to the value of five thousand ($5,000.00) dollars or more, * * * * * * * * * * * * * * *" (Underscoring ours.)

It is noted in your letter that the applicant is separated from his wife. Under such a set of facts the foregoing quotation from Section 9451 should govern the allowance of the blind pension.

CONCLUSION

It is the opinion of this writer that if

the investigation made by the Missouri Commission for the Blind reveals there has been a bona fide separation of this couple, then the blind husband would be entitled to receive a blind pension by otherwise qualifying.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WOJ:FS

TRUST AND TRUSTEES: The income from the Elias and
STATE SCHOOL NO. 2 Amelia C. Perry Memorial fund
AT CARROLLTON, MO.: should be paid to the Board of
Managers of the State Eleemosynary
Institution.

- -

July 31, 1942

FILED
46

8-5

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of July 16th, 1942, in which you request an opinion, as follows:

> "Enclosed please find copy of an endowment gift to the Children's Home, Carrollton, Missouri. As you undoubtedly know, this Children's Home was first under the State Board of Charities and Corrections; it was then placed under the Board of Managers of the Eleemosynary Institutions; it was next placed under Social Security, and at the last session of the Legislature abandoned by Social Security and designated as School No. 2 of the Feebleminded and Epileptic School at Marshall, as part of that School, and again placed under the Board of Managers of the Eleemosynary Institutions.
>
> "These buildings are now occupied by girls and boys who are feebleminded, and are sent to the No. 2 School at Carrollton from the feebleminded school at Marshall.

> "Under the terms of this endowment gift are the children at Carrollton entitled to the benefits of this gift? We understand that the original of this instrument is with the Trustee of the fund, and it is our understanding that he would like to have an opinion, and the Board of Managers would like to have an opinion, as to whether they can accept the interest for the benefit of the children now at the Carrollton School."

By the Laws of 1921, page 89, the General Assembly of Missouri established an institution to be known as the State Home for Children. The stated purpose of the institution is set forth in Section 1 of the Act as follows:

> "There is hereby established an institution to be known as the state home for children. The purpose of said home shall be to provide for neglected and dependent children a temporary home that will furnish for them, pending placement in permanent family homes, proper care and instruction. Said care and instruction shall be such as to develop the children while in said home mentally, morally and physically and train them in the industrial arts."

It was provided by the act that the home be under the management and control of the State Board of Charities and Correction and it was further provided that the Board provide a suitable location and the necessary buildings to take care of the children sent to such home under the provisions of the statute. It was also provided that only children under seventeen years of age who were dependent on the public for support, abandoned, neglected or ill

treated and who were of sound mind should be received into the home. It was provided that all commitments to said home should be made by the juvenile courts of the child's residence.

All of the provisions of the Act of 1921 were carried into the revision of 1929 as Article 4, Chapter 125, Sections 14095 to 14110, inclusive, without any changes. The home provided for therein was located at Carrollton, Missouri.

Section 14096, R. S. Mo. 1929, was repealed by the Laws of 1933, page 189, and the control and management of the home was placed in the hands of the Board of Managers of the State Eleemosynary Institutions, and all the powers and duties that were possessed by the State Board of Charities and Corrections were given to the Board of Managers of the State Eleemosynary Institutions, as provided in a new section, 14096a.

By the Laws of 1937, page 468, Sections 14096 and 14096a, as enacted by the Laws of 1933, were repealed and the State Social Security Commission was given the power to supervise and manage the State Home for Children. Thereafter, by the Session Acts of 1939, page 272, Section 14097, R. S. Mo. 1929, empowering the State Board of Charities and Corrections to select a proper location for the State Home for Children, was repealed. Finally, the whole of Article 5, Chapter 56, R. S. Mo. 1939, relating to the State Home for Children at Carrollton, was repealed by Laws of Missouri 1941, page 320, and there was enacted in lieu thereof two new sections to be known as Sections 9634 and 9635, establishing an institution to be known as the Missouri State School No. 2, and to be used in connection with the Missouri State School at Marshall, Missouri, as a colony for feebleminded and epileptic children, and the management and control of all the grounds and properties now used by the "State Home for Children" at Carrollton, Missouri, was to be transferred to the Board of Managers of the State Eleemosynary Institutions for the use of said Missouri State School No. 2.

With this brief history of the State Home for Children, we come now to the question requested in your letter. Accom-

panying your letter of request is a copy of the instrument creating the "Elias and Amelia C. Perry Memorial Fund." We will not set forth the trust agreement in its entirety but only such portions as we deem pertinent to the question. The instrument is designated as "Endowment Gift" and was executed December 26, 1923, at the height of the Christmas season, and created a trust with the First National Bank at Carrollton as trustee, placing in the hands of the trustee a three thousand dollar note, which has, at this time, been changed to cash and other securities, for the following purpose:

> "To establish a permanent endowment fund to be known and designated as the 'Elias and Amelia C. Perry Memorial Fund', to be held perpetually in trust as an endowment for the benefit of the children that are now or may hereafter be in the Childrens Home, (Established by the State of Missouri) at Carrollton, Missouri, or under its care, control or custody.
>
> "Said fund to be loaned or securely invested by said Trustee so as to yield a fair return thereon, always keeping foremost in mind the security of the corpus of said Trust Fund.
>
> "The income (and the income alone) from said Trust Fund shall be used and expended by said Trustee for the benefit of the children who are now, or may hereafter be in the said Childrens' Home, or under its care, control or custody, and for the Home itself. Such expenditures of said income shall be made at the sole discretion of the said trustee. However, I know that the said Trustee will consult with the State Board of Charities and Corrections, now in control of said Home, or with the authorities that may hereafter be in charge and control thereof, as successor or successors to said State Board of Charities and Corrections."

We think, without doubt, by the terms of this instrument that it creates a charitable trust. In 10 Am. Jur., Section 4, page 587, a charitable trust is defined as follows:

> "* * * Any trust coming within the definition of a legal charity for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor and constituting some portion or class of the public is a charitable trust. It has been said that a charitable trust, in a legal sense, is one which originates from the gift and which limits property to any public use to which it is lawful to devote property forever. * * * * * * *"

At the time the trust was created by the donor in 1923, the Home at Carrollton, Missouri, was used as a temporary home for neglected and dependent children and was under the supervision of the State Board of Charities and Corrections. At the present time the lands and property formerly used as a home for children are used as a colony for feebleminded and epileptic children from the Missouri State School, and is designated as Missouri State School No. 2. It is under the control of the Board of Managers of the State Eleemosynary Institutions. We understand from the inquiry from the Board of Managers of the Eleemosynary Institutions that the children now at the home are children who heretofore had been sent to the Missouri State School at Marshall, Missouri. Both the original Home for Children at Carrollton, Missouri and the present State School No. 2 are operated and supported by the State.

Your question, as we understand it, is whether there has been such a failure of purposes of the charitable trust created by Mr. Perry that there is a reverter to the donor or his heirs, or, what now becomes of the corpus of the trust fund and the income derived therefrom. Without a

general discussion of the cy pres doctrine, we think that it should be applied in this case and the income be used for the benefit of the children now in the Missouri State School No. 2 at Carrollton. Briefly, cy pres means:

> "Cy pres means 'as near to,' and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter."
>
> 14 C. J. S., Sec. 52, page 512.

The meaning of the doctrine of cy pres is further stated in the same section as follows:

> "* * * The meaning of the doctrine of cy pres is that when a definite function or duty to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced, and the reason or basis for the doctrine is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter."

Our opinion is based somewhat on one of the leading cases in Missouri on charitable trusts, Thatcher v. Lewis, 335 Mo. 1130, 76 S. W. (2d) 677, which pertains to the Bryan Mullanphy Trust in St. Louis, which trust has been the source of much litigation in Missouri and furnishes a great deal of law on the subject of charitable trusts and the cy pres doctrine in Missouri.

CONCLUSION

It is, therefore, our opinion that the trustee is empowered under the terms of the "Endowment Gift" to continue to act as such trustee and to pay the income from said trust fund to the Board of Managers of the State Eleemosynary Institutions for the benefit of children now in or who may hereafter be placed in said Missouri State School No. 2.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

CRH:CP

BLIND PENSIONS: Income should be computed for twelve successive calendar months, not for calendar year.

- -

August 21, 1942

8-28

FILED
46

Mrs. Lee Johnston
Chief Investigator
Missouri Commission for the Blind
102 Capitol Building
Jefferson City, Missouri

Dear Mrs. Johnston:

Under date of August 11, 1942, you wrote this office requesting an opinion, as follows:

> "The question has arisen in the case of several blind pensioners, whose income has increased during recent months because they are working in shops for the blind and on war orders, whether or not the law should be interpreted to mean that at any time during a year a pensioner becomes ineligible, through having earned more than Six Hundred Dollars ($600.00) the previous twelve months and should be stricken, or whether this should be checked by fiscal years."

Section 9451, R. S. Mo. 1939, sets out the qualifications necessary to entitle a person to receive a blind pension. This section also contains the following clause:

> "* * * Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any

source whatever, * * * * * * * * *"

Your question calls for an interpretation of this clause.

The words "per annum" mean by the year, or, through the year. In the rules for construing statutes, Section 655, R. S. Mo. 1939, is the following rule:

> "* * *; third, the word 'month,' shall mean a calendar month, and the word 'year' shall mean a calendar year, unless otherwise expressed, and the word 'year' be equivalent to the words 'year of our Lord; * * * * * * * * * *."

While the word "year" by Section 655, supra, ordinarily means calendar year, it may be interpreted to mean twelve calendar months, not necessarily the twelve calendar months starting January 1, and ending December 31, but any full twelve calendar months running in succession, or 365 days, when the context of the law in which the word is used clearly indicates such an intention on the part of the Legislature in enacting the law. Muse v. London Assur. Corp., 13 S. E. 94; Sims v. City of Bremerton, 66 Pac. (2d) 863; Lane v. Tarver, 113 S. E. 452; In re Stulman's Will, 263 N. Y. S. 197.

Section 9454 R. S. Mo. 1939, contains the following:

> "* * * And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll: * * * * * *"

In the case of Dahlin v. Missouri Commission for the Blind (when appeals were allowed from circuit courts) reported in 262 S. W. 420, the Springfield Court of Appeals, in discussing the time at which the eligibility of a person for a blind pension should be determined, spoke as follows at l. c. 421:

> "Having disposed of the question of jurisdiction, we are brought to the merits. The question is raised as to the time at which the extent of vision of the applicant is to be determined. Is it the day of filing the application, or the date of the examination by the oculist, or the date the application is passed on by the commission, or the date of the trial in the circuit court on appeal from the commission? The first authoritative determination of the facts is made when the commission passes on the application. We see no reason why the commission should be bound to any date prior to the date of its determination. While the statute provides that the beginning of the pension shall be from the filing of the application, it is apparent that changes in the condition of the applicant as to any of the qualifications necessary to entitle a party to a pension might take place after the filing of the application which change might prevent its allowance.
>
> "In addition to the question of the degree of sight possessed by the applicant, there are property and other qualifications. An applicant might not be subject to any of these disabilities when the application was filed, or when examined by the oculist, but might be subject

> thereto when the application is passed on by the commission. In that event, the commission ought, and we think could, under the law, reject the application. Some one or more of these disabilities might be present when the application is filed, but not present when passed upon by the commission. In that event, it would seem that as to the commission, the condition at the time of the hearing before the commission should be the proper date at which to determine the facts as to the eligibility of the applicant. Suppose, on the evidence sent to the commission by the probate judge, it should appear that the applicant was eligible, but the commission should learn of other testimony which would show the applicant not eligible. We think that on proper notice to the applicant the commission could secure the attendance of witnesses, and hear further testimony, or, if they should think it advisable, require further examination by approved oculists before passing upon the application. * * * * * * * * * * * * "

This indicates the condition of the applicant at the time of the determination by the Commission should govern.

CONCLUSION

From the foregoing the conclusion follows that the words "income," and "per annum," as used in Section 9451, should be interpreted to mean twelve calendar months or three hundred sixty-five days and not the calendar year.

Respectfully submitted,

WOJ:CP

APPROVED:

W. O. JACKSON
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

ELEEMOSYNARY INSTITUTIONS: Missouri not responsible for care of patients paroled from institutions in other states to persons in this state.

August 25, 1942

4-78

FILED
46

Hon. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jones:

This is to acknowledge receipt of your letter of August 21, in which you request the opinion of this department. You desire to know whether there is any legal reason why a patient, who has been confined in a mental hospital in another state and who is under a parole from that institution, may not be brought into this state.

Pursuant to your telephonic communication in regard to the above request, you have advised us that a patient is now in a Colorado institution for the insane, and that in accordance with the laws, rules and regulations governing institutions of that state, they desire to parole a patient to persons in another state, or in the State of Missouri. Unless there is some restriction placed on the patient by the authorities of the State of Colorado, the legal residence of the parolee, as to where the patient shall go, we can see no legal reason why such patient cannot come into the State of Missouri. We think, however, that you should have a clear understanding with the Colorado authorities that in the event that there is a recurrence of the mental disorder of the patient, Missouri shall assume no responsibility for the care of such patient and that she is still subject to the jurisdiction of Colorado, and is still their patient.

CONCLUSION

It is the opinion of this department that there is no legal reason why the patient cannot come into the State of Missouri, subject to the limitations mentioned above.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OFFICERS: Acts performed before taking oath of
JUSTICE OF THE PEACE: office are acts of a de facto officer
and valid as to third parties.

- -

September 17, 1942

9-26

FILED
46

Honorable Kelso Journey
Assistant Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Journey:

Under date of May 19th, 1942, you wrote this office requesting an opinion, as follows:

> "You furnished this office an opinion of March 9, interpreting sections 13954 and 13955, R. S., 1939, concerning de facto township officers.
>
> "Upon the township officers' election they subscribed to the statutory oath before a justice of the peace, who was elected upon the same date, but who never qualified as provided by statute. The question now is: 'Was the justice of the peace a de facto officer and was the oath administered by him sufficient to qualify the members of the township board?'
>
> "I would appreciate your earliest attention to this matter."

Your request came to the writer after two previous assignments.

Section 6 of Article XIV of the Constitution of Missouri requires that all officers, both civil and military, under authority of the State of Missouri, shall take and subscribe to an oath. There have been numerous cases

in which the failure of an officer to take the prescribed constitutional oath has been raised.

In the early case of State v. Dierberger, 90 Mo. 369, the question was raised as to the acts of a constable. The Supreme Court went into that question at length at l. c. 374, from which the following quotation is taken:

> "The more difficult question arises from the failure of the defendant to take an oath of office. Here it may be stated that the uncommunicated intentions of the constable had nothing to do with the case, and the evidence in that behalf should have been excluded. The defendant accepted the appointment for what it purported to be, and his right to act as a deputy must be tested by it and the failure to take an oath of office. The statute, section 3887, provides that a deputy sheriff shall file his appointment, with the oath endorsed thereon, with the clerk of the circuit court, and as no such statutory provision is made, either as to the oath or its preservation, with respect to deputy constables, the opinion seems to prevail, to some extent, at least, that the latter are not required to take an oath. But section 6, article 14, of the constitution requires all officers under the authority of the state, before entering upon the discharge of the duties of their respective offices, to take and subscribe an oath or affirmation to support the constitution and to faithfully demean themselves in office. Clearly the deputy constable is an officer under the authority of the state. He should take the oath, and until he does so, he is not an officer de jure; and the further question is, was he an officer de facto.

"In State v. Carroll, 38 Conn. 449, the conclusion among others is reached, that one is an officer de facto, where the duties of the office are exercised under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, or give a bond. So the acts of a justice of the peace were held to be valid as to third persons, though he had not taken an oath which the statute made a condition precedent to his right to act as such. Murgate Pier Co. v. Hannan, 3 Barn. & Ald. 265. The same principle applies in respect to a ministerial officer, as where a deputy constable or sheriff fails to take the oath of office. Lisbon v. Bow, 10 N. H. 167; Merrill v. Palmer, 13 N. H. 184.

"The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference, for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal and valid appointment. The appointment made and constituted him a deputy; and though he failed to take the oath he was an officer de facto. The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers de jure. 21 Am. Dec. 213; 19 Am. Dec. 63, and notes; 50 Mo. 593; 72 Mo. 189."

In the case of Aiken v. Sidney Steel Scraper Co., 197 Mo. App. 673, a question was raised concerning the acts of a circuit judge who had failed to take his oath of office.

From this case the following lengthy quotation is taken, at l. c. 680:

> "However, we would prefer to pass by this mere technical objection and determine the broad question whether the failure to take the oath of office required by the statute is necessary to the legality of action taken by an officer duly elected and commissioned. For, as said above, we take judicial notice that Judge Buckner was elected and we should presume that the governor performed his duty in delivering a commission to him. The oath of office does not make the individual an officer. It merely relates to the manner in which he shall perform the duties of the office. It is perhaps true that were it known that an officer had not taken the oath of office he could be prevented from entering upon its duties generally, or in any particular case, until he had taken that step. It may be that the emoluments of the office could be withheld from him; but the oath is no more than an invocation to God that he will be faithful to the trust reposed in him, and it is not a necessary prerequisite to the validity of his official acts.
>
> "So it is stated to be the law that an oath of office 'is not indispensable, it is but a mere incident to the office and constitutes no part of the office itself.' (Mechems Public Offices, sec. 255.) In Clark v. Stanley, 66 N. C. 59, 60, it is said that, 'Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office "coupled with an interest."

But the oath and the salary or fees are mere incidents, and constitute no part of the office.'

"On the same subject we take the following from 23 Am. & Eng. Encyc. of Law (2 Ed.) 355: 'The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond, as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are as valid as though he were an officer de jure. His title to the office cannot be attacked collaterally, but only by direct proceedings in the nature of quo warranto. The failure to qualify constitutes a ground for ousting him from the office.'

"A failure to qualify by filing a bond when required, does not vacate the office. (State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230.) In Sproul v. Lawrence, 33 Ala. 674, it is said that the election gives the right and invests him with title to the office. And that is the view taken in this State, even the commission being held to be mere evidence of his title.

"From these views it follows, that the fact that Judge Buckner failed to take the required oath of office following his election to the short term, falling between the expiration of his appointment and the beginning of his full term, did not invalidate his official acts taken during that time."

Both of these cases, and several others, hold that where one is duly elected or appointed, but fails to take

the oath of office that person is a de facto officer and his acts are valid as to third persons. The same principle should apply to a justice of the peace.

CONCLUSION

The conclusion follows that the justice of the peace was a de facto officer and the oath administered by him would be sufficient to qualify the members of the Township Board.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri

WOJ:CP

TAX EXEMPTION: Personal property of charitable organizations is not exempt from taxation.

October 20, 1942

10-23

FILED
46

Honorable Ira A. Jones
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this Department on the question of whether or not the "Vernon County Assistance League" is subject to personal property taxes.

From your letter it appears that the "Vernon County Assistance League" is a nonprofit organization formed for purely charitable purposes. It further appears that this corporation functions as a purely nonprofitable charitable organization.

Section 6 of Article X of the Constitution of Missouri provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property,

> real or personal, as may be used exclusively for agricultural or horicultural societies: Provided, that such exemptions shall be only by general law."

Section 10937, R. S. Missouri, 1939, provides, in part, as follows:

> "The following subjects are exempt from taxation:
>
> * * *

In the case of The City of Kansas v. The Kansas City Medical College, 111 Mo. 141, the question of taxation of office furniture and furniture for the medical college not fastened to the building, belonging to the Kansas City Medical College, was before the court for consideration. At l. c. 145, the court said:

> "As will be readily seen, the only question arising upon this record is whether the furniture and appliances used by the defendant in its medical college are subject to taxation. The question is restricted to the personal property of the defendant so used.
>
> "It is conceded that the lot and buildings used for the college are exempt by the general law of the state, but the contention of the city is that the constitution and statute alike limit the exemption to 'the lot with the buildings thereon,' and does not extend to the personal property. * * * * * * * * * *."

After considering the foregoing sections of the Constitution and statutes, the court further said at l. c. 146:

> "* * * So that it only remains for us to determine whether the words, 'the lot with the buildings thereon,' can be construed to include the personal property used in the building and not a part of the realty in law. We are very clear that they do not.
>
> "The evident purposes was to exempt a certain amount of real estate. This is obvious from the immediate context. In the next succeeding clause the exemption of agricultural and horticultural property is extended to both real and personal

> property. Neither the language of the exemption, nor the provisions in pari materia will, in our opinion, admit of any other construction than that we have given it. The purpose is clear to limit the exemption to real estate and to a definite amount."

So, the court in that case held that the personal property of an educational institution was not exempt from taxation. The same principle would apply to the exemption of the personal property belonging to the "Vernon County Assistance League."

CONCLUSION.

Therefore, it is the opinion of this Department that the "Vernon County Assistance League", even though it is a nonprofit organization, and organized for purely charitable purposes, yet under the Constitution and statute it is not exempt from paying personal property taxes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB/rv

COUNTY COURT - OFFICERS: County Court may appoint county treasurer or county collector to prepare financial statement.

November 12, 1942

11-17

FILED
46

Hon. Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 7, 1942, which reads as follows:

> "I should like to have you advise me whether the County Court can appoint the County Treasurer or the County Collector as agent of the Court to prepare the financial statement for the county, as required by Sections 13827 and 13828 Revised Statutes of Missouri, 1939."

Section 13827 R. S. Missouri, 1939, partially reads as follows:

> "On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending Dec-

ember 31, preceding. * * *. At the end of the statement the person designated by the county court to prepare the financial statement herein required shall append the following certificate:

"I ____, the duly authorized agent appointed by the county court of ____ county, State of Missouri, to prepare for publication the financial statement as required by section 13827 of the Revised Statutes of Missouri, 1939, hereby certify that I have diligently checked the records of said county and that the above and foregoing is a complete and correct statement of every item of information required in said section 13827 of the Revised Statutes of 1939 for the year ending December 19__ and especially have I checked every receipt from every source whatsoever and every disbursement of every kind and to whom and for what each such disbursement was made and that each such receipt and disbursement is accurately shown. (If for any reason complete and accurate information is not given the following shall be added to the certificate.) Exceptions: The above report is incomplete because proper information was not available in the following records ____ which are in the keeping of the following officer (or officers). The person designated to prepare the financial statement shall give in detail any incomplete data called for by this act.

Date _____

> "Officer designated by county court to prepare financial statement required by section 13827, Revised Statutes 1939.
>
> "Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following form:
>
> "Clerk of the county court and ex officio officer designated to prepare financial statement required by section 13827, Revised Statutes 1939.
>
> * * * * * * * * * * * * ."

It will be specifically noted in the above partial section, that in setting out the form of the certificate the legislature saw fit to use the term, "designated by the county court" when it referred to who should make the certificate to the financial statement. It further provides that where no one has been designated by the county court, the certificate must be made by the clerk of the county court and ex officio officer designated to prepare financial statement required by Section 13827, supra.

Section 13828 R. S. Missouri, 1939, partially reads as follows:

> " * * * For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, and no pay shall be allowed for pasting a printed copy in the record.
> * * * * * * * * * * * * *

> If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this law he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

The above partial section sets out the compensation to the person who prepares the financial statement. It will also be noticed that in this section, as stated above, the following appears:

> " * * * If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties * * * * * * * * *."

This specific phrase does not say, "other than the clerk of the county court", but says, "other than a bonded county officer to prepare the financial statement * * *." This shows that it was the intention of the legislature not to require a bond from any bonded county officer, but only requires a bond from an individual who has been desig-

nated and employed by the county to make the financial statement. Under this section, the county court may designate and employ any person other than the county clerk, and may employ any bonded county officer such as the county treasurer, and the county collector. The only limitation is that it not require the bond from the bonded county officer that is required of an individual under this section. The county treasurer is under bond, in compliance with Section 13795 R. S. Missouri, 1939. The county collector is under bond in compliance with Section 11056 R. S. Missouri, 1939.

Section 13828 R. S. Missouri, 1939, also sets out a penalty for not complying with the provisions of that section, and specifically says, "If any county officer or other person employed to prepare financial statement * * ." It does not specifically say, "the clerk of this county court", but sets out any county officer. In reading the wordings of the different sections, it appears clearly that it was the intention of the legislature that the county court could designate and employ any individual or any other county officer, and was not required to designate, employ or appoint the county clerk, but, by operation of law, if the county court refused, or failed to employ, appoint or designate any other person to prepare the financial statement, the county clerk was considered the designated officer to prepare said statement.

When the legislature used the words, "if the county shall employ a bonded county officer" and did not say, "county clerk", it was not a use of useless words and it is implied that bonded county officers, other than the county clerk, could be designated. (State ex inf. McKittrick v. Wymore, 132 S. W. (2d) 979.)

When the wording of any statute is plain and unambiguous it needs no construction. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667.)

Hon. Alvin R. Juergensmeyer (6) November 12, 1942

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court can appoint the county treasurer, or the county collector, as agent of the court, to prepare the financial statement for the county, as required by Sections 13827 and 13828 R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION:
Buildings on Leased
Real estate:

Buildings and improvements on leased lands should be taxed as real estate.

February 4, 1942

2-5

FILE
47

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Kamp:

This is in reply to your letter of recent date wherein you submit a question upon the following statement of facts:

"I have a matter up with the County Court of this county relative to delinquent taxes, on buildings which are situated on leased ground belonging to the Wabash Railroad Company.

"The situation is as follows: For many years Blattner Brothers Produce Company of Wellsville, Missouri, owned a large brick building and a large frame building, which they erected as their poultry plant in Wellsville, Mo., which was erected on Wabash Railroad ground, under the provisions of a lease which they had with the railroad company. The buildings have always heretofore, been assessed to the owner of the buildings, as personal property and listed on the personal tax book, and the taxes thereon paid by Blattner Brothers, and the taxes on the lots and ground paid by the railroad company.

"However, the situation changed in 1938, when Blattner Brothers sold the buildings to a party who lived and has always lived in Macon County, Missouri. The property, as I have stated, shows delinquent on the personal tax book of this county for the years, 1938, 1939, 1940 and 1941, and the owner who lives in Macon County, refuses to pay same.

"The question on which I would like to have your opinion, is whether this brick building

> and frame building, for taxation purposes, should be considered as real property, and set up on the real estate tax book and the tax collected from the non-resident owner as real estate tax, or whether this is personal property, and since the owner is a non-resident of this county would not be liable for personal tax in this county.
>
> "My purpose is, that if this is real estate and taxable as such, then we could assess same for the back years, under the provisions of Section 11000, R. S. 1939, and collect the taxes."

From our research on this question, I think that the answer to your question will depend entirely on the definition of the term "real estate". Under some circumstances, the improvements on leased premises may not be considered as real estate. Referring to our tax statute for a definition of the term "real estate", I find that under section 11211 R.S. Mo., 1939, the term "real property" etc., is defined as follows:

> "The term 'real property,' 'real estate,' 'land' or 'lot' wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon, all shot towers and all machinery therewith connected, all smelting furnaces and all machinery therewith connected, all grist mills, sawmills (except portable mills of every description), oil mills, tobacco, hemp and cotton factories, tobacco stemmories, rope walks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass and other foundries, and all rights and privileges belonging or in anywise pertaining thereto, except where the same may be otherwise denominated by this chapter."

This definition of the term "real property" or "real estate", evidentally was intended to make it all inclusive, in other words all rights and privileges belonging or in anywise pertaining to such real estate are included in the term "real estate" or "real property". The parties who own these buildings, which are situated on the railroad property certainly would come within that class, because they have certain leasehold rights. Your letter does not indicate just what those rights are but we think if they have any leasehold rights, such rights may be taxed as an interest in the real estate.

In our research in this question, we find that it has been before our Supreme Court in the case of State ex rel. v. Mission Free School, 162 Mo. 332, 337. In that case the Mission Free School owned certain lands which were exempt from taxes. It leased a portion of these lands to one Thompson, who erected thereon a building worth forty thousand dollars ($40,000). The taxing authorities assessed this land and the building to the Mission Free School. The court in that case held that the assessment should have been made against Thompson, as his leasehold interest might appear. In that case in discussing the question which is similarily here involved, the court said: l. c. 337.

> "In most States the interest of Thompson under a lease like this is real estate, and as our statute provides that the words "real estate" shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. As it is obvious he has not been assessed at all, no judgment can be rendered against him in the present action, but the statute supplies the remedy in such cases."

We also find the rule stated in 61 C. J. page 187 paragraph 150:

> "Except where the rule is changed or modified by statute or agreement, buildings or other improvements constructed upon the land

> of another become part of the freehold for purposes of taxation, may not be taxed to the builder either as realty or as personalty, and become taxable to the landowner as realty, unless the land itself is exempt, in which case the improvements share the exemption as part of the land. However, several interests may be owned by different persons in the same premises and be separately taxable to their respective owners. Improvements may be separately taxable to one other than the landowner where constructed pursuant to an agreement creating an ownership in the improvements separate from the fee, as under a lease providing for ultimate purchase of a building by the lessor, or reserving right of removal by the lessee, or where the fee is subject to easements and the structures sought to be assessed are appurtenant to such easements and not to the fee, or where applicable statutes provide for taxation of specified improvements irrespective of the fee ownership; or under statutes providing for assessment of realty to the person in possession thereof."

The Mission Free School case supra, is the only case which we find in this State, which is in point.

CONCLUSION.

Therefore, it is the opinion of this department that the interest of a lessee in real estate should be taxed as real estate against the lessee.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

TWB:AW

TAXATION: Only goods, wares and merchandise of stock in
MERCHANTS: trade should be included in the merchant's tax
assessment return.

- -

December 10, 1942

12-15

FILED
47

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following request:

> "The County Assessor asked me to write you for an opinion on the following question, concerning the assessment of Merchant's property.
>
> "Where a person in the merchandising business is assessed with the valuation of his stock of merchandise, and who owns automobiles, trucks, and such motor vehicles used in connection with the business, should he be assessed separately with the value of such motor vehicles?"

The statutes which apply to merchants' taxes are 11303 and 11305, R. S. Mo. 1939, which are as follows:

> "Sec. 11303. Who declared to be a merchant. Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."
>
> "Sec. 11305. Tax to be paid. Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and

> merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

In the case of Monett v. Hall, 128 Mo. App. 92, 94, the court, in speaking of the authority of a city to impose a license tax on a business, said:

> "* * * It has been frequently adjudged to be perfectly competent for the State to collect an ad valorem tax on property used in a calling, and at the same time to impose a license tax on the pursuit as a condition to the right to carry it on, * * * *"
>
> (Underscoring ours.)

It will be noted by the underscored portion of this statement that the courts have taken the view that the ad valorem tax may be imposed on property used in a calling. In other words the motor vehicles and fixtures used by a merchant may be taxed under the ad valorem tax act. And, in State ex rel. v. Alt, 224 Mo. 493, 507, the court, in speaking of the merchants' tax, said:

> "* * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay

> an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

By this statement it will also be noted that the court has distinguished between merchandise and other personal property for assessment purposes. In other words, they refer to the merchandise as goods, wares, etc., which is the stock in trade. We do not think that automobiles, trucks, and other vehicles which are used in connection with the merchandise business could be classed as stock in trade.

CONCLUSION

From the foregoing it is the opinion of this department that automobiles, trucks, motor vehicles, etc., used in connection with the operation of a business should not be classed as merchandise and, therefore, should not be returned by the merchant on his merchant's assessment return.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRIMINAL PROCEDURE: Preliminary for grand jury indictment must be had under Section 3774, R. S. Missouri 1939.

January 19, 1942

1-20

FILE 48

Mr. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of January 9, 1942, which is as follows:

> "Recently a man was charged by information with stealing a cow in Dent County, but before the trial, it appears to have been ascertained that the offense, if committed, was committed in Iron County, and the court made an order transferring the case here, and he was recognized to appear at the next term of circuit court in this county.
>
> "Section 3774, R. S. 1939, provides:
>
> "'When it appears at any time before verdict or judgment that the defendant is prosecuted in a county not having jurisdiction of the offense, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county, and recognize the defendant to appear before such court on the first day of the next term thereof, to await the action of the grand jury. The witnesses shall also be recognized to appear at such court, that the prosecution may be proceeded with as provided by law.'
>
> "It is my opinion that as prosecuting

> attorney I can proceed as in other criminal cases without action of a grand jury, and it appears to me that there would be no need of filing a complaint as required in original cases, but could proceed by filing of an information, without going through the process of according the defendant a preliminary examination before a justice of the peace, yet I am not certain about that.
>
> "Please let me have your opinion about the matter."

Section 12 of Article II of the Constitution of Missouri provides as follows:

> "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."

It is very noticeable under the above section that an indictment and an information shall be concurrent remedies.

Section 28 of Article II of the Constitution of Missouri provides as follows:

> "The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law; and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases. And that in the trial by

> jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict. Hereafter, a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill: Provided, however, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime."

As to the presentment of an indictment by a grand jury the rule is stated in the case of The State v. Blunt, 110 Mo. 332, l. c. 337 as follows:

> "Under the construction given by this court in Ex parte Slater, 72 Mo. 102, to sections 12 and 22 of article 2 of the constitution of 1875, an indictment cannot be found in any county but that in which the offense is committed. This ruling was followed by this court, in the subsequent case of State v. McGraw, 87 Mo. 161, holding that so much of section 1691, Revised Statutes, 1879, as authorized the crime of burglary to be prosecuted in a county other than that in which it was perpetrated, was constitutionally invalid. And in State v. Hatch, 91 Mo. 568, a similar ruling was made by this court with respect to the crime of embezzlement being prosecuted by indictment in a county other than that of its perpetration. The Kansas City court of appeals has followed the same line of ruling, by discharging on habeas corpus a person indicted, where the indictment found by the grand jury of Caldwell County showed on its face that the offense, murder, was committed in the county

> of Ray, but within five hundred yards of the boundary separating the two counties mentioned. This indictment was found upon the authority of section 1697, Revised Statutes, 1879, which permitted an indictment to be found in such circumstances in either county. But this section was pronounced unconstitutional on the authority of Ex parte Slater, supra. In the Matter of McDonald, 19 Mo. App. 370."

In the case of The State v. McGraw, 87 Mo. 161, l. c. 163, the court said:

> "It has been repeatedly held by this court that when goods are stolen in one county and are taken by the thief into another county, that he may be indicted and tried in such county. Such indictments are upheld on the distinct ground that each asportation of stolen property from one county to another is a new or fresh theft. State v. Smith, 66 Mo. 61. The grounds, however, on which indictments are sustained, found by the grand jury of a county into which stolen goods are taken by the person who steals them in another and different county, do not apply to the crime of burglary, and so much of section 1691, Revised Statutes, as authorizes a person committing burglary in one county to be indicted and tried for that offence in another county is, under the ruling of this court in the case of Ex Parte Slater, 72 Mo. 106, invalid. It follows from this that the conviction of defendant for burglary was erroneous."

Also, in the case of Ex Parte Slater, 72 Mo. 102, l. c. 107-108, the court said:

> "Reading section 12, article 2, of the constitution, in the light of the well under-

stood meaning of the word indictment at common law as modified by section 28, article 2, of the bill of rights, and it would read thus: 'No person shall, for a felony, be proceeded against criminally otherwise than by an indictment, that is, otherwise than by an accusation at the suit of the State, by the oath of nine men (at least, and not more than twelve), in the same county wherein the offense was committed, returned to inquire of all offenses, in general, in the county determinable by the court in which they are returned, and finding a bill brought before them to be true.'

"If this is the true reading of section 12, supra, (and we cannot perceive how it is susceptible of any other,) it guarantees to every person the right to be exempt from criminal prosecution for a felony except upon an accusation or indictment preferred by a grand jury of the county where the offense was committed, and as the indictment under which the petitioner is held shows upon its face that it was preferred by a grand jury of Scotland county, and charges the offense not to have been committed in said county, but in Clark county, it necessarily follows that defendant cannot be held in custody under it unless section 1804 of the Revised Statutes is effectual for that purpose and authorizes such a proceeding, as the attorney general contends it does. That section is as follows: 'Whenever a felony has been committed in any county, and the grand jury of the county has considered the matter, and failed to find an indictment against the offender, and the same is certified to the judge of the same circuit from the foreman of the grand jury or the clerk of the circuit court of such county, and the judge of such circuit is satisfied that an impartial grand jury can-

not be had in the county where the offense was committed, he shall order the examination of the offense to be had in some county adjacent to the said county, where he believes no such cause exists, but no investigation can be ordered by him, except in one county; and, where an indictment is found in such county, a trial before a petit jury shall be had in the county where found, unless removed on application of the defendant.' We are of opinion that this statutory provision is utterly null and void, for the reason that it undertakes to deprive a person of the constitutional right conferred upon him by section 12, supra, of the constitution, which section, as we have shown, gives to every person charged with a felony, before he can be tried, the right to have the charge preferred in an indictment found by a grand jury of the county where the offense was committed. While the constitution gives this right to every person, the statute in question takes it away and denies it to some persons. While the constitution declares that a person charged with a felony can only be tried after an accusation has been made upon the oaths of the grand jury of the county where the crime was committed, the statute in question declares, on the contrary, that a person charged with a felony may be tried on an accusation preferred upon the oaths of the grand jury of another and different county than the one where the crime charged was committed. The statute being thus in direct conflict with the constitution, which can in no way be reconciled, must, therefore, fall and be considered as no law."

In all of the above cases the holding was to the effect that a grand jury indictment can only be presented by a grand jury of the county in which the crime has been committed.

We are aware of Section 3769, R. S. Mo. 1939, upon which the cases of State v. Bockman, 124 S. W. (2d) 1205, and State v. Arndt, 143 S. W. (2d) 286, are based. Under the above statute and cases, a prosecution for larceny can be had either in the county where the property is stolen or in another county where the property is sold or brought into for the reason that the courts construe the possession of the stolen property in a different county other than where stolen as a fresh theft of the property.

Under the facts in your request, if the property stolen in Iron County was sold by the defendant or was in possession of the defendant in Dent County, either county would have had jurisdiction of the crime.

Since under Section 12, Article II, of the Constitution, supra, the indictment or information is a concurrent remedy, it goes without saying that the information must be filed in the county where the crime is committed, except in the case of larceny as above set out and other exceptions.

Section 3893, R. S. Mo. 1939, partially provides as follows:

> "No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * *"

Under the above partial section, it is unlawful for the prosecutor or circuit attorney to file an information upon a felony until the defendant is given a preliminary examination before some justice of the peace in the county. Under the facts in your request, you state that an information had been filed in Dent County, and it goes without saying that a preliminary was held in Dent County, but under Section 3893, an information cannot be filed in Iron County until a preliminary is held in Iron County. Of course, a grand jury in Iron County could indict the defendant.

Since no information can be filed without a preliminary examination in Iron County, and since informations and indictments are concurrent remedies, the only one who can file an information is the qualified prosecutor of the county where the crime was committed. That he must be qualified was held in State v. Jones, 268 S. W. 83, l. c. 85, where the court said:

> "However, the Constitution and the statute empower the prosecuting attorney to initiate criminal prosecutions by information, in lieu of indictments, which must be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. Section 3849. The oath of the prosecuting attorney is required as an assurance of his good faith. In this respect he performs the functions of the grand jury. The Constitution and the statute contemplate that an information may be filed only by a qualified or disinterested prosecuting attorney."

Since in your request you state that the information was first filed in Dent County, this information was not filed by a qualified prosecuting attorney of Iron County and is therefore null and void.

In your request you refer to Section 3774, R. S. Mo. 1939, which provides that when it appears at any time before verdict or judgment that the defendant is being prosecuted in the wrong county, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county. It also provides that the defendant give bond to appear before the proper court "to await the action of the grand jury." It also provides that the witnesses shall give bond to appear at such court, that the prosecution may be proceeded with as provided by law. In other words, the prosecution, to be continued, must be either by way of a grand jury indictment or a preliminary and the filing of an information by the prosecuting attorney.

When reading Section 3774, supra, one must also read Sections 3775, 3776, and 3777, R. S. Mo. 1939, which merely provide the procedure for the transfer of all papers filed in the wrong county, the removal of the prisoner, and that he has not been placed in jeopardy. The sections also provide that the laws relating to changes of venue shall apply when applicable, that is, the certifying and transfer of all papers, bonds of prisoners, witnesses, etc.

CONCLUSION

In view of the above authorities, it is the opinion of this department that where the defendant was charged with larceny by an information in Dent County, and the venue should have been in Iron County, the prosecution can only be brought in Iron County upon transfer by the Circuit Court of Dent County under the provisions of Section 3774, R. S. Mo. 1939. The defendant must be granted a preliminary in Iron County or be reindicted by a grand jury of Iron County.

It is further the opinion of this department that a new information cannot be filed until the defendant is granted a preliminary hearing in Iron County for the reason that the information would allege a separate and distinct crime in Iron County and the information filed in Dent County would allege the larceny in Dent County.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:HR

WEAPONS: CONCEALED: Unlawful for guards of U. S. property
EXPOSED: - to carry concealed firearms in Missouri; may carry firearms in plain view peaceably and soberly, without license. License required for purchase.

January 23, 1942

1-24

Hon. Carleton E. Kelley
Sr. Attorney
War Department
U. S. Engineers Office
Clock Tower Building
Rock Island, Illinois

FILE
4-8

Dear Sir:

This is in reply to your request for an official opinion by your recent letter which is in the following terms:

> "In accordance with directive from higher authority, this office has taken increased precautions for the protection of government property, particularly the locks and dams in the Mississippi River. It is deemed necessary that the civilian guards and supervisors placed on these government-owned structures be armed.
>
> "A brief inspection of the 1939 Revised Statutes of the State of Missouri reveals that Section 4423, Chapter 31, Crimes and Punishments, provides that:
>
> > 'Sec. 4423. Carrying concealed weapons. - If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any

school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, spring-back knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons, or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or,directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment: Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state.'

> "It is noted that there is apparently no provision made by statute for the issuance of a license or permit for the carrying of a concealed weapon. If the civilian guards employed by this office do not fall within the exceptions provided by the above statute, can a permit or license to carry a concealed weapon be issued by responsible state or county officials? If so, what procedure should be followed?"

Section 4423 R. S. Missouri, 1939, quoted in your letter prohibits the carrying of a concealed firearm by any person other than sheriffs and police officers, and other persons whose bona fide duty is to execute process, make arrests, or aid in conserving the public peace. We understand that the "civilian guards" referred to in your letter are not sheriffs or police officers. The reference in the statute to "bona fide" duty in our opinion means official duty. We believe a private citizen under the above mentioned statute has no right to carry a concealed weapon in anticipation of a contingency in which it might be lawful for him to preserve the peace or restrain the perpetrator of a felony committed in his presence. In our opinion it would be unlawful for the civilian guards to carry concealed firearms. Violation of Section 4423 R. S. Missouri, 1939, is now a felony. Said Section 4423, supra, does not conflict with the Constitution of the United States or of the State of Missouri.

In State v. Keet, 269 Mo. 206, l. c. 209, 214, 190 S. W. 573, the Supreme Court of Missouri said:

> "Our statute against carrying concealed weapons is not in conflict with the second article of the amendments to the Constitution of the United States, as that amendment has no reference to State legislation, but is a limitation upon the powers of the national Government only. (State v. Shelby, 90 Mo. 302; Presser v. Illinois, 116 U. S. 252.)

> "Neither is that statute in conflict with the Bill of Rights in our State Constitution (Art. II., Sec. 17) which provides, 'That the right of no citizen to keep and bear arms in defense of his home, person and property, or in the aid of the civil power, when thereto legally summoned, shall be called in question, but nothing herein contained is intended to justify the practice of wearing concealed weapons.' (Parenthesis and explanation therein ours.) * * * *
>
> "The provision exempting those who carried a weapon in self-defense from the penalty of the law originated in the Revised Statutes of 1879, section 1275. That provision was expressly repealed by the Act of April 28, 1909 (Laws 1909, p. 452), and has never been reenacted."

When, under an earlier statute, the offense of carrying a concealed firearm was a misdemeanor, the Kansas City Court of Appeals, in State v. Hale, 70 Mo. App., 143, l.c. 145, 146, said:

> "* * * The rule in such cases is that there must have been a concealment, and this must be proved by the state. 2 Wharton's Criminal Law, sec. 1557; Ridentur v. State, 65 Ind. 411; Smith v. State, 69 Ind. 140. ** * * *

tion of the statute is constitutional. In State v. White, 253 S. W. 724, l. c.727, 299 Mo. 599, it was ruled:

> "* * * The only reasonable and sensible construction to give the statute is that the exhibitions of deadly weapons in a rude, angry, or threatening manner, when the act of aggression or assault is being committed by such citizen, is all that is prohibited.
>
> "The portion of section 3275, R. S. 1919, thus attacked is not only wise and salutary, and in the interest of public peace and the protection of human life, but is also in harmony with section 17, art. 2, of the Constitution, when its purpose is understood. The attack upon the statute and information is without merit."

Section 4423, supra, also prohibits the carrying of an exposed firearm in churches, schools, election precincts on election day, court rooms in session, and in political and other assemblies except military meetings.

Another statute, Section 4369 R. S. Missouri, 1939, makes it unlawful to "display any deadly weapon. . .within one hundred yards of any polling place * * *."

Cities are by statute given authority to regulate firearms generally. Cities of the first class are authorized by Section 6293 (XLIX) R. S. Missouri, 1939, "To regulate, prevent and prohibit the use of fireworks and firearms." Cities of the second class may "regulate. . . discharge of firearms"Sec. 6609, (LIX) R. S. Mo. 1939. Cities of the third class may "prohibit and punish for the carrying of concealed deadly weapons," (Sec. 6958) and "regulate discharge of firearms," (Sec. 6950). The same powers are given to cities of the fourth class by Sections 7177 and 7169 R. S. Missouri, 1939. We suggest that you consult the City Attorney of affected cities regarding their ordinances.

From all the foregoing it is clear that the carrying of a firearm in plain view in a peaceable and sober manner at places other than those enumerated in Section 4423, supra, is not prohibited by the law of the State of Missouri, and no license is required or provided for by the law of this State.

A license is required for the purchase by persons other than manufacturers, and wholesale and retail dealers, of firearms of a size which may be concealed upon the person. Section 4826 R. S. Missouri, 1939, provides:

> "No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction, and a full description of such weapon, and shall be countersigned by

> the person to whom granted in the presence of the circuit clerk. The circuit clerk shall receive therefor a fee of fifty cents. If the permit be used, the person receiving the same shall return it to the circuit clerk within thirty days after its expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep a record of all applications for such permits and his action thereon, and shall preserve all returned permits. No person shall in any manner transfer, alter or change any such permit or make a false notation thereon or obtain the same upon any false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another."

Section 4827 R. S. Missouri, 1939, provides as follows:

> "No person within this state shall lease, buy or in anywise procure the possession from any person, firm or corporation within or without the state, of any pistol, revolver or other firearm of a size which may be concealed upon the person, that is not stamped as required by section 4825; and no person shall buy or otherwise acquire the possession of any such article unless he shall have first procured a written permit so to do from the circuit clerk of the county in which such person resides, in the manner as provided in section 4826."

And, Section 4825 requires that a retailer selling such a firearm must keep a record of the permit of the purchaser.

CONCLUSION

In our opinion, it would be unlawful for civilian guards of United States property, such as locks and dams in the Mississippi River, to carry concealed firearms in the State of Missouri, unless such guards are lawfully constituted police officers. Said guards may lawfully carry firearms in plain view in a peaceable and sober manner, in places other than churches, schools, election precincts on election day, court rooms in session, and political and other assemblies except military meetings, and no license therefor is required or provided by the law of this State. City ordinances should be consulted.

Respectfully submitted

ERNEST HUBBELL
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

EH:RW

MUNICIPAL CORPORATIONS AND TAXATION:

City cannot increase limitation of tax levy for bandpurposes by vote of majority of two-thirds voting on the proposition.

May 16, 1942

Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

FILE 48

Dear Sir:

We are in receipt of your letter of May 12, 1942, in which you request an official opinion, as follows:

> "In my official capacity as prosecuting attorney I wish to respectfully request an opinion on the construction of Sections 7431, 7432, 7433 and 7434 R. S. Missouri, 1939, with particular emphasis on Section 7432. I would like your construction on this section with reference to the following set of facts.
>
> "The City of Nevada, Missouri at the last regular city election voted on the proposition of levying a tax to support a municipal band. This proposition was initiated by a petition signed by ten per cent of the qualified voters. A count of the votes on the proposition revealed that it had failed to carry by a two-thirds majority by only seventeen votes. The mayor of the city and the city

counselor, both lawyers, had informed the proponents of the plan that such a majority was necessary under the law.

"It will be noted that the Section 7432 previously referred to provides that 'a majority of the voters thereat (the election) shall be sufficient to carry the provisions of the law into effect.' However the latter part of the statutes says, 'Provided, however, that such levy made under either of the options of section 7431 to 7434, inclusive, shall not increase the tax levy of any such political subdivision to exceed the limitations of article 10 of the Constitution of Missouri, except upon a vote as required by said article 10 of the Constitution of Missouri.

"Turning to the Constitution of Missouri, Art. 10 the only section which seems to obtain is section 11. There it is provided, 'Provided, the aforesaid annual rates for school purposes may be increased..... on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such counties, cities or school districts, voting at such election, shall vote therefore.....'

> "The question therefore is what was meant by the latter portion of Section 7432.
>
> "One further question is this; if an election is held as in the above set of facts and the proposition voted down, how long must be allowed before another election, i.e. a special election, could be called to submit the proposition to the voters?"

Section 7431 R. S. Missouri, 1939, reads as follows:

> "Any city, village or town having a population of less than 25,000, howsoever organized, and irrespective of its form of government, may, by one of the two methods hereinafter authorized, levy a tax for use in providing free band concerts, or equivalent musical service by the band upon occasions of public importance."

This section authorizes a levy of a tax if submitted and approved under the procedure as set out in Section 7432 R. S. Missouri, 1939.

Section 7432, supra, reads as follows:

> "The mayor and council board of aldermen or board of trustees may levy a tax of not more than one-half mill on each one dollar assessed valuation on all property in such city, village or town, or,

> when initiated by a petition signed by at least ten per cent of the qualified electors, the proposition shall be submitted to the electors at a special or general municipal election, and a majority of the voters thereat shall be sufficient to carry the provisions of this law into effect, and it shall become the duty of the mayor and council, board of aldermen or board of trustees to levy each year on all the property in such city, village or town, a tax of not to exceed two mills, or such part thereof as shall be petitioned for, on each one dollar assessed valuation. The question on the ballot shall be in the following form: 'Shall _____ levy a tax of _____ mills for the creation of a band fund?' and shall be voted 'yes' or 'no' as is provided by law in such cases: Provided, however, that such levy made under either of the options of sections 7431 to 7434, inclusive, shall not increase the tax levy of any such political subdivision to exceed the limitations of article 10 of the Constitution of Missouri, except upon a vote as required by said article 10 of the Constitution of Missouri."

Under the procedure in this section an election may be held under two different sets of procedure. The first procedure is that the mayor and council, board of aldermen or board of trustees may levy a tax of not more than one-half mill on each one dollar assessed valuation on all the property in such city, or, it may be initiated

by a petition signed by at least ten per cent of the qualified electors calling for a vote on the question of levying a tax not to exceed two mills upon each one dollar assessed valuation for the creation of a band fund.

That a majority of the votes cast is all that is necessary to carry the proposition, was held in the case of State ex rel Rose et al v. Webb City, 64 S. W. (2d) 597, where the court said:

> "The plaintiffs, property owning, taxpaying citizens of Webb City, which contains less than 25,000 inhabitants, seek by this proceeding to enjoin the defendants, Webb City, the mayor and councilmen thereof, from levying, extending, or collecting any taxes under a certain ordinance of said city purporting to authorize such taxation for the support of free public band concerts to be given in said city. The defendants prevailed in the trial below, and the plaintiffs appealed from the decree dismissing plaintiffs' bill.
>
> "The assailed ordinance, No. 2583, was enacted June 25, 1930, under purported authority of Session Acts of 1927, page 137, to be found in sections 7278-7281 of the Revised Statutes of 1929 (Mo. St. Ann. secs. 7278-7281, pp. 5866,5867), and of a municipal election held pursuant thereto. The Act of 1927 purports to authorize any city, village, or town having a population of less than 25,000 inhabitants 'to levy a

> tax for use in providing a fund for free band concerts, or equivalent musical service, upon occasions of public importance,' by one of the two methods specified in the act. Under one of the methods such tax may be levied when initiated by a petition signed by 10 per cent. of the qualified electors; the proposition so initiated is required to be submitted at a general or special municipal election, and a majority of the votes thereat is sufficient to carry the proposition, and it thereupon becomes the duty of the mayor and council to levy the tax so petitioned for and voted." (Underscoring ours.)

The provision in Section 7432, supra, does not apply or come within the exceptions as set out in Section 12, Article X of the Constitution of Missouri, which partially reads as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and

> county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: * * * ."

Section 7431, supra, only applies to cities having a population of less than 25,000. Section 12 of Article X of the Constitution of Missouri, which is an exception to the general law of limitations of tax levies, does not contain a proviso for a city of less than 25,000 to increase the tax levy for musical services of a band on public occasions. The exceptions set out in Section 12 of Article X of the Constitution of Missouri provides for bonded indebtedness, and the erection of public works, such as waterworks, electric light systems, etc., but does not specifically set out an increase for the purpose of levying a tax for use in providing free band concerts.

In the case of Brooks v. Schultz, 178 Mo. 222, l.c. 227, which is an analogous case, referring to a city library, the court, in discussing tax levy limitations said:

"It is contended on behalf of respondent that section 11 of article 10, just quoted, is not a limitation on the power of the General Assembly, but only on that of the county, school district or municipal corporation, and as to them only a limitation on the power of taxation by that section conferred upon them. The proposition is that section 11 of article 10 confers directly on counties, school districts, cities and towns, authority to levy taxes to the limit therein specified; that that authority they may exercise independent of the will of the General Assembly, and that in addition thereto, they may impose such taxes as the General Assembly may authorize.

"That is a misconception of that section. There is no language therein which is susceptible of the meaning that governmental power is conferred on counties, school districts and municipal corporations independent of the Legislature. The first sentence in the section only points out the character of property subject to taxation, and lays a restriction in the matter of assessing its value; all the rest of the section is negative in form and is in effect a declaration that beyond a certain limit, taxation shall not go; the provisos, though in form permissive, are but exceptions to the restrictions which they follow.

"Section 1 of article 10 declares: 'The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.'

"Section 10 of article 10 is: 'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

"Then follows in immediate connections, section 11 which we have above discussed. The three sections read together mean that the General Assembly may authorize such corporations to levy taxes within the limits specified, but not beyond the limit unless otherwise in the Constitution specified.

"In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuation of taxable property in its jurisdiction; that was the limit of its taxing power, and therefore this special tax of two mills on the dollar for library purposes is illegal, unless it can be brought, as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes."

Also, in the case of Strother v. Kansas City, 283 Mo. 283, l. c. 294, the court said:

"* * * According to the conceded facts, the city has levied other taxes to the constitutional limit

for the year 1919, and the tax in controversy, if laid by the city in its own capacity, carries the total levy of two mills on the dollar beyond that limit; that is, the special levy is excessive in the entire amount of it. Cities cannot exceed, for any purpose, the limit of taxation fixed by Section 10 of Article XI of the Constitution, because the section says the rates allowed 'shall apply to taxes of every kind and description, whether general or special,' except those levied to pay past indebtedness. In enforcing that declaration of the Constitution, this court decided that a city tax laid in excess of the limitation to maintain a library was void, although the Legislature had authorized it. (Brooks v. Schultz, 178 Mo.222.) The position taken in that case in favor of the special tax was that it was not levied under the authority of Section 11, Article X, which purports to limit the rate of taxation allowed to municipalities 'for city and town purposes,' but instead, under a power specially granted by the General Assembly, was levied pursuant to Section 10 of said article, which prohibited the Assembly to impose taxes on cities for municipal purposes, but in words immediately following, declared the Assembly 'may, by general law, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.' The

> court said Section 11, if interpreted literally, only limited power of cities to tax for city purposes; that is, to raise the general revenues, thereby giving room for the notion that when empowered by the legislature, a municipality might make a special levy for an expense not incidental to carrying on its government. The court then rejected said notion, saying the provision of the Constitution making the rates prescribed apply to taxes of every description, was intended to preclude such an interpretation; said further, that the General Assembly could not, by force of Section 10, Article X, of the Constitution, authorize municipal corporations to levy taxes for local purposes above the rates prescribed in Section 11. That decision is conclusive in favor of the proposition that the levy by Kansas City in excess of ten mills on the dollar, was void if the excess was for local purposes."

Section 11, Article X of the Constitution of Missouri, partially reads as follows:

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. * * * For city and town purposes the annual rate on property * * * * in cities.

> and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * *."

Under this section of the Constitution, in the city of Nevada (the population of which, according to the 1940 decennial census was 8,181) the levy is limited to not more than fifty cents on the one hundred dollar valuation.

Under the holding in the case of Brooks v. Schultz, supra, and Strother v. Kansas City, supra, the levy is limited to fifty cents on the one hundred dollar valuation, and an increase cannot be had by a vote of two thirds of the voters voting on such a proposition, for the reason that such an exception is not included in Section 12, Article X of the Constitution of Missouri.

Under the above authorities, the proviso as set out in Section 7432, supra, is a nullity and void. Section 11, of Article X of the Constitution of Missouri limits the tax levy and the levy cannot be increased by a vote of any kind. The fact that the proviso is a nullity does not invalidate the limitations of the section. The test in determining whether a statute may be sustained in part though void in other parts is whether after separating the invalid parts a law which in all respects is complete and susceptible of constitutional enforcement, and which the Legislature would have enacted if it had known that the deleted portions were invalid, is left. (Poole & Creber Market Co. v. Breshears, 125 S. W. 2d 23, 343 Mo. 1133.)

In view of the holding in the above case, the proviso which we claim is a nullity does not affect the limitations of the section. Section 7432, supra, which provides that all that is necessary to carry the proposition is a majority and not a two thirds majority, and all that is necessary now is for the

mayor and council to make the additional tax levy, providing the levy does not exceed the limitations as set out in Sections 11 and 12, Article X of the Constitution of Missouri. We find no law limiting the number of times such a proposition may be submitted for the levying of a tax for the use of providing free band concerts, although for other purposes, where an additional tax levy is authorized, such as for city librarires, a limitation is placed upon the number of times within a certain period of time such a proposition can be submitted.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that the proviso as set out in Section 7432 R. S. Missouri, 1939, is a nullity and the only way that a tax levy can be legally levied for the use of bands for free concerts is that the levy after the adoption by election of a majority of the voters and not two thirds of the voters can be valid is in a case where the additional levy does not increase the limitation of tax levies as set out in Sections 11 and 12, Article X of the Constitution of Missouri.

It is further the opinion of this department that the increase of fifty cents on the one hundred dollar valuation, as set out in Section 11 of Article X of the Constitution of Missouri cannot be increased by a majority of two thirds of the voters voting on such a proposition, for the reason that it is not one of the exceptions as set out in Section 12 of Article X of the Constitution of Missouri.

It is further the opinion of this department that the levy adopted at the last regular city election by a majority of the voters, and not a two thirds majority can be levied by the mayor and council provided it does not raise the tax levy above fifty cents on each one hundred dollar valuation.

It is further the opinion of this department that the proposition may be submitted or resubmitted at any time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CRIMINAL LAW: Civil usury over eight per cent per annum; Criminal usury over two per cent per month.

June 5, 1942

69

FILE 4-8

Hon. H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

We are in receipt of your letter dated May 28, 1942, in which you request an opinion as follows:

> "In my official capacity as prosecuting attorney I wish to request an opinion on the following state of facts:
>
> "A local motor company sold a motor car to a purchaser for $200.00 receiving a trade-in of an old car as $75.00 leaving $125.00 unpaid on the balance. The car was to be paid for in installments of $10.90 each. After the purchaser had paid eight payments he discovered that the motor car company was still claiming that there was an unpaid balance of $109.00. The purchaser refused to make further payments and removed the car to Kansas. The motor car company demands a warrant for the purchaser for removing mortgaged property. The purchaser demands a warrant for the operator of the motor car company claiming usury. The operator counters with the statement that the

> $71.20 over and above the purchase price is $4.00 sales tax, $1.00 for drawing papers and $66.20 insurance and carrying charges.
>
> "Can the motor car company evade the usury statute by calling the amount of money above 8% in excess of purchase price a 'carrying charge'?

The criminal statute pertaining to usury, is Section 4813 R. S. Missouri, 1939, which reads as follows:

> "Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Under the above section, in order to obtain a conviction for the crime of usury, the defendant must charge

an interest rate greater than two per cent per month. This section applies to criminal prosecutions.

Where no rate of interest has been agreed upon, the rate that can be collected by a collector, is six per cent per annum, as set out under Section 3226, R. S. Missouri, 1939, which reads as follows:

> "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

The civil statute on usury is Section 3227 R. S. Missouri, 1939, which reads as follows:

> "The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract."

Under this section, the maximum amount of interest that can be charged under an agreement in writing is eight per cent per annum.

By reason of the enactment of Section 3227, supra, the legislature enacted Section 3230 R. S. Missouri, 1939,

which reads as follows:

> "Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness: Provided, however, that no corporation shall, after this act takes effect, interpose the defense of usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor, be set aside impaired or adjudged invalid by reason of the rate of interest which the corporation may have paid or agreed to pay hereon."

Section 3230, supra, permits the debtor to plead usury in a civil action and also sets out the method of applying the payments upon the original debt.

This method was followed in the case of Whitworth v. Davey, 185 S. W. 241, l. c. 246, where the court said:

> "Prior to the passage of this act in 1905, there could be no recovery of usury paid, and since its passage, as we construe the act, a court will look to the contract between the parties, and if it finds there has been a sum paid in excess of the legal interest where 6 per cent. applies, or in excess of the contractual rate where the contract as to interest is reduced to writing, then there must be a recovery under this section of all sums paid by the borrower that exceed the principal plus the legal rate of 6 per cent.; the statute expressly so provides. In other words, if the borower has paid more than 6 per cent. Where only 6 per cent. could be collected, or has paid more than 8 per cent. where only 8 per cent. could be collected, then in either case he has a recovery under this statute for all sums paid in excess of the principal, plus the legal rate, or 6 per cent. simple interest."

Section 7182 R. S. Missouri, 1909, referred to in the case of Whitworth v. Davey, supra, is now Section 3229 R. S. Missouri, 1939.

We are assuming that the chattel mortgage mentioned in your request was an ordinary chattel mortgage and was not made under what is known as the "Small Loan Act", Article VII, of Chapter 39, R. S. Missouri, 1939. Under the Small Loan Act the maximum rate of interest on an amount of One Hundred Dollars, or less, is three per cent a month, and the maximum rate of interest on a loan of One Hundred Dollars to Three Hundred Dollars is two and one-half per cent per month.

We are also assuming that the chattel mortgage was not made to a loaning investment company, as set out in Article VIII, of Chapter 33, R. S. Missouri, 1939, which allows a charge of not more than Twenty Dollars on a loan made upon a motor vehicle. The purpose of the charge being on account of the extra hazard involved in the loan. In your request your main question is contained in your second paragraph, which reads as follows:

> "Can the motor car company evade the usury statute by calling the amount of money above 8% in excess of purchase price a 'carrying charge'?"

Since you have mentioned eight per cent as being the rate of interest, we are assuming that you are inquiring as to the civil statute, and not the criminal statute, on usury. The courts of this State have allowed commissions and other charges to be added to the amount of the loan which are not considered as part of the interest charge. Each case depends upon the actual facts, as set out in each transaction.

In the case of Fischman v. Schultz, 55 S. W. (2d) 313, l. c. 318, the court said:

> "Plaintiff further contends that the instruction for a directed verdict should have been given, because the commission paid by defendants as shown by their testimony was usurious. This contention may well be ruled against plaintiff on the ground that usury was not pleaded. Section 2843, R. S. 1929 (Mo. St. Ann. Sec. 2843); Bond v. Worley, 26 Mo. 253. Besides, usury does not conclusively appear from this record. The charge of a commission by the agent of the borrower, or by an independent broker, is not usurious. * * * * * *."

Also, in the case of Cuendet v. Love, Bryan & Co. et al., 57 S. W. (2d) 701, l. c. 704, the court said:

> "This brings us to the question, therefore, of whether Love, Bryan & Co. had the right to charge for such separate services, and we think the answer must obviously be given in the affirmative. Of course, one who lends his own money is not entitled, under the guise of charging a commission, to exact such charge in addition to the lawful rate of interest, without falling within the inhibition of the usury laws. But if the circumstances attendant upon the transaction require the rendition of services separate and apart from the mere making of the loan, if they are not mere pretended services, and if they are actually rendered in good faith, then the lender may properly require the borrower to pay a reasonable compensation in addition to the highest legal rate of interest upon the money loaned. * * "

Also, in the case of Stewart v. Boone County Trust Co., 87 S. W. (2d) 223, l. c. 226, the court said:

> "We find, according to the weight of the authorities, that where a contract for a loan, which requires in terms, or from necessary implication, the rendition of services by the lender for the benefit of the borrower, a fair and reasonable charge, for the services over and above the highest legal rate of interest on the money

> loaned, does not render the contract usurious. However, we also find, according to the weight of the authorities, that, no matter in what form the contract appears, no matter how fair it may appear on its face, courts are not bound to take the contract as if it were what it appears to be, but may inquire into the facts and circumstances in order to determine whether or not it is in good faith for real, substantial services and that the amount of the compensation set out for the rendition of such services is reasonable and not excessive. In other words, the nature of the services, whether they are substantial, necessary, and valuable, and whether the amount attempted to be exacted for the rendition of the services is reasonable, are determinative factors in construing whether the contract be for the rendition of services alone or merely a cloak whereby excess interest over the legal rate may be collected by the lender."

And, the court in holding that it was a question of fact, at page 227 of the same case, said:

> "We are clearly of the opinion that reasonableness of the charge, and whether the services were substantial or insignificant and unsubstantial, are questions of fact and determinative factors in reaching a conclu-

> sion as to the nature of the 5 per cent. clause in the contract, and therefore the issues should have been submitted to the jury."

Also, in the case of Hansen et al v. Duvall, et al., 62 S. W. (2d) 732, l. c. 736, the court said:

> "* * * '* * * But on accepted principles a charge or commission for alleged services cannot be made for the purpose solely of evading the usury laws, and therefore, to be sustained as lawful and to rescue the contract from the taint of usury, the additional charge must be shown to be based on some service rendered, some trouble encountered, or inconvenience sustained, or risk assumed by the lender, other than the advance of money.'"

In all of the cases cited the question involved as to extra charges was whether or not the alleged services were made for the purpose solely of evading the usury laws, but if the extra charges were made for services actually performed by the person who loaned the money, then the courts have held that it should be considered as an extra charge, and not as an evasion of the usury laws.

In your request you stated that a charge of Sixty-six Dollars and Twenty Cents was made for insurance and carrying charges. The facts are not very clear as to the exact overcharges made, but if the extra charges were such that they could be considered lawful, as set out in the four cases herein quoted from, then the extra charges should not be considered as interest, but, if the extra charges were made solely for the purpose of

evading the civil usury laws, then the extra charges could be counted in as part of the interest and the present owner of the motor car, if he has paid more than eight per cent interest could defend a suit brought against him on the ground of usury, or could institute a suit for the amount of money overpaid.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that a motor car company cannot evade the civil usury statute by calling the amount of money charged above eight per cent, in excess of the purchase price, a carrying charge, unless the carrying charge consisted of charges made that were for services actually performed for the benefit of the debtor, and were not made for the purpose of evading the civil usury statute.

It is further the opinion of this department, that in order to obtain a conviction on criminal usury, the defendant must have charged more than two per cent per month as interest on a loan.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SALES TAXES: Operator of community sales must disclose his principal and, in his sale statement, show that the commodities so sold are exempt from sales taxes.

September 1, 1942

9-25 FILED 48

Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Kelso:

This is to acknowledge your inquiry of August 20, 1942 relating to the question of collection of sales taxes by the operator of a community sales pavilion, which is as follows:

> "In my official capacity as prosecuting attorney I wish to respectfully request an opinion construing Rule No. 29 of the Rules relating to the Missouri Sales Tax Act.
>
> "My facts are briefly these: An operator of a Community Sales Pavilion has not been collecting sales tax where he sold surplus items of farmers and other persons not engaged in the regular business of selling. He adopted this policy because of the last sentence of Rule No. 29 aforementioned which reads, "persons selling livestock, live poultry, and those persons not engaged in retail business who personally dispose of surplus items through community sales, are not required to collect and remit the tax thereon."
>
> "Could you inform me wheather or not he has placed the proper construction on this Rule?"

Section 11408, Laws of Missouri, 1941, is in part as follows:

> "From and after the effective date of this article and up to and including December 31, 1943, there shall be and is hereby levied and imposed and there shall be collected and paid:
>
> "(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Subsections (f) and (g) of Section 11407, defining the word "seller" and "sale at retail" are as follows:

> "The word 'seller' when used in this article means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under Section 11408.
>
> " 'Sale at Retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Section 11409 of said act, relating to exemptions and embracing the above subject is as follows:

> "There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the

> Constitution of this state. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into foodstuffs which are to be sold ultimately in processed form at retail."

Section 11413, thereof, is in part as follows:

> "For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the State Auditor shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article."

Rule No. 29, promulgated by the Auditor and relating to such subject is as follows:

> "Many times persons regularly engaged in the business of selling tangible personal property offer property such as furniture, apples and other fruits, potatoes and other vegetables, building materials or fence posts, through community sales. The person, agency, firm or corporation managing, conducting or acting as auctioneer or otherwise officiating at such sales should require the purchaser of items such as those mentioned above to pay Missouri Sales Tax on their purchases and should remit said tax to the State Auditor. Persons selling livestock, live poultry, and those persons not engaged in retail business who personally dispose of surplus items through community sales, are not required to collect and remit the tax thereon."
> (Underscoring ours)

The sales mentioned in your inquiry, therefore, are comprehended by the Sales Tax Act, unless exempted under the provisions of the above statute and rule.

The status of taxes and their vital need in support of government was very aptly expressed by the Supreme Court in the case of State ex rel. v Rowse, 49 Mo. 589, l.c. 592, in the following language:

> "By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government."

The strict construction rule relating to exemptions from taxation was announced by the Supreme Court in the case of National Cemetery Association v. Benson, 129 S.W. 2d. in excerpts on pages 844 and 845, which are as follows:

> ***
> "An exemption from taxation can be sustained only when expressed in explicit terms and it cannot be extended beyond the plain meaning of those terms."
> ***
> "The burden is on the property owner clearly to establish that his property falls within the exempted class."

The same question was ruled by the same court in Young Women's Christian Association v. Baumann, 130 S.W. 2d. 499, 501 in the following language:

> "*** The principles to be followed in construing provisions for exemption from taxation, have been announced in many cases. They are well stated by Judge Lamm in State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, 21 L.R.A., N. S., 171. Suffice it to say they call for a strict construction against the right of exemption. Taxation is the rule, exemption is the exception; yet strict construction must be a reasonable construction. ***"

In the case of St. Louis Young Men's Christian Association v. Gehner, 47 S.W.2d. the plaintiff sought to enjoin the collection of taxes on realty belonging to it, althoug h it was renting such property for lodgings, and operating cafeterias, barber shops, etc. The court, at page 778 of such decision held:

> "*** These contentions may be conceded, and still the property is not exempt for the reason the statute does not exempt property that may be used for purposes purely charitable, but exempts property that is exclusively used for such purposes.
>
> "In ruling the question in State ex rel. v. Board of Assessors, 52 La. Ann. 223, 26 So. 872, Loc. cit. 876, it was said: 'The argument is that caring for the social, moral and spiritual condition of men is charity in the broadest sense, and that a place provided by the association where young men can assemble for religious exercises, and be secluded from temptation, is a charity and blessing. We wish we could yield to this reasoning. It demonstrates the capacity of the association to aid in the intellectual improvement of young men, and the usefulness of the association in promoting religious purposes. But, in our opinion, the argument fails to bring the association and its rooms within the exemption granted in the constitution to property actually used for charitable purposes.***"

There is no ambiguity in the above statute. The rule based thereon is obviously reasonable. Therefore, the question is settled by interpretation of the above rule.

The rule on its face clearly shows that the Auditor had no intention of attempting to enlarge the exemption statute by bringing within an exempt class anypersons or types of taxable sales.

The rule made by such Auditor, with full knowledge of the law relating to exemptions, with reference to persons and sales, was made and promulgated with the sole purpose of defining <u>who</u> might sell the mentioned exempt commodities through community sales without collecting and remitting taxes.

Both statute and rule are silent as to definition of the words "community sales." The customary manner of conducting such sales is on a commission basis or by paid employees.

The Auditor cannot, by rule, enlarge nor restrict a class of persons or property, that are exempt from taxation, by statutory enactment which does not violate a constitutional provision. He cannot, by rule prohibit a person from selling personally, by agent or through an operator of a community sales pavilion, the property of such person which is tax exempt. Neither can he, by rule, require any of such parties to collect and remit sales taxes on such transaction when made in such manner.

However the auctioneer or employee sells tangible personal property-- not his own-- which is taxable per se unless exempt per se. Unless in his sales statement, he names the owner and commodity so as to show that the exemption exists it would be questionable as to whether taxes were due.

Section 11420, Laws of Mo. 1941, is in part as follows:

> "***The burden of proving that a sale of tangible personal property , services, substances or things was not a sale at retail, shall be upon the person who made the sale.***"

Rule No. 62 promulgated by the Auditor is in part as follows:

> "*** The burden is placed upon the seller of feed to determine at the time of the sale whether or not the sale is taxable. Therefore such sellers are directed to take from the purchaser a blanket certificate of resale, and must retain the same in their records to support deductions for feed taken on their tax report.***"

Rule No. 63 is in part as follows:

> "*** Where persons conduct markets, sale barns, and the like, at which agricultural produce is sold for use or consumption to purchasers, by agents on behalf of principals who are unknown or undisclosed, such persons conducting such markets or sale barns must collect and remit the tax on said sales.***"

Under a well established rule of the Appellate Courts of this state, the burden is placed on the property owner to clearly establish that his propertyfalls within the exempted class. The above statutes and rules are based upon and follow such reasoning.

C O N C L U S I O N

THEREFORE, it is the opinion of this department that the Auditor may require an operator of a community sales pavilion to make a return showing that no sales taxes are due from sales made by him in such capacity unless, at the time of each sale, in his sale statement, he discloses his principal and clearly shows that commodities so sold are exempt from such taxation.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SVM:LeC

SCHOOLS: A six-day school week for the purpose of accelerating the termination of a school term, is within the discretion of the school board.

January 20, 1942

121

FILE

Mr. Lloyd W. King
Superintendent of Schools
State of Missouri
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "We are receiving many letters like the one attached inquiring whether it will be possible to use Saturdays for school sessions to shorten the length of term. Such use would, of course, make a six day school week.
>
> "In Section 10362, Revised Statutes, 1939, the statement is made that the school week shall consist of five school days. Does this mean a minimum of five days or is it mandatory that the school week be only five days? Please advise us on the interpretation of this section."

Article 2 of Chapter 72 of the Revised Statutes of Missouri, 1939, contains "Laws applicable to all classes of schools." Section 10324 of that article provides in part as follows:

> "Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for

> the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, * * * * *"

This section is construed in State ex rel. Whetchel v. Claxton, 263 Mo. 701, 173 S. W. 1049, as follows:

> "The clear intendment of the statute is to compel, under penalty of losing its corporate existence, every such school district to have an eight months' term of school."

Section 10362, R. S. Mo. 1939, provides as follows:

> "The school day shall consist of six hours occupied in actual school work; the school week shall consist of five school days, except when Thanksgiving day, December 25, February 22 or July 4 shall fall upon a regular school day, then the four remaining school days, if taught, shall constitute a legal school week; the school month shall consist of four weeks, and the school year shall commence on the first day of July and end on the thirtieth day of June following."

We believe it is obvious that Section 10362, supra, is merely a statute defining various terms used in the article and does not in any way provide or set forth a scheme of procedure or administration of school matters. This section defines a "school month" as consisting of four weeks of five days each. We, therefore, use this definition to determine the minimum term that is required by Section 10324, supra.

That section provides that there must be a term of eight school months. It apparently means that the school must be in session one hundred sixty days out of the year.

Section 10340, R. S. Mo. 1939, provides that:

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district --* * * * *."

As was said in State ex rel. O'Bannon v. Cole, 220 Mo. 697, 119 S. W. 424:

> "This court, however, has always recognized the right of the school boards of the state to make reasonable rules for the regulation of their respective schools."

Therefore, since the only requirement imposed by our school law is that there must be a term each year of at least thirty-two school weeks, that is, one hundred sixty days, we believe it is left to the sound discretion of the school board as to when the pupils of its district are to attend the school. As long as the minimum requirements of the statutes are complied with by the school board then any rule and regulations of the board in carrying out such a law is reasonable.

In State ex rel. Lewis v. Graves, 219 N. Y. S. 189, the Appellate Division of the Supreme Court of the State of New York said in regard to the practice in that state of dismissing children one hour each week to attend religious instructions outside of the school:

> "* * The minimum number of days for schools to be in session is fixed, * * *. See Education Law, Secs. 620, 621, as amended by Laws 1921, c. 386. Much is left to the judgment of local authorities, to

> whom management of schools is intrusted, subject to advice and direction of the commissioner. There is no claim that the children did not take the prescribed subjects, or failed to attend the prescribed number of days; * * * *."

Therefore, we believe that a school board may by rule and regulation provide for a six-day week so as to accelerate the school term.

Conclusion

It is, therefore, the opinion of this Department that every school district which has a levy of forty cents or more on the one hundred dollars valuation, is required by Section 10324, R. S. Mo. 1939, to provide for a term of eight school months, which, under Section 10362, R. S. Mo. 1939, means one hundred sixty days. It is further the opinion of this Department that a rule and regulation of a school board that school shall be held six days a week, thereby accelerating the termination of the school term, is proper and reasonable.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

AOK:EG

SCHOOLS: State Board of Education retains custody of United States Savings Bonds purchased out of State School Funds.

January 21, 1942

1-49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

FILE
49

Dear Mr. King:

We are in receipt of your letter of January 17th wherein you state as follows:

> "Pursuant to an order of the State Board of Education at its meeting on November 10, 1941, authorizing and directing the President of the State Board of Education to purchase $8,000 United States Savings Bonds, Defense Series "G", for the account of the State Seminary Fund, I made application for and had delivered to me bonds of said description.
>
> "The State Board of Education has instructed me as President of the State Board of Education to seek the advice of the Attorney General as to what disposition should be made of the bonds now that they have been purchased and are in the possession of the President of the State Board of Education. Should they be turned over to the State Treasurer as custodian of state funds or should they be retained by the State Board of Education?"

In an opinion rendered by this Department to Honorable Forrest C. Donnell, under date of July 11, 1941, we held that under the Constitution and statutes of this State the authority to invest the State School Fund in United States government securities is in the State Board of Education and not in the State Board of Fund Commissioners.

In said opinion we considered the following sections of the Revised Statutes of Missouri, 1939.

Section 10874:

> "Whenever there shall be in the treasury or elsewhere, subject to the order of the treasurer, any money belonging to the capital of the public school funds, the state auditor shall make reports thereof to the state board of education, who shall direct the investment of the same in bonds of the United States, bonds of the state of Missouri, or state certificates of indebtedness. That portion of the income and revenue to be distributed for the support of the public schools shall be payable on the warrant of the auditor, in favor of the treasurers of the several counties, in each year, immediately after the apportionment of such moneys shall have been made and filed: Provided, that such portion of said income and revenue as falls to the share of the city of St. Louis shall be made payable to the secretary and treasurer of the school board of the city of St. Louis."

Section 10884:

> "The treasurer shall be the custodian of the certificates of indebtedness

> of the state to the 'public school fund' and of the certificates of indebtedness of the state to the 'seminary fund,' and of all renewals thereof, and of all registered county, municipal or school district bonds of this state in which the 'public school fund' or the 'seminary fund' shall be invested, and also of all money belonging to either of said funds, and no money shall be paid out of said funds by the state treasurer except upon warrants drawn by the state auditor, in accordance with requisitions made by the board of fund commissioners, as hereinbefore provided."

The same Legislature that in 1909 enacted Section 10884, supra, authorizing the State Treasurer to be custodian of certain bonds, (Laws of Mo. 1909, Sec. 58, p. 896), also reenacted Section 10874, supra, placing the investment in bonds of the United States in the State Board of Education (Laws of Mo. 1909, Sec. 76, p. 801).

The Legislature by failing to enumerate bonds of the United States in Section 10884, supra, obviously intended that such bonds would not be among the class of bonds of which the State Treasurer would be custodian.

This conclusion is supported by the rule of statutory construction that the expression of one thing in a statute is the exclusion of another, State ex rel. Kansas City Power and Light Company v. Smith, 342 Mo. 75, 111 S. W. (2d) 513, and the other rule that the reviewing court must assume that the Legislature was familiar with other statutory provisions covering similar subject matter, Smith v. Pettis County, 345 Mo. 39, 136 S. W. (2d) 282, l. c. 287.

The Legislature having placed the authority of purchasing United States bonds in the State Board of Education and having failed to designate any other board or

officer to retain custody of the same, we are of the opinion that the custody of the United States Savings Bonds, Defense Series "G", should be retained by the State Board of Education.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG

SCHOOLS:
STATE BOARD OF EDUCATION:
BOND:

Bond given by the State Superintendent of Schools does not cover custodian of securities held by the President of the State Board of Education.

- -

March 6, 1942

3-14

Honorable Lloyd W. King
State Superintendent of Schools
Jefferson City, Missouri

FILE
49

Dear Sir:

This is to acknowledge receipt of your letter of recent date, wherein you request an opinion from this Department. Your letter of request is as follows:

> "In accordance with Section 10,598, Revised Statutes Missouri, 1939, I as State Superintendent of Public Schools have given bond.
>
> "In accordance with Section 10,663, Revised Statutes Missouri, 1939, I as State Superintendent of Public Schools am president of the State Board of Education.
>
> "According to an opinion from your office on January 21, 1942, the custody of certain United States Savings Bonds, Defense Series "G", purchased by the State Board of Education for the account of the State Seminary Fund is to be retained by the State Board of Education. Therefore, the State Board of Education has requested me to seek the advice of the Attorney General as to whether the bond given by the State Superintendent of Schools, as such, would cover matters handled by the State Superintendent of Schools as President of the State Board of Education."

The question is: Does the official bond given by the Superintendent of Schools as required by Section 10598, R. S. Mo. 1939, cover the United States Savings Bonds, Defense Series "G", purchased by the State Board of Education for the account of the "Seminary Fund," and in your custody as President of the State Board of Education?

The State Superintendent of Schools under Section 10598, supra, is required to give an official bond in the amount of $10,000 to the State of Missouri. Section 10598, supra, reads as follows:

> "Before entering upon the discharge of his official duties, the said superintendent shall give bond in the penal sum of ten thousand dollars to the state of Missouri, with two or more sureties, to the acceptance of the secretary of state, conditioned that he will truly account for and apply all moneys or other property which may come into his hands, in his official capacity, for the use and benefit of public schools, and that he will faithfully perform the duties enjoined upon him by law; and he shall take and subscribe the oath or affirmation required by the Constitution of the state, and diligently and faithfully discharge the duties of his office as prescribed by law; which bond, with certificate indorsed thereon, shall be filed with the secretary of state."

Under the provisions of Section 10663, R. S. Mo. 1939, the State Superintendent of Schools is President of the State Board of Education and the Governor, Secretary of State and Attorney General are ex officio members of said board. We have searched the statutes and have been unable to find any statute which makes it the duty of the President of the State

Board of Education to be custodian of the bonds in question. The bond given by the State Superintendent of Schools is a statutory bond and its terms cannot be enlarged by implication and does not cover matters that are beyond the scope of his official duties.

In the early case of City of St. Louis v. Sickles, 52 Mo. 122, l. c. 126, the court said:

> "The contract of the sureties is only for the faithful performance of those trusts that properly and legally belong to his office. (Blair vs. Perpetual Ins. Co., 10 Mo.,560.) The sureties of a public officer whose duties are defined by law, are only responsible for the faithful performance of the duties assigned to him by law and cannot be made liable for malversation in the conduct of affairs which do not pertain to his office, and if the officer engage or those who by law have the control of his official conduct employ him in matters foreign to his office, the sureties will not be bound for his acts while so employed; and any losses which may happen in the transaction or management of such business cannot be visited upon those who have guaranteed the official conduct of the officer. (Nolley vs. Callaway Co., 11 Mo., 447.) * * * * * * * * * * * * * * *"

And, also in the case of The Home Savings Bank v. Traube, 75 Mo. 199, l. c. 202, the court said, in quoting from the case of State v. Sandusky, 46 Mo. 381, the following:

> "* * * 'The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.' The same rule is asserted in other cases. Blair v. Perpetual Ins. Co.

> 10 Mo. 560; Nolley v. Callaway Co., 11 Mo. 463; State v. Boon, 44 Mo. 262; Orrick v. Vahey, 49 Mo. 431; City of St. Louis v. Sickles, 52 Mo. 122."

And, also, in the case of State ex rel. Hamilton v. May, 177 Mo. App. 717, at l. c. 722, it is said:

> "It is an action in the name of the State, as required by statute, and is at the relation of the father and mother and to their use. It is on the bond and to determine the liability of the principal and sureties on the bond, we must look to the condition of the bond, for the bond is the contract into which the makers entered. The obligation is to be found in the bond itself, and as there expressed, the bond to be fairly construed and not to be extended by implication. The liability of sureties is said to be <u>strictissimi juris</u>. These rules are elementary, but see City of St. Louis v. Sickles, 52 Mo. 122, l. c. 127; State ex rel. Chase v. Davis, 88 Mo. 585; 35 Cyc., par. C, p. 1900; 25 Am. & Eng. Ency. of Law (2 Ed.), par. IX, p. 723. *"

The rule is also stated briefly in 46 C. J. p. 1068, Sec. 399, as follows:

> "Liability upon an official bond arises as a rule only with reference to acts of the officer which pertain to some function or duty which the law imposes upon his office."

If the statutes had contemplated that the Superintendent of Schools, either as Superintendent or in his capacity as President of the State Board of Education, should be the custodian of the bonds and other securities in the Seminary Fund it would seem that the Legislature would have made special provision therefor and would have required a much larger official bond than the $10,000 required by Section 10598, supra.

CONCLUSION.

It is, therefore, our opinion that the official bond given by the State Superintendent of Schools does not cover his acts in connection with the custodianship of bonds and securities held and in his possession as President of the State Board of Education and his sureties would not be liable for wrongful acts in connection therewith.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:CP

SCHOOLS: School district transporting non-resident high school pupils may be paid the cost in excess of three dollars by the "sending" school district.

March 13, 1942

3-61

FILE 49

Hon. Lloyd W. King
State Superintendent of Schools
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"The proper and adequate financing of public school transportation of high school pupils from rural areas in this state has presented many problems. The maximum state apportionment as reimbursement to school districts, on account of expenditures incurred in providing transportation, is $3.00 per month for each pupil transported. The cost of transporting non-resident high school pupils in a majority of cases exceeds $3.00 per month.

"Section 10327, R. S., 1939, makes provision for the transporation of non-resident high school pupils as follows:

"1. The board of directors of any district (rural, etc.), that does not maintain a high school may transport the high school pupils whose tuition it is obligated to pay. The cost of such transportation may be paid from the incidental fund and state transportation reimbursement.

"2. The board of directors of a district (high school) that admits non-resident pupils to its high school may make provision for transporting such pupils; provided, that no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transportation.

* * * *

"The cost of transportation of non-resident high school pupils provided by the high school district usually is greater than $3.00 per month, the maximum reimbursement to districts. If the high school district is limited in its expenditures to the amount received for such transportation, the additional cost in excess of $3.00 per month must be forthcoming from some other source. For example: If the cost is $4.00 per month for each pupil transported, and the high school district receives only $3.00 per month as reimbursement from the state, the additional $1.00 per month must come from another source.

"The rural or sending district has authority under the law to provide transportation of its high school pupils, whose tuition the district is obligated to pay, but does not take advantage of this law because of the uneconomical conditions of small unit transportation. Therefore, would it be legal for such sending district to pay to the high school district that provides transportation for its pupils the additional cost in excess of $3.00, or $1.00 per month as illustrated above?

> "In brief, is it legal for the receiving and sending school districts to cooperate in providing transportation facilities for non-resident high school pupils in meeting the cost of such transportation whereby the receiving district would use all moneys received from the state to help pay the cost of such transportation, and the rural or sending district would pay from its own incidental fund the additional cost in excess of $3.00 to the high school district in order that the full transportation expenditures may be made by school district? * * * * * * * * *."

The free transportation of school children has been a practice recognized for some years in this State. The obvious purpose of such laws is to facilitate the opportunity of every child in this State to obtain an education. While there is some confusion arising from inconsistencies in the various laws relating to this subject, still we believe that the statutes, as a whole, disclose a unity of purpose and intent.

It is a well-recognized rule of statutory construction, that in order to determine the intent of the legislature as to the meaning of various statutes, that the history of the legislation therein may be looked to. (State v. Forest, 162 S. W. 706, 59 C. J. 1017.)

What is now Section 10326 R. S. Missouri, 1939, was enacted in 1911, (L. of 1911, P. 397.) This statute was identical with its present form, except that the last proviso extending transportation to private schools was not a part thereof, this clause being added in 1939. That section provides as follows:

> "Whenever the board of directors of any school district or board of educa-

tion of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 10361. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district: Provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

In 1919 the general assembly provided that in counties having a population of 250,000, and less than 500,000, school districts which did not have a high school could send their pupils to an adjoining district and pay the cost of the tuition and transportation. These were the only two sections relating to transportation of students until the passage of what is known as the 1931 School Law. In that law it was provided that a school district which did not maintain a high school could send its pupils to a high school in another district in the same, or an adjoining county, and the tuition could be paid by the sending district. The statute further provided: (L. of Mo. 1931, P. 334.)

> " * * * Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools and the method of transporting and the amount paid therefor is approved by the state superintendent of schools, the amount paid in state funds for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district: * * * ."

In 1935, Section 16, supra, was amended and the clause relating to transportation was taken out of said section and a new section relating to transportation was enacted. This act provided, as follows:

> "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three

dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state superintendent of schools, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits non-resident pupils to its high school makes provision for transporting such pupils to such high school and the method of transporting and the transportation routes are approved by the state superintendent of schools before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils: * * ."

(Section 10327 R. S. Missouri, 1939).

In 1939, Section 10326, supra, and Section 16, which is now 10327, were both amended by a proviso being added extending the privilege of transportation to private schools which are not operated for profit.

The question presented in your request is: Whether three dollars is the maximum amount that may be spent for transportation, or whether the three dollars is the maximum that may be paid by the State in aid of such transportation.

It is a rule well recognized in law that a school district does not have the right to provide free transportation for its pupils in absence of a specific enactment by the legislature granting to said district this privilege. (State ex rel Beard v. Jackson, 168 Ind. 389; Shanklin v. Boyd, 146 Ky. 460; State ex Boynton v. Bunton, 141 Kas. 103.)

Reviewing the history of the statutes relating to transportation, it will be seen that from 1911 until 1931 the only transportation that could be provided by a school district was that to its resident pupils to a school within the district. When Section 10326 R. S. Missouri, 1939, says that there shall be transportation "to and from school", it means to a school located in the district. (Gould School District v. Holdtorff, 171 Ark. 668, 285 S. W. 357; State ex rel Keller v. Board of Education, 11 Ohio App. 298.) The sole exception was that in counties having a population of 250,000, a school district having no high school could pay the cost of transporting the pupils to a high school in another district. However, the expense of transportation in both instances was borne entirely by the district.

Therefore, for a period of twenty years the burden of paying for the transportation of pupils was placed upon the school districts.

The 1931 provision seemed to carry out this view, in that it provided that "the amount paid in state funds for transportation" would not exceed three dollars per month. The legislature recognized that this three dollars

paid by the State was merely in aid of the transportation costs and that the districts still had the right to pay any amount needed in addition to that received from the State.

Therefore, the three dollars provided for was not the maximum amount that could be paid for transportation, but only set a limit to the amount that the State could pay to a school district.

The 1935 amendment in the first two clauses, however, provided that "the amount paid for transportation, not to exceed three dollars per month for each pupil transported for a distance of two miles or more" shall be a part of the money received from the State. In the third clause it provided "the amount spent" for transporting pupils should be a part of the State aid.

While the words "in State funds" were omitted, we believe that the meaning of the words is the same, that is, that the district, as a part of its State aid is to receive an amount not to exceed three dollars to assist it in the transportation of pupils. This is a fair construction of the language in the section and is also in line with the policy and intent of the legislature as evidenced by the previous enactments. The general assembly did not mean to take away from the school district the power to pay for transportation from district funds, but intended only to extend to these districts help and aid in carrying on the transportation of pupils. This intent is further shown by the title to the 1939 Act, in which this payment, received from the State is designated as "State aid." (L. of Missouri, 1939, P. 718.) The title shows that the three dollars was merely to "aid" the school districts, and was not to cover the entire cost of transportation.

Section 10326, supra, sets up the method whereby money may be raised to pay for the transportation of resident pupils to a school within the district, which money is to augment the money received from the state under the first clause of Section 10327, supra, if said extra money is needed. However, in so far as the second and third clause s are concerned, which provide for state aid where a district with no high school sends its pupils to another high school, or when a high school district, admits non-

resident pupils, there is no statute which provides how the money may be raised by the district to accomplish and carry out these activities.

It is a well settled rule of law that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such power fully efficacious or to render the performance of such duty effectual is conferred by implication. (State ex Bybee v. Hackman, 207 S. W. 785, 276 Mo. 110, 46 C. J. 1032.)

Therefore, since the right to send the pupils to a high school in another district is given by the statute we believe that the right to spend money therefor necessarily accompanies such right, and is implied therein.

CONCLUSION

Therefore, it is the opinion of this department, that a school district which provides transportation facilities for high school pupils from another district, for which said district receives the amount of Three Dollars per month as reimbursement from the State, may be paid the amount in excess of the Three Dollars which it costs said district to transport the non-resident high school pupils by the school district from which the pupils come.

This additional cost shall be paid by the "sending" school district out of its incidental fund.

Respectfully submitted,

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

AO'K:RW

SCHOOLS: State Superintendent has power to prescribe form for reports called for by Section 10501, R.S. Mo. 1939, as amended, Laws of 1941, p. 536; form submitted with request held to be sufficient.

March 24, 1942

3-27

FILE
49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Inquiry has come to this Department about the form of financial report required by the board in Section 10501, as amended in House Bill No. 146, Laws of 1941, page 536.
>
> "Section 10501 was amended to require school boards to submit the annual financial report to the State Superintendent of Schools for approval before the state school apportionment may be released for the ensuing school year.
>
> * * * * * * * * * * * * * *
>
> "Each year, on or before the 15th day of July, the district clerk or secretary of the board of each district that maintains a high school is required to file a statistical and financial report in this Department. This information is summarized and published in the State Superintendent's annual report as required by law.

"The financial section of the secretary of the board's report calls for a complete report of receipts and disbursements: First, by funds as required by law, and second, by character, divided into major sources of revenue and the chief character classifications of disbursements.

"This Department has not required a financial report which would show each minute item of expenditure for which a warrant may have been issued. Such a report would be quite voluminous and would require a great deal more facility to handle the report and summarize the information before it would have much value and could be published.

"The attached copy of this Department's required financial report is for your examination. This report appears to be quite exhaustive and concise in giving a clear picture of a school district's financial receipts and disbursements.

"Question:

1. Does the proviso that the State Superintendent shall not release the state aid of a district until a copy of the required report has been received and approved by him give the State Superintendent the authority to determine, within the general provisions of the law, the form and extent of the financial report required of the board?

2. Is this report to the State Superintendent complete enough to comply with the provisions of Section 10501, as amended in House Bill No. 146, Laws of 1941, page 536?"

We shall answer your questions in the order listed in your request.

I.

"Does the proviso that the State Superintendent shall not release the state aid of a district until a copy of the required report has been received and approved by him give the State Superintendent the authority to determine, within the general provisions of the law, the form and extent of the financial report required of the board?"

Section 10501, R. S. Mo. 1939, as amended by Laws of 1941, page 556, provides in part as follows:

" * * * and provided further, that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having six directors or having high schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all purposes for the year, which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report

> to the state superintendent of public schools at Jefferson City. The state superintendent of schools shall not release the state aid apportioned to such a district for the next ensuing school year until a copy of the required report has been received at his office in Jefferson City and has been approved by him, and any board of education or board of directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

It will be seen from the foregoing section that what must be included in the report filed by the secretary of the board is set out in the section itself. The matter therein required must, therefore, be included in any report which is made in compliance with said section. It would not be within the power of the state superintendent to accept any report which did not contain the matters required by Section 10501. However, Section 10605, R. S. Mo. 1939, reads as follows:

> "The blanks for the reports required to be made by the various school officers under the provisions of this chapter shall be printed under the direction of the commissioners of public printing, in the form prescribed by the state superintendent of public schools, to be paid for in like manner and upon the same terms as other public printing."

It will be observed that the foregoing section of the statutes expressly vests the state superintendent of schools with authority to prescribe the form upon which school officers

shall make reports which are required of them by law. Since Section 10501 requires a report of school officers, the state superintendent of schools, by virtue of Section 10605, supra, has the authority to prescribe the form upon which said report shall be made. Such authority, of course, is limited to prescribing the form in which the matters required by Section 10501 shall be submitted, but such authority does not extend to prescribing a form which would not call for all of the information required by said Section 10501.

CONCLUSION

It is, therefore, the opinion of this department that the state superintendent of schools has authority to prescribe the form upon which the report of the school boards required by Section 10501, R. S. Mo. 1939, as amended by Laws of 1941, page 536, shall be made, subject only to the limitation that any form so prescribed would have to call for the information required by said Section 10501.

II.

"Is this report to the State Superintendent complete enough to comply with the provisions of Section 10501, as amended in House Bill No. 146, Laws of 1941, page 536?"

Said Section 10501, as quoted in the first part of this opinion, requires the school boards to make and publish

> "a detailed statement of all receipts of school moneys, when and from what source derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for

> all purposes for the year, which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City."

Your second question is whether or not the form which you submitted along with your request for an opinion meets the foregoing requirements. An examination of the form submitted shows that it calls for the present indebtedness of the district, the nature of such indebtedness, and the rate of taxation for all purposes for the year. There is no question, therefore, but that said form complies with that part of Section 10501. The only other question left to determine is whether the form which you submitted calls for a "detailed statement of all receipts of school moneys, when and from what source derived, and all expenditures, and on what account." In other words, the question is as to how minute must the details of said report be.

In the case of State ex rel. v. Commissioners of Washington County, 56 Ohio St. 631, 47 N. E. 565, the court passed upon the sufficiency of a financial report required by statute to be made by the Commissioners of Washington County. Said report in listing the expenditures of the revenue listed items such as the following:

For blanks, county auditor.....	$120.50
For sheriff, prison board.....	854.00
For sheriff, superintending prison labor.....	106.73
For sheriff, washing for prisoners	73.07
For allowance to military companies	354.44
For gas, court house and jail..	374.61
For telephone rent	50.00
For water rent, court house and jail.....	225.15

The report in that case was attacked on the ground that the same was not a "detailed report." In passing upon

the sufficiency of said report the court said, 47 N. E. 1. c. 568:

> "In making and filing the report of their financial transactions for the year preceding August 31, 1893, in the form just recited, did the board of county commissioners comply with the requirements of section 917, Rev. St.? This statute, so far as it relates to the form or substance of the report required of the county commissioners, is in the following words: 'Sec. 917. The county commissioners, annually, on or before the third Monday in September, shall make a detailed report in writing, to the court of common pleas, of the county, of their financial transactions during the year preceding the time of making such report. * * *' If, by requiring of the county commissioners an annual 'detailed' report of their financial transactions, the general assembly intended that they should reduce their account to its ultimate analysis, then the account set forth by the commissioners in their answer did not comply with the statute; for it is obvious that many, if not all, of the items (so called) in this report, are made up of a large number of more minute items. For illustration, under the statement of expenditures from dog tax fund, only two items are found:
>
> | | |
> |---|---|
> | For claims for sheep killed by dogs ..... | $1,259.16 |
> | Witness fees, mileage, and blanks..... | 79.70 |
> | Total..... | $1,338.86 |
>
> "A subsequent part of the record discloses that there were at least 57 distinct claims paid on account of sheep

killed or injured by dogs. Probably there were a number of others. If, however, the number was 57 only, as the statute requires each claim to be established by two witnesses, and as each witness would be entitled to a specific fee of 50 cents and mileage, and as the account, reduced to its last analysis, must state the fee and mileage separately, each sheep claim would require 5 distinct items, making for the 57 claims 275 items instead of 2, as stated in this report; requiring nearly as much space for stating it, and expense for its publication, as will be necessary in respect of the entire report as made. This part of the report perhaps shows a greater condensation than any other portion of it; but an inspection of the whole statement, as reported will clearly show that a reduction to its final analysis would enlarge it manifold. In the more populous and wealthy counties--Hamilton and Cuyahoga, for instance--the report would swell into an immense volume if thus extended. No one would be found patient enough to wade through the vast mass of detail, and each item would be lost in the multitude of its fellows. It is, of course, within the power of the general assembly to require such minuteness as this in the report made by the commissioners; but, unless the language chosen by that body imperatively demands such construction, the section should not, in our opinion, be so construed. Doubtless an account or report which gave the most minute circumstances of a transaction, or resolved into its ultimate component parts every composite item, would properly fall within the definition of a detailed account or report; but the common acceptation of the

> term, as applied to the ordinary transactions of mankind, denotes also a much less specific and extended subdivision of a transaction. None of the lexicographers assign to this word 'detail' such a fixed and unyielding sense as to limit its application to such transactions and accounts only as have been subjected to the most minute and extended subdivision or analysis of which they were susceptible; nor do we think the legislature used the word in the section under consideration in this narrow sense.
>
> "In the report under consideration the county commissioners classified the several heads of expenditure concisely and clearly, and, under its appropriate head, stated, separately, each particular subject of expenditure. In every instance the purpose to be attained by the money expended was clearly shown. The report afforded the data necessary to enable the committee appointed, pursuant to the statute, to intelligently examine it. It advised the taxpayers of the county of the several subjects to which the public revenue had been devoted, and the amount expended upon each subject; and this, we think, is all the statute requires."

It seems to us that the reasoning adopted by the court in the foregoing case is the reasoning which should be adopted in determining the sufficiency of the details of the report required by the statute under consideration here. The form of report which you submitted with your request classifies the several heads of expenditures clearly and calls for each particular subject of expenditures. If said report is properly filled out it will show data which will advise the taxpayers of the district of the several subjects to which the public revenue has been devoted and the amount expended upon each subject. Likewise, said report, properly filled out, will furnish the state superintendent of schools

with information needed by his office. We think this form, properly executed, would comply with the statute in question.

CONCLUSION

It is, therefore, the opinion of this department that the form submitted by you for the report required of school boards by Section 10501, R. S. Mo. 1939, as amended by Laws of 1941, page 536, is complete enough to comply with the provisions of said section.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

HEALTH, BOARD OF: Clerk of City Board of Health is to remain as the local State Registrar in the City of St. Joseph, Missouri, a city of the first class unless removed by failure or neglect of duty.

May 19, 1942.

FILE. 49

Mr. Homer C. King
City Counselor
St. Joseph, Missouri

Dear Sir:

Your letter dated May 13th, 1942, requesting an opinion has been referred to me. This request is as follows:

> "In January 1942, the Commissioner of the State Board of Health, appointed a new local state Registrar of Vital Statistics for the City of St. Joseph, when prior thereto and ever since the organization of the State Bureau, the Clerk of the local city Board of Health, had acted as local State Registrar, so that all of the vital statistics were handled through the one office and permitted us keeping up our records under our ordinances so that complete records for the past 32 years have been kept.
>
> "After the appointment of the new local State Registrar, a demand was made by a representative of the State Board that all of our files and records be turned over to the new local State Registrar, which request the City Board of Health refused, maintaining that they were the local records made out by the Clerk of the Board of Health of our city and preserved under the regulations and ordinances providing for same by the city.
>
> "Then, since the change of registrars, information has been put out among the

doctors, cemetery sextons and the undertakers that the State Registration laws superseded our local requirements so that it was not necessary for any of them to comply otherwise with the requirements of our local city ordinances.

"There are three (3) questions which we herewith present and request your opinion on them. In presenting these questions for your opinions the Mayor and City Council of St. Joseph, its Board of Health and certain of the physicians and all of the undertakers and cemetery sectons have requested that we obtain your opinions on these matters. Supplementary to this letter we set out the ordinances involved, some of the charter provisions of cities of the first class, and some sections of the laws relating to the State Bureau of Health which are involved in this matter, together with a few suggestions to aid in your investigation.

"If there are any further details that you would like to have, we will be glad to furnish them or assist you in any way that we can.

"The questions are as follows:

"QUESTION ONE: Does the City of St. Joseph have the right, under its charter as a city of the First Class, and its ordinances herein set out, to require the registration of births and deaths and require burial permits from the Clerk of the Board of Health of this city before the internment or removal of dead bodies in the city.

"In other words, are these ordinances requiring the registration of births and deaths with the City Board of Health and the ordinance requiring burial permits from the Clerk of our Board of Health, valid?

"QUESTION TWO: Assuming that the City of St. Joseph has maintained an efficient and competent local registration bureau: Did the Commissioner of the State Board of Health (In view of Sections 9763 and 9749), have the right to remove, discharge or discontinue our Clerk of the City Board of Health as local state registrar of vital statistics for this city in January 1942, without cause other than his desire to give the place to another person with the emoluments thereof?

"QUESTION THREE: Is it necessary for the City of St. Joseph Board of Health to turn over to the new local state registrar our books of records of vital statistics consisting of the bound volumes of duplicates of registrations prepared and filed in this office by the Clerk of the City Board of Health as explained herein?"

The request contains three questions which we will endeavor to answer in order. However, in rendering our opinion on these questions, we are assuming per your letter that (1) the Registration Bureau in the City of St. Joseph is an efficient and competent bureau and that (2) the official sought to be removed has not been replaced through failure and neglect of duty but only through the "desire to give the place to another person with the emoluments thereof."

The facts seem to show that St. Joseph became a city of the first class in 1909 and at that time all the laws or parts of laws, not inconsistent with provisions of the article designating such city as being of the first class, and which ordinances were operative in the city prior to its reorganization, should continue in force until repealed or changed by ordinance. Further, that at the time of reorganization of the city, there were ordinances providing that there should be a record kept of all births, marriages and deaths and that burial permits should be procured before the burial of any bodies.

Under paragraph 18 of Section 6293, R. S. Mo. 1939, which section has to do with the powers and duties of the

Mayor and Council in a city of the first class, we find the following:

> "XVIII. To provide for the registration of births, marriages and deaths, and to suppress prize fights, bull fights, dog fights, chicken cock fights, gaming or gambling houses, and to suppress bawdy and disorderly houses, houses of ill-fame and assignation."

We will next cite you to Section 6538, R. S. Mo. 1939, which section provides for the establishment of a Health Department in all cities of the first class in Missouri, in which category St. Joseph falls. Said section is as follows:

> "There is hereby established in all cities of the first class a department to be known as the health department, which shall be under the control of a board of health, which shall consist of three members, who shall serve without compensation and who shall be appointed by the mayor, as are other appointive officers. The mayor in such cities shall be ex officio a member of said board of health, and may be present at its hearings and deliberations, and make such recommendations as he may see fit, and take part in all matters coming before said board of health, but shall not be entitled to a vote."

Section 6540, R. S. Mo. 1939, then prescribes the powers and duties of the Board of Health of such city which is created by Section 6538, supra. This section provides as follows:

> "Said board shall have power and it shall be its duty to enforce the laws of the state of Missouri and all ordinances in relation to public health; to have the care, management and control of all buildings, institutions and property owned or used in such city as hospitals

> or institutions for the care and treatment of sick or injured persons, or as quarantine hospitals or stations within or without the corporate limits of such city, and to have the custody of all persons confined therein; to direct the inspection of every part of such city and its environs, with a view to the maintenance of the sanitary condition of such city, and for such purpose shall have power to enter any public building or premises, and, on reasonable notice, any private building or premises, whenever the same may become necessary in the discharge of the duties imposed on said board; to have charge of the inspection of dairies, milk, meat, all foodstuffs, and all water supplies for drinking purposes; to enforce all pure food laws; to investigate the nature of all contagious or infectious diseases, and take measures to prevent their development or continuance, by quarantine or otherwise, and when necessary to the public health and safety, to order the destruction of animals suffering from any contagious or infectious diseases, and the building within which they have been sick of such diseases; to abate all nuisances in such city, and to regulate the sanitary condition of all morgues, cemeteries, crematories, vaults, and burial places, and the disposition of dead bodies of persons and animals; to provide for the registration of births, marriages and deaths within such city; to perform such other duties as may be conferred by ordinance."

As can be seen from this section, the Board of Health of your city has the power to regulate the registration of "births, marriages and deaths" in such city.

Section 9764, R. S. Mo. 1939, dealing with the procurement of a burial permit, provides as follows:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs: Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided: Provided, that when a dead body is transported by common carrier into a registration district in Missouri for burial, then the transit and removal permit, issued in accordance with the law and health regulations of the place where the death occurred, when said death occurs outside of the state of Missouri, shall be accepted by the local registrar of the district, into which the body has been transported for burial or other disposition, as a basis upon which he shall issue a local permit, in the same way as if the death occurred in his district, but shall plainly enter upon the face of the burial permit the fact that it was a body shipped in for interment, and give the actual place of death; but a burial permit shall not be required from the local registrar of the district in which interment is made when a body

> is removed from one district in Missouri to another in the state, for purpose of burial or other dispostion, either by common carrier, hearse, or other conveyance; and no local registrar shall, as such, require from undertakers or persons acting as undertakers any fee for the privilege of burying dead bodies."

We do not think that the ordinance of the City of St. Joseph in any way conflicts with the State statute cited above.

In view of the statutes cited supra, it is the opinion of this Department that the city of St. Joseph has the authority, through its Health Department, to regulate by ordinance the registration of births and deaths in said city, and to require the possession of a burial permit before any body is interred.

> "QUESTION TWO: Assuming that the City of St. Joseph has maintained an efficient and competent local registration bureau: Did the Commissioner of the State Board of Health (In view of Sections 9763 and 9749), have the right to remove, discharge or discontinue our Clerk of the City Board of Health as local state registrar of vital statistics for this city in January 1942, without cause other than his desire to give the place to another person with the emoluments thereof? "

We will cite you to Section 9763, R. S. Mo. 1939, which provides as follows:

> "Within ninety days after the taking effect of this article, or as soon thereafter as possible, the state board of health shall appoint a local registrar of vital statistics for each registration district in the state. The term of office of local registrars, appointed by said board, shall be for four years, beginning with the first day

of January of the year in which this article shall take effect, and their successors shall be appointed at least ten days before the expiration of their terms of office: Provided, that in cities where health officers or other officials are conducting effective registration of births and deaths under local ordinances at the time of the taking effect of this article, such officers shall be continued as registrars in and for such cities, and shall be subject to the rules and regulations of the state registrar, and to all of the provisions of this article. Any local registrar appointed by said board who fails or neglects to discharge efficiently the duties of his office as laid down in this article, or who fails to make prompt and complete returns of births and deaths, as required thereby, shall be forthwith removed from his office by the state board of health, and his successor appointed, in addition to any other penalties that may be imposed, under other sections of this article, for failure or neglect to perform his duty. Each local registrar appointed by said board shall, immediately upon his acceptance of appointment as such, appoint a deputy, whose duty it shall be to act in his stead in case of absence, illness, or disability, and who shall accept such appointment in writing, and who shall be subject to all rules and regulations governing the action of local registrars. And when it may appear necessary for the convenience of the people in any registration district, the local registrar is hereby authorized, with the approval of the state registrar, to appoint one or more suitable persons to act as subregistrars, who shall be authorized to receive certificates and to issue burial or removal permits in and for such portions of the registration district as may be designated; and each subregistrar

> shall note, over his signature, the date on which each certificate was filed, and shall forward all certificates to the registrar of the district within ten days, and in all cases before the third day of the following month: Provided, that all subregistrars shall be subject to the supervision and control of the state registrar, and may be by him removed for neglect or failure to perform their duties in accordance with the provisions of this article of the rules and regulations of the state registrar, and they shall be liable to the same penalties for neglect of duties as the local registrar: Provided, that on and after July 1, 1937, in all counties having or which may hereafter have a population of two hundred thousand inhabitants and less than four hundred thousand inhabitants according to the last federal decennial census, where a deputy state health commissioner shall have been appointed by the county court, such deputy state health commissioner shall be the local registrar and shall be subject to all rules and regulations governing the action of local registrars, prescribed by this article."

This section was originally passed on May 6, 1909. The information furnished this Department shows that an ordinance of St. Joseph provided for the Clerk of the Board of Health to register births, marriages and deaths as early as 1891 or eighteen years preceding the passage of the State law.

Again citing a portion of Section 9763, supra, we find the following:

> "Provided, that in cities where health officers or other officials are conducting effective registration of births and deaths under local ordinances at the time of the taking effect of this article, such officers shall be continued as registrars in and for such cities, and shall be subject to the rules and regulations of the state registrar, and to all of the provisions of this article. * * *"

According to the facts as furnished this Department, the Health Department was conducting an effective registration of births and deaths at the time the State provisions were passed. Then under the provision above, the officer having charge of the registration at that time, remained as the local "registrar" for such city only to be removed for "failure or neglect of duty." We feel that the legislators did not intend, in passing this provision, to supersede the powers of the city of the first class. Rather we think that it was the intention of the lawmakers to let a city which had a well organized and efficient Health Department, take care of their own registration and that the officer selected by the Board of Health of such city should remain as the local state registrar for that city, unless removed for failure or neglect of duty. This intention on the part of the legislators has been recognized by the fact that for the past thirty-two years the Clerk of the City Health Department has been local registrar in the City of St. Joseph.

It is, therefore, the opinion of this department that the City Clerk of the Health Board of the City of St. Joseph is the local registrar for that city, until he is removed for failure or neglect of duty. Further, that the appointment of any other person to replace him by the State authorities, was void unless he was removed for those reasons.

> "QUESTION THREE: Is it necessary for the City of St. Joseph Board of Health to turn over to the new local state registrar our books of records of vital statistics consisting of the bound volumes of duplicates of registrations prepared and filed in this office by the Clerk of the City Board of Health as explained herein?"

This question is superfluous in view of our opinion on question two. In other words, if the records are still in the possession of the Clerk of the City Board of Health, which your request seems to indicate, he remains as local registrar for the city and is still the legal custodian of the records. Therefore, if a demand is made for the records by some person without authority, he is under no compulsion to relinquish possession of same. If the clerk had been removed for failure or neglect

of duty, there would be a different question presented since he would not be the legal custodian.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

TWO QUESTIONS IN REGARD TO VOCATIONAL EDUCATION:

State Board of Education is not authorized to receive funds from R. E. A. cooperatives for such training program.

June 24, 1942

6-25

FILED
49

Hon. Lloyd W. King
State Superintendent of Public Schools
Jefferson City, Missouri

Dear Mr. King:

We have your opinion request of June 3, 1942, which is as follows:

> "The State Department of Education, Vocational Division, has been requested by the United States Department of Agriculture, Rural Electrification Administration, to cooperate in a job training program for the Rural Electrification administration cooperatives in Missouri. The training program, if inaugurated, would be financed by funds from the cooperatives matched with Federal funds for vocational education.
>
> "Before making any arrangements for carrying on the job training program for the Rural Electrification Administration, I should like to have your opinion about the following:
>
> 1. Would the State Department of Education, Vocational Division, be authorized to receive funds from the Rural Electrification Administration cooperatives, deposit those funds in the State Treasury, and after having matched them with Federal funds, expend them for carrying on a training program.

2. Is the Rural Electrification Administration a government agency? Would the cooperatives of the Rural Electrification Administration be construed as a part of a government agency or would the cooperatives of the Rural Electrification Administration be public (non-private) institutions?"

For the purpose of this opinion we shall answer your questions in reverse order. The first question to be considered is,"Is the Rural Electrification Administration a government agency?" Chapter 31, Title 7, Paragraph 901, U. S. C. A., in very clear words decides this question. That section is as follows:

> "There is hereby created and established an agency of the United States to be known as the 'Rural Electrification Administration', all of the powers of which shall be exercised by an Administrator, who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of ten years, and who shall receive a salary of $10,000 per year. This chapter may be cited as the 'Rural Electrification Act of 1936'." (Underscoring ours.)

The second part of your second question namely,"Would the cooperatives of the Rural Electrification Administration be construed as a part of a government agency or would the cooperatives of the Rural Electrification Administration be public (non-private) institutions?". As I understand the law, the cooperatives of the R. E. A. would not be construed as either of the two mentioned. The Rural Electrification Cooperative Act is found in Article 7, Chapter 33 of Revised Statutes of Missouri, 1939. The second section under this chapter

designates just what these cooperatives are. Section 5387, which is the section we mention, is as follows:

> "Cooperative, nonprofit, membership corporations may be organized under this act for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas. Corporations organized under this act and corporations which become subject to this act in the manner hereinafter provided are hereinafter referred to as 'cooperatives.'"

Further, Section 5388, R. S. Mo., 1939, sets out the powers among which are the following:

> "A cooperative shall have power:
>
> (a) To sue and be sued, in its corporate name;
>
> (b) To have twenty-five years existence;
>
> (c) To adopt a corporate seal and alter the same at pleasure; * * * * * "

Section 5389 provides that rules and regulations prescribed by the Public Service Commission shall apply to these cooperatives.

Section 5391 sets out how they may be organized.

Section 5392 provides for articles of cooperatives to be filed with the Secretary of State.

Section 5393 provides for bylaws to be adopted.

Section 5394 provides for qualifications for membership, meetings, etc.

Section 5395 provides for a board of directors to manage the cooperative.

Sections 5402 provides in part as follows:

> "Any corporation organized under the laws of this state for the purpose, among others, of supplying electric energy in rural areas may be converted into a co-operative and become subject to this act with the same effect as if originally organized under this act by complying with the following requirements: * * * "

Hence, we believe that a Rural Electrification Cooperative is nothing more nor less than a private corporation organized under the laws of this State in a like manner as any other private corporation.

Now, turning to your first question, which asks in substance if the State Department of Education-vocational division-could receive funds from these cooperatives, divert them to the State Treasurer and after matching them with federal funds expend them for carrying on a training program. We must assume in the first instance that this training or job program would be a program to train men for these cooperatives. Section 46, Article 4, Constitution of Missouri, provides as follows:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Article 8, Chapter 72, R. S. Mo., 1939,

together with the amendments of Sections 10525, 10526, 10527, 10528, 10529, Laws of Missouri, 1941, sets out just what the State Board of Education--Vocational Division--can do, who shall keep the funds, where the funds shall be obtained and all other matters relating to this branch of the educational system.

Section 10553 permits the State Board to accept gifts and donations which shall be used as you set out in your question only for the rehabilitation of disabled persons. Nowhere in this Act is authority granted the State Board to accept such aid nor to dispense funds in such a manner as you have mentioned in your question.

CONCLUSION

It is, therefore, the opinion of this office:

1) That the Rural Electrification Administration is a government agency.

2) That the cooperatives formed under the Rural Electrification Administration are merely corporations organized similarly to and governed in the same manner as other corporations of like nature.

3) That the State Board of Education is not granted

the authority to accept funds from the cooperatives and divert them to the State Treasurer who would in turn match them with federal funds for the purpose of special job training for the cooperative's personnel.

Respectfully submitted,

MAX [illegible] BRYAN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

SCHOOLS: Under Section 10501, R. S. Mo. 1939, as amended Laws of Mo. 1941, "copy" of treasurer's statement does not mean "certified copy" or "proof of publication."

July 22, 1942.

1-73

FILED
49

Honorable Lloyd W. King
State Superintendent of Schools
Jefferson City, Missouri

Dear Mr. King:

The Attorney-General wishes to acknowledge receipt of your letter of July 18, 1942, requesting an opinion from this department. The letter requesting such opinion, after omitting the caption and signature, is as follows:

> "Inquiry has come to this Department about the requirements of the law governing the making and publishing of a financial report by the board of education as required in Section 10501, as amended in House Bill No. 146, Laws of 1941, page 536.
>
> "Section 10501, as amended, requires the board of education to make and publish, annually, on or before the 15th day of July in each year, a financial statement. The law further provides that a copy of the board's financial report shall be sent by the secretary to the State Superintendent of Public Schools before the district can qualify for the state apportionment of public school funds.
>
> "In a previous inquiry, I submitted to you a general financial statement form to be used by the secretary of the board in making the required financial report to this Department. In submitting this form, I asked if it was complete enough to comply with the provisions of Section 10501, as amended in House Bill No. 146, Laws of 1941, page 536. Also,

I asked if this law gave the State Superintendent authority to determine, within the general provisions of the law, the form and extent of the financial report required of the board.

"In your official opinion of March 24, 1942, you advised that the form submitted by this Department is complete enough to comply with the provisions of the law, and that the State Superintendent of Schools has authority to prescribe the form upon which the report shall be made to his office.

"Boards of education have asked whether or not it is mandatory, under this act, for them to submit as proof of publication a certified copy as reported and published in the district, and whether or not the State Superintendent of Schools has the authority, under this act, to require such proof of publication.

"Question:

"1. Does the State Superintendent of Schools have specific authority, under the provisions of this act, to require the board of education to submit to this Department a copy of the certified proof of publication before the district can qualify for the state public school fund apportionment?

"2. If the State Superintendent of Schools does not have authority to require proof of publication of the financial statement, on whom rests the responsibility for enforcing the law which requires its publication?

"I shall appreciate your advice and official opinion."

As to your first question, I will cite Section 10501 of the Revised Statutes of Missouri for 1939, and as amended by the Laws of Missouri, 1941, page 536, which section provides as follows:

> "No member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services; Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year; and provided further, that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having six directors or having high schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all purposes for the year, which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City. The state superintendent of schools shall not release the state aid apportioned to such a district for the next ensuing school year until a copy of the required report has been received at his office in Jefferson City and has been

> approved by him, and any board of education or board of directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

As can be seen from the above statute, this law provides that a detailed statement of all receipts and of school moneys, when and from what source derived, and all expenditures, the present indebtedness of the school district and the rate of taxation for all purposes for the year, shall be duly attested by the president and the secretary of the school board and published, and the secretary shall forward a copy of said report to the State Superintendent of Public Schools at Jefferson City, Missouri. Unless a copy of such report, duly attested by the president and secretary of the board, is received by the State Superintendent of Schools, the latter shall not release the State aid apportioned to such district until such copy is furnished him. It will be noted that the statute does not speak of a "certified copy" of such statement or of a "proof of publication" of such statement, but only provides that a "copy" of such statement, which was made and published according to the above statute, shall be furnished the Education Department. The only requirement is that such copy be attested by the president and secretary of the board.

Upon receipt of a copy, attested in the proper manner, from any of the school boards, the State Superintendent of Schools can presume that the officers of such boards have performed their duties as required by Section 10501, R. S. Mo. 1939, as amended, and therefore presume that this statement, a copy of which has been sent to him, has been published pursuant to the statute mentioned above. In general, it is presumed that an officer does his duty and that his proceedings are legal and regular. See State ex rel. Ball v. The Board of Health, 26 S. W. (2d) 772, 325 Mo. 41; Waterman v. Chicago Bridge and Iron Works, 41 S. W. (2d) 575, 328 Mo. 688; Gilbert v. Malan, 100 S. W. (2d) 606, 231 Mo. App. 469.

Following this line of decisions the State Superintendent of Schools, upon receipt of a purported copy of the treasurer's report properly attested, has the power to then apportion the State Aid to which the school board in question is entitled. This department does not feel that the Legislature intended to say that a "certified copy" or a "proof of publication" should be furnished the State Superintendent of Schools. The only term used is "copy" and we feel that that was the intention of the Legislature in view of the authorities we have cited above.

As to your second question, if any officer of the school board shall fail, refuse or neglect to prepare a statement of this kind after having been ordered to do so by the board, such officer or officers shall be deemed guilty of a misdemeanor and punished by a fine not to exceed One Hundred Dollars as provided in the section set out above. In view of the fact that this constitutes a criminal offense, the responsibility for enforcement of the law rests on the law-enforcement authorities in the county in which the school district is located. It can be seen from reading the above statute that an officer of a school board is guilty of no offense unless he refuses to prepare and publish such statement after having been ordered so to do by the school board.

Conclusion

Therefore, it is the opinion of this Department that the statutes do not contemplate the furnishing of a certified copy or proof of publication of the statement required to be made under Section 10501, R. S. Mo. 1939, as amended by the Laws of Missouri, 1941, but that only a copy of such statement, attested to by the president and secretary of the school board, is necessary. It is further the opinion of this department that the enforcement of the above section with regard to publication of a statement as required under Section 10501, R. S. Mo. 1939, as amended by the Laws of Missouri, 1941, is in the hands of the law-enforcing authorities of the county wherein the school board is located.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

JSP:EG

VOCATIONAL EDUCATION:) Board of Education may
SUPERINTENDENT OF SCHOOLS, COMPENSATION:) employ State Superintendent of Schools as State Director and compensate him for such services if same are not a part of his duties as Superintendent and executive officer of Board of Education. Payment for extra services or additional duties does not violate constitutional provision against increasing salary of officer during term.

December 30, 1942

12-30

FILED
49

Honorable Lloyd W. King
Superintendent of Public Schools
Jefferson City, Missouri

Dear Sir:

On December 28, 1942, you requested an opinion upon the following:

> "A question has been raised by an auditor of the United States Office of Education concerning the payment of $300 per month additional compensation to the State Superintendent of Schools for added services rendered by him as Executive Officer of the State Board for Vocational Education and as State Director for Vocational Education in performing duties imposed in cooperating with the Federal Vocational Education program.
>
> "A question also has been raised as to whether the above compensation amounts to a raise in salary for the State Superintendent of Schools during his term in office.
>
> "May I recite the following facts and then ask your opinion on two specific matters.
>
> "Article VIII, Revised Statutes of Missouri 1939, refers to vocational education and vocational rehabilitation. Section 10527 of Article VIII designates the State Board of Education as the

Board charged with the duty and responsibility of cooperating with the Federal Board for Vocational Education in the administration of the Federal Vocational Act and is given all power necessary to such cooperation.

"Section 10528 of Article VIII authorizes the State Board to incur expenditures in the administration of the program as far as Federal funds are concerned. Other sections in the Act authorize the State Board to incur expenditures necessary for the administration of the law and in short to administer the program in the state.

"For years the State Superintendent of Schools has served not only as the Executive Officer but as State Director for Vocational Education and as Executive Officer and Director of Vocational Education has been paid for the performance of the duties of these offices. These duties are additional duties. They were not contemplated by the Constitution. They consist of the actual administration of the whole program of vocational education which in this state now include the following divisions:

"Vocational Agriculture
Vocational Home Economics
Trade and Industrial Education
Distributive Education
Occupational Information and Guidance
War Production Training Program which consists of: (a) Vocational Program of Instruction Essential to the War Production Program for out-of-school Rural and Non-Rural Persons; (b) Vocational Training for War Production Workers

"The program involves the direction of the supervision of the many local programs in

these Divisions and involves the financial administration of the entire program.

"The questions I respectfully ask you to consider are:

"1. May the State Board for Vocational Education vote to pay and may the State Superintendent of Schools receive the additional amount indicated as Executive Officer and Director of Vocational Education?

"2. Does the payment of this sum for additional duties performed amount to a raise in salary for the State Superintendent of Schools during his term of office?"

The two questions submitted will be answered in order.

I.

The duties of the State Superintendent of Schools other than those relating to vocational education and vocational rehabilitation are in the main detailed by Articles 13 and 17 of Chapter 72, R. S. Mo. 1939. Other statutes place additional work upon the Superintendent. They are not here set out as no additional light would be cast thereby upon the propositions under consideration.

Article 8 of Chapter 72, R. S. Mo. 1939, and its amendments, undoubtedly place new and additional duties upon the State Board of Education and the State Superintendent of Schools. It was adopted many years after the office of Superintendent of Schools was established and his duties prescribed. The act and its amendments (Laws of 1941, pages 548, 549, 553-4 and 556) accepts the benefits of various congressional enactments with reference to vocational education and vocational rehabilitation and provides that the State Board of Education (of which the Superintendent of Schools is a member and president) is the Board responsible for and charged with the duty of

cooperating with the Federal Board for Vocational Education in the administration of such acts. It is also provided (Laws of 1941, page 556):

> "That such state board of education is hereby authorized to incur such expenditures for the salaries of assistants and such office and other expenses as it may deem necessary to the proper administration of the funds allotted to the State of Missouri under the provisions of such acts."

The Missouri Constitution does not prevent the State Superintendent of Schools from acting as administrator or director of vocational education or vocational rehabilitation. Section 18 of Article IX bars a state officer from holding a county, city or other municipal office in counties of 200,000 and more inhabitants and prohibits one from holding two municipal offices at the same time, with certain exceptions. This section obviously has no application to the present question.

No statute has been found that would foreclose the State Superintendent of Schools from being executive officer of the Board in administering vocational education, but quite the contrary Section 10536, R. S. Mo. 1939, directs that the Superintendent shall be the executive officer of the Board in the administration of the vocational and rehabilitation educational law.

The common law doctrine of incompatibility of office has been followed in Missouri. See State ex rel. Walker v. Bus, 135 Mo. 325. By such rule one may not hold an office and accept a second one incompatible with the first and where there is an inconsistency in the function of the offices, as where one office has the supervision of the other. This common law rule, if applicable, would destroy the terms of Section 10536, supra, because the State Superintendent is a member of and president of the Board whose duty it is to supervise the administrative efforts of the State Superintendent. This rule cannot apply because it is in conflict with the statute.

Rules of common law do not prevail when repugnant to or inconsistent with the Constitution or statute laws of the

State, by virtue of Section 635, R. S. Mo. 1939. State v. Dalton, 114 S. W. 1132, 134 Mo. App. 517; Lines Music Co., v. Holt, 332 Mo. 749, 60 S. W. (2d) 32, l. c. 34; and Roberson v. Jones, 136 S. W. (2d) 278, 345 Mo. 828.

Laws of 1941, page 556, authorizes the Board to incur expenditures for the assistants as deemed necessary to the proper administration of the funds allotted. The amount of such expenditures and the perons employed is thus left to the judgment of the Board.

While a public officer is presumed to r ender his services gratuitously and he has the burden of pointing out statutory authority for the payment of compensation (Nodaway County v. Kidder, 129 S. W. (2d) 857), the last above mentioned enactment destroys such presumption. It authorizes the payment of assistants' salaries, which would include a State Director of Vocational Education, in amounts to be fixed by the Board, if that body deemed such assistants and a director were necessary to the proper administration of the law.

Although the request does not definitely so state, it is assumed that the State Director of Vocational Education performs duties other than those executed by the State Superintendent of Schools as the administrative officer. We understand that the State Director is primarily responsible to the Board and not the Superintendent of Schools as administrative officer. Thus the Superintendent of Schools does not in fact control his own activities as State Director. The State Director is likewise indirectly responsible to the United States Office of Education, we believe.

It is therefore concluded that the State Board of Education may employ the State Superintendent of Schools as State Director of Vocational Education to perform functions not a part of the duties of the Superintendent of Schools as executive officer of the Board and at such salary as the Board may deem proper.

II.

The second question presented is in effect: Does the payment of a salary to the State Superintendent of Schools for

services as Vocational Education Director violate the constitutional rule against increases in compensation during such official's term of office?

The salary of the State Superintendent of Schools is provided by Section 13389, R. S. Mo. 1939, which is as follows:

> "The officers of state shall receive for their services, annually, the following sums: First, the governor, the sum of five thousand dollars; second, the judges of the supreme court, each four thousand five hundred dollars; third, the judges of the circuit courts, each, two thousand dollars; fourth, the secretary of state, three thousand dollars; fifth, the state treasurer, three thousand dollars; sixth, the state auditor, three thousand dollars; seventh, the attorney-general, three thousand dollars; eighth, the Superintendent of public schools, three thousand dollars; ninth, the commissioner of permanent seat of government, three hundred and fifty dollars: Provided, that this article shall not affect the operation of any special law now in force relating to the salaries of any of the officers herein named." (Underscoring added)

Section 24 of Article V of Missouri's Constitution, is:

> "The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms; and they shall not, after the expiration of the terms of those in office at the adoption of this Constitution, receive to their own use any fees, costs, perquisites of office, or other compensation. All fees that may hereafter

> be payable by law for any service performed by any officer provided for in this article shall be paid in advance into the state treasury."

By Section 1 of such article the State Superintendent of Schools is made a member of the Executive Department.

As has been pointed out above the appointment made under the Vocational Education and Educational Rehabilitation Act (Article 8 of Chapter 72, R. S. Mo. 1939, and amendments) fastens additional duties upon the State Superintendent of Schools. This being true the allowance of compensation for such additional services does not increase his salary contrary to the terms of the Constitution.

In the case of Cunningham v. Ry. Co., 165 Mo. 270, the Supreme Court held that a statute requiring the payment of a docket fee to the Circuit Judge to which a case is sent on a change of venue did not violate the constitutional provision against increasing or diminishing a judge's compensation during his term of office. The following language was used, l. c. 277:

> "The compensation mentioned in the Constitution means compensation paid by the State, or some subdivision thereof, in the way of an increase of salary or compensation, which can not be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the State treasury."

The Supreme Court in State ex rel. Harvey v. Sheehan, 269 Mo. 421, sustained a statute that required prosecuting attorneys in certain counties to attend inquests and allowed an additional fee for such attendance. It was pointed out that such statute was not an unconstitutional increase in compensation. The following appears at page 429 of such opinion:

> "Another contention made is that since the appellant was an officer at the time

> of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 165 Mo. 270; State ex rel. v. Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 89; State ex rel. v. McGovney, 92 Mo. 428; County v. Felts, 104 Cal. 60; State ex rel. v. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Purnell v. Mann, 105 Ky. 87; Lewis v. State ex rel., 21 Ohio C. C. 410.)"

To the same effect is the ruling in State ex rel. Zevely v. Hackman, 254 S. W. 53, 300 Mo. 59, l. c. 66.

However, it has been decided that where an officer's compensation is not fixed by statute but is left to the judgment of some body, such as a county court, and that body determines the salary and no extra services are required after the salary is fixed, the officer's compensation may not be later increased during the term of office in which the salary was set. "* * * Those terms imply rather that this payment was in full of salary to that date, but as such a construction would increase the salary, which could not be done under the constitution, (art. 14, sec. 8,) we must infer that it was only intended to cover the salary for two years, leaving the additional period for future adjustment." Givens v. Daviess Co., 107 Mo. 603, l. c. 610.

Conclusion

It is the opinion of this Department that the payment of additional compensation by the State Board of Education to the State Superintendent of Schools for additional or extra duties as State Director of Vocational Education does not violate the constitutional provisions against increasing the compensation of such officer during the term for which he was elected. However, after the salary for such additional duties is fixed by the Board of Education for any one term, it may not be increased during that term for such services.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

VCT:EG

SCHOOLS:
TAXATION:
TOWNSHIP TRUSTEES:

School moneys in counties under township organization should be turned over to township trustees.

April 11, 1942

See opinion May 18, 1942

FILE
51

Mr. Yewell Lawrence
Clerk of County Court
Stoddard County
Bloomfield, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you request an opinion from this Department on the following statement:

> "One of the township Treasurers in our county--as you no doubt know, we have township organization--is of the opinion that since he is township Treasurer he would be entitled to receive all of the School money directly from the County Treasurer for his particular township, regardless of whether or not it is for a Consolidated School District--which have their own Treasurer, or a Village School District that has their own Treasurer."

Since this is a matter which is controlled entirely by the Statutes, we refer to the following statutes, which we think apply; Section 14017 provides in part as follows:

> "The township collector shall be required to draw or procure a plat of each school district or fractional part thereof in his township, and shall keep a true and correct account of all school moneys collected by him in each school district or fractional part thereof; and when said collector pays the moneys so collected by him

> to the township treasurer, he shall state the amount collected from each school district or fractional part thereof, and take duplicate receipts therefor, one of which he shall retain, and file the other with the township clerk. As soon as the school funds are apportioned, the township treasurer shall apply to the county treasurer for the school moneys belonging to each school district or fractional part thereof, in his township, and the county treasurer shall pay over to him all of said school money, taking duplicate receipts therefor, one of which he shall file with the township clerk. The township treasurer shall safely keep such money until paid out upon the order of the board of directors of the various school districts in his township.* * * * * * * * *"

This section borders closely on the answer to your question, however, we refer you to other sections. Section 13989 R. S. Mo., 1939, pertains to this question and it provides in part as follows:

> "The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. * * *"

Under this section, the county treasurer of such counties who is ex officio collector therein, collects delinquent personal

property taxes. licenses, merchants taxes, taxes on railroads and other corporations and delinquent or nonresidents' lands or town lots. However, from the provision of Section 14017 supra, it would seem that ex officio collector, when he has made these collections turns them over to the township treasurer. Under Section 14016 township collector returns to the county treasurer his record of uncollected taxes. Section 10479 R. S. Mo., 1939, is quite pertinent to this question and it provides as follows:

> "Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, the same shall, on the application of the treasurer of said town, city or consolidated school district, be paid over to him by said county or township treasurer, * * * * * ** * *."

This section clearly indicates that moneys apportioned to township, city or consolidated school districts are paid to the township treasurer in counties under township organization. Section 10400 R. S. Mo., 1939, seems to be a special section on this question; it provides in part as follows:

> "The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer;* * * * *."

This section clearly indicates that the township treasurer in counties under towhship organization is the custodian of all

school moneys belonging to the township and his duties correspond to those of county treasurer in counties not under township organization.

CONCLUSION

It is therefore the opinion of this department, that the township treasurer in counties under township organization is entitled to receive all school moneys, either those in the custody of the county treasurer or those which have been collected by the township collector. These moneys include those of consolidated school districts, cities, towns or village districts which are within the bounds of such townships.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

SCHOOLS:
TAXATION:
TOWNSHIP TRUSTEES
(Supplementing Opinion)

SCHOOL moneys in counties under township organization should be turned over to township trustees except cities, towns and consolidated school district's moneys.

May 18, 1942.

6-3

FILE
51

Mr. Yewell Lawrence
Clerk of County Court
Stoddard County
Bloomfield, Missouri

Dear Sir:

Supplementing our opinion to you under date of April 11, 1942, which related to school moneys in counties under township organization and the duties of the township trustees in relation thereto, we make the following observations.

After the rendition of this opinion, our attention was called to Section 10482 R. S. Mo., 1939, which seems to conflict with our conclusions in the opinion rendered on April 11th. It has been suggested that Section 10482 R. S. Mo.,1939, is a special act referring to cities, towns and consolidated school districts.

In order to give these sections proper construction, we will look to the history of this legislation. The first sentence of Section 14017 R.S. Mo., 1939, referred to in our opinion, is almost identical language as was contained in Section 7538 R. S. Mo., 1879. At that time, apparently the township collector was paying over to the township trustee,all school moneys which he collected.

Section 10482 R. S. Mo., 1939, provides as follows:

> "The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon suchpayment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education,

> and the other shall be filed in his settlement with the county court."

It will be noted that this section in plain language directs the township collector to turn over school moneys to the treasurer of the board of education of the city, town or consolidated school district within his township. Said Section 10482 is an amendment of Section 7152 of the Revised Statutes of 1879. The first sentence of this section reads as follows:

> "The county collector shall pay over to the treasurer of said board of education, all moneys received and collected by him to which said board is entitled, at least once in every month, and oftener if required in writing by the treasurer of said boards; and upon his payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of the board of education, and the other shall be filed in his settlement with the county court * * * *"

Apparently, the lawmakers discovered that the collectors of counties not under township organization were turning over school moneys to the treasurers of the boards of education of cities, towns and consolidated school districts, while township collectors were turning over funds to the township treasurer as now provided by section 14017, supra. As a result thereof, the General Assembly in 1887 Laws of Missouri of 1887, amended said Section 7152 R. S. Mo., 1879 to read as follows:

> "The county <u>or township</u> collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled, at least once in every month; and upon such payment he shall take du-

> plicate receipts from said treasurer, one of which he shall file with the secretary of said board of education and the other shall be filed in his settlement with the county court."

So it will be seen that by this amendment, the lawmakers took care of the subject of your inquiry. In other words, by the provisions of this later and special act, the law was so amended that the township collector in counties under township organization was required to turn over the school moneys to the treasurers of the boards of education, the same as had been required of the county collectors in counties not under township organization.

CONCLUSION

That being the case, it is the opinion of this Department, that our opinion to you under date of April 11th, should be amended to the extent that the township collectors should follow the provision of Section 10482 R. S. Mo., 1939, and pay over to the treasurers of the boards of education of cities, towns, and consolidated school districts, all moneys received and collected by him to which said board is entitled.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

SCHOOLS: Special election can be held under Section 10358 to increase tax levy after the annual election has been held.

June 13, 1942

Honorable Don Land
County Clerk
Cass County
Harrisonville, Missouri

FILE 57

Dear Sir:

This will acknowledge receipt of your request for an opinion from this office, which request is as follows:

> "I have a rural school Dist. that wants to hold a special election to vote more levy for their Dist.
>
> "They voted 40c levy and have it filed and I have the book extended and added.
>
> "What I want to know can they hold a special election and vote more levy to be extended on the tax book, or is there a certain time that they have to get the levy filed in this office.
>
> "Of course I can erase the tax I have already extended if it is legal for them to vote the extra levy this lade. I can't find any law only that they can hold a special election but can't find, if there is any certain time for them to hold the election."

The legal procedure provided by law for levying taxes for maintaining rural schools is as follows: "The voters at the annual meeting determine the rate, if any, in excess

of forty cents on the one hundred dollar valuation to be levied for school purposes. (Section 10419) Thereon the Board of Directors, on or before May 15th, forwarded to the County Superintendent an estimate of the amount of funds necessary to maintain the schools of their district, and the rate required to raise said amount (Section 10347). The County Superintendent then approves the estimate and turns same over to the County Clerk (Section 10612), and the County Clerk prepares the tax book and extends the taxes thereon.

However, Section 10358, R. S. Missouri, 1939, reads as follows:

> "Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation for school purposes, or when any five resident taxpayers of such district shall petition such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said school district who are taxpayers of such school district, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board whether the rate of taxation be increased as proposed by said board, due notice having been given as required by section 10418; and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase, the result of such vote, and the rate of taxation so

> voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

It will be noted that no time limit is set in Section 10358, for the holding of the election to vote on increasing the levy. The section merely provides that, "whenever it shall become necessary * * * to increase the annual rate of taxation for school purposes," the board shall determine the rate of taxation necessary to be levied, and also call an election for the purpose of testing the sense of the voters on the proposed increase. The section does not require that such election be held before the board is required to submit the estimate to the County Superintendent, nor is any other time set within which such election must be held.

The Supreme Court of Missouri, in the case of Benton v. Scott, 168 Mo. 378, had before it the question of when an increase over forty cents levy could be voted. What was then Section 9777 is now Section 10358 (except that section 9777 provides that ten taxpayers could require an election to be held, whereas section 10358 provides that five taxpayers can require such an election), and what was then Section 9750 is now Section 10419. In considering that question, the court said, l. c. 390:

> "Section 9777, Revised Statutes 1899 on its face discloses that it is a provision for a special, not an annual meeting. That section looks to a condition when the board in its judgment

> deems it necessary to increase the rate, and the meeting is only authorized to pass upon those things for which it is called. Such a meeting is not to determine the rate but to increase that already determined at the annual meeting."

Again, at page 391, the court said:

> "The statutes now in force provide for three distinct methods for having an election to vote on the increase of the tax rate:
>
> "First, when the voters in annual meeting see fit to so order.
>
> "Second, when a special meeting is called by the board of its own motion.
>
> "Third, when the board calls a special meeting for that purpose at the request of ten taxpayers."

It will be seen that the court held that the annual tax rate is determined at the annual school meeting, and that any increase in that rate would be voted at a special election held thereafter. Reference to Section 10358 will show that the increase referred to is an increase in the annual rate. Such annual rate must have been determined before an increase in it can be voted on. Therefore, it would seem that Section 10358 was designed to provide a method of increasing a tax rate which had previously been set. It is entirely probable that conditions might arise after the annual school meeting which would make it apparent that the tax rate voted at such annual meeting would be insufficient to produce enough revenue to maintain the schools, and the Legislature has made provisions to meet such a

situation.

Therefore, if the district in question holds a special election in accordance with Section 10358, and the clerk of the district certifies to you that a specific rate has been voted by a majority of the voters, who were taxpayers, it would be your duty, under said section 10358, to "proceed to assess and carry out the amount so returned on the tax books on all the taxable property * * * * * *."

CONCLUSION

It is, therefore, the opinion of this office that a school district can hold a special election under the provisions of Section 10358, R. S. Missouri, 1939, and that if, upon said election, an increase is voted in the tax rate and such information is certified to the county clerk, the county clerk must extend the tax for said district upon the tax book in accordance with such increased rate.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK/rv

NEPOTISM: A school director may vote to employ his son-in-law's niece, being of no kin either by affinity or consanguinity.

July 15, 1942

7-16

FILED
51

Hon. Hubert E. Lay
Assistant Prosecuting Attorney
Houston, Missouri

Dear Mr. Lay:

This is to acknowledge receipt of your letter of July 12, 1942, in which you request an official opinion from this department. Your letter, omitting caption and signature, is as follows:

> "I would appreciate an opinion whether a school director can legally vote to employ as a teacher the niece of his son-in-law under the nepotism act."

Section 13, article 14, of the Constitution of Missouri, provides as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In 2 C. J. 378, it is said:

> "Blood relations of the husband and blood relations of the wife are not

> related to each other by affinity. Nor does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Brittanica, (11th Ed.) Vol. 1, page 301, the author has the following to say about affinity:

> "The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In the case of Pemiscot Land & Cooperage Co. v. Davis, 147 Mo. App. 194, l. c. 202, the court had this to say:

> "The juror challenged stated that he was a second cousin to the wife of one of the defendants. That brought him within the degree of affinity, though not of consanguinity, prescribed by the statute. One is within the prescribed degree of affinity when the 'relationship is by marriage between a husband and his wife's blood relations, or between a wife and her husband's blood relations' (Webster's New International Dictionary, Ed. 1910)."
>
> "There is no 'affinity' between blood relations of husband and blood relations of wife, within constitutional provision prohibiting judge from presiding on trial of any cause where the parties or either of them shall be connected with him by 'affinity' or 'consanguinity." (See cases cited.) W rds and Phrases, Vol. 2, (Pocket Part) page 65.

It will be noted from reading the above definitions and cases cited that the relationship by affinity comes into force through marriage, and upon the statement of the facts before us, it certainly could not be said that the school director in question and his son-in-law's niece would be kin by affinity.

CONCLUSION

From the foregoing, we are of the opinion that the school director could, under the nepotism law, vote to employ as a teacher the niece of his son-in-law, he being no kin to said niece, either by consanguinity or affinity.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:NS

STATE BOARD OF NURSE EXAMINERS: Permits to practice nursing as provided by Section 10033, R. S. Mo., 1939, cannot be issued to any applicant under the age of 21 years.

August 27, 1942.

9 3

FILED
51

Miss Laura Layher, R. N.
Executive Secretary
Board of Nurses Examiners
Jefferson City, Missouri

Dear Miss Layher:

The Attorney-General wishes to acknowledge receipt of your letter of August 26th requesting an opinion from this Department. Your letter, omitting caption and signature, is as follows:

> "The Board desires an opinion on the possibility of the issuance of temporary permits to student nurses who are seeking enrollment in Medical Unit No. 70, which is about to be activated for military service. A number of the student nurses lack a month or two of attaining their twenty first birthday that would make them eligible for the State Board examination to be held September 17th and 18th.
>
> "Section 10033 of our law refers to the issuance of temporary permits.
>
> "Your opinion will be appreciated."

For the purpose of determining this question we would like to cite two sections of the statutes. The first provision we wish to call to your attention is Section 10033, Revised Statutes of Missouri for 1939, which reads as follows:

> "The Board may in its discretion grant a temporary permit to practice as a registered nurse for a designated period

pending permanent licensing by examination or by reciprocity to an applicant who shall satisfy the Board as to character and professional qualifications and as to the need of such temporary permit upon the payment by such applicant therefor of a fee of two dollars ($2.00) pending examination, or ten dollars ($10.00) pending determination as to whether such person is entitled to a license by reciprocity, and such fee for such temporary permit shall be applied upon the fees payable upon the issuance of a permanent license to such person."

I also wish to call your attention to Section 10034, R. S. Mo. 1939, which provides as follows:

"The Board shall admit to examination for license to practice as a nurse any applicant who shall pay a fee of ten dollars ($10.00) and shall submit to the Board satisfactory written evidence, verified by oath, if required, that said applicant:

"1. Is twenty-one years of age;
"2. Is of good moral character;

"3. Is a graduate of an accredited high school or has the quiivalent in units of high school work to the satisfaction of the board.

"4. Has since the year 1927 graduated from an accredited school of nursing giving a three-year course of instruction, (or has graduated previous to 1927 from an accredited school of nursing giving at least a two-year course of instruction), in which course of instruction the theory taught shall have been proportioned to practice in a hospital to the satisfaction of the board. An applicant failing to pass such examination shall be re-admitted

to examination within one year thereafter without the payment of an additional fee."

This seems to be a question of the construction of the statutes with regard to temporary permits. As can be seen from Section 10033, cited above, the board may in its discretion issue a temporary permit to persons to practice as registered nurses for a designated period, even though such nurses have not had the opportunity of taking the examination as required by statute. However, as will be seen from reading the aforesaid section we see that the board may issue such permits "to an applicant who shall satisfy the Board as to character and professional qualifications." In other words, these permits may be issued if the persons applying for same are qualified both as to character and as to professional qualifications.

Granting for the purpose of this opinion that all applicants can satisfy the board as to their moral qualifications, the question seems to rest upon the interpretation of the term "professional qualifications." In order to arrive at a definition as to this term, it is necessary to look at Section 10034, cited above. The first qualification under this section of the statute is that a person be twenty-one years of age. In order for a person to take such examinations they must have this qualification and it is our opinion that in order for a permit to be issued to any applicant that they also must have such qualifications. As we view this matter the only purpose of a permit, as set out by Section 10033 aforesaid, is to allow applicants who have completed their term, who are of good moral character and who are of the age of twenty-one years, to practice as a registered nurse until they have an opportunity to take the examination as required by law. It is apparent that they are not permitted to take such examination until they are twenty-one years of age and we do not believe that they can be issued a permit until they have reached that age. If a person is twenty-one years of age and can meet the additional requirements as set out by statute, we are of the opinion that the Board of Nurse Examiners can issue a permit to them to practice for a designated time, which we interpret to be such time as they are able to take the examinations.

Conclusion

Therefore, it is the opinion of this Department that the permits to practice nursing as contemplated in Section 10033 of the Revised Statutes of Missouri for 1939, cannot be issued to any applicant who does not have the professional qualifications and that a permit cannot be issued to a person under the age of twenty-one years.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

TAXATION:
ASSESSMENT OF
PROPERTY:

A person owning or holding property in Missouri on the first day of June, is liable for taxes thereon, regardless of the fact that he has been assessed in another state for taxes on such property.

August 11, 1942

8/12

FILED
52

Mr. Rudolph Lebonia
Assessor of Atchison Township
Nodaway County
Clearmont, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of the assessment of taxes on properties held or owned by persons who have come to this State and who have been assessed on such property while residing in another state, but who own or hold the property on June 1st, of this year in this State.

From your letter, it seems that the persons whom you propose to assess have come from the State of Iowa and they are taking the position that since that State fixes the assessment date as of January 1st, and since they have been taxed as of that date, then the State of Missouri would be prohibited from taxing the same property which they own or hold on June 1st, of this year.

Section 10940 R. S. Mo., 1939, provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Under Section I of Article X of the Constitution of Missouri, it is provided as follows:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly, for county and other corporate purposes."

Section 6 of said Article exempts property in the following language:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

By the foregoing sections, it will be seen that the property if owned or held in the State of Missouri on the first day of June, is liable for taxes unless it comes within the exemptions provided in Section 6 supra.

We think that the contention of the Iowa taxpayer is met by the statement of the court in the case of State ex rel v. Gehner, 9 S.W. (2d) 621 - 623, wherein the court said:

> "Each state is sovereign, and, where it has a right to impose a tax, it cannot be deterred from imposing it by the fact that some other state has seen fit to tax the same property. It is not double taxation." (Citing cases.)

This principle was announced by the Supreme Court of this State en banc, July 1928. Following this principle, the fact that the taxpayer has been assessed in some other State on this property, that would not prohibit the State of Missouri from assessing the property if it is owned or held by a taxpayer in the State on the first day of June.

CONCLUSION

It is therefore the opinion of this department, that even though a person has been assessed on property which he owned or held in the state of Iowa on January 1st, yet it is his duty if he owns or holds that property in the State of Missouri on June 1st, to return such property for assessment and taxing purposes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

SCHOOLS: Registration day should be included as a school day in report of district clerk.

- -

March 31, 1942

4-1

Honorable Frank C. Mann
910 Landers Building
Springfield, Missouri

FILE
56

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The Board of Education of the School District of the City of Springfield has directed me to write you requesting your opinion on the following state of facts:
>
> "In order to be entitled to its apportionment of state funds, the length of the school term for the year 1941-1942, must consist of at least 180 school days. The present school term opened Monday, September 8th, and, according to the present schedule and school calendar, it will close May 29th. Under this calendar after deducting all the holidays provided for it will have the full 180 teaching days provided the first day, September 8th, may be counted.
>
> "The facts with reference to September 8th are, as follows: The superintendent and the board were prevailed upon to hold no classes on September 8th, in order that the pupils might attend the opening day of our Ozark Empire District Fair, which was being held during the week of September 8th. No

classes were scheduled or conducted. However, the faculty was assembled, the students were enrolled and conferences with reference to course of study were held throughout the day. The students were required to enroll on that day but were otherwise not required to attend school.

"I enclose an exchange of correspondence between Mr. Harry P. Study, our superintendent of schools, and Mr. Lloyd W. King, State Superintendent, consisting of Mr. Study's letter of November 8th, and Mr. King's letters of November 8th and 13th, from which you will note that Mr. King advises 'We in making the apportionment of state funds for your school shall accept the day (September 8th) as a day in attendance by the pupils'. That would appear to me to settle the question except for the fact that the secretary of the School District, who is required by the provisions of Section 10390, Revised Statutes of Missouri, 1939, to make an affidavit showing, among other things, 'the total number of days attendance of all pupils, the length of the school term -- the number of days taught by each teacher --', and he is unwilling, without legal advice to make the affidavit include September 8th, in view of the provisions of Section 10362, which provides in part 'The school day shall consist of six hours occupied in actual school work'.

"The Board of Education would, therefore, appreciate your opinion as to whether its secretary would be warranted in including in the affidavit required to be made, as above stated, September 8th, although no classes were actually assembled or taught on that date, although the faculty was assembled, the students enrolled and conferences held throughout the day."

Section 10390, R. S. Mo. 1939, provides for the apportionment of the public school funds by the State Superintendent of Public Schools to the various school districts of the state. The Superintendent bases his apportionment on a report made by the clerk of each school district to the county clerk, "showing the number of teachers employed, the total number of days attendance of all pupils; the length of the school term, * * * the number of days taught by each teacher." This information is given in the form of an affidavit and the statute provides that any person who knowingly furnishes false information shall be guilty of a misdemeanor.

The question presented in your request is whether the first day of school, spent in enrolling the pupils and the conducting of conferences by the teachers with the pupils and by the head of the school with the teachers, is a school "day" within the meaning of Section 10390, supra.

Section 10362 R. S. Mo. 1939, provides that "the school day shall consist of six hours occupied in actual school work." We believe that the registration of pupils, conferences between the teachers and the pupils and meetings of the teachers with each other are a necessary part of the administration and conduct of a school. Section 10362 is, as pointed out in an opinion rendered by this department to Hon. Lloyd W. King, State Superintendent of Schools, on January 20, 1942, "merely a statute defining various terms used in the article and does not in any way provide or set forth a scheme of procedure or administration of school matters." The enrollment of pupils, their assignment to the various rooms and any meetings and conferences which tend to familiarize the teachers or the pupils with the work to be done in the ensuing school year, are, we believe, obviously a necessary part of school work.

Furthermore, as noted in your letter, the State Superintendent of Schools has ruled that such opening day was a school day within the meaning of the statute. What was said in State ex rel. Rose v. Job, 205 Mo. 1, is, we believe, especially applicable to the situation at hand. In that case our Supreme Court said:

> "We are unwilling to disturb the practical construction given the statute by

those whose duties impose upon them the proper administration of the school laws of this state."

CONCLUSION

It is, therefore, the opinion of this department that the first day of school, which is spent in enrolling the pupils and in conferences and meetings, the purpose of which is to familiarize the students and teachers with the work to be done during the ensuing year, is a school day and should be included by the clerk of the school district as such when he makes his report to the county clerk.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

INSANE PERSONS:
ELEEMOSYNARY IN-
STITUTIONS:

Counties are liable for support of indigent insane soldiers who are residents of such counties, even though such insanity developed after induction into the United States Army.

November 5, 1942

FILED
56

Mr. Lloyd Main
Clerk of the County Court
Barton County
Lamar, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 2, 1942, in which you submit the following for an opinion:

"On April 18, 1941, one Lafayette Bowling was inducted into the army from this county and was accepted at the induction station on April 19, 1941. Since that time he has been continuously in the United States army.

"The county court of this county has received a communication from Ira A. Jones, President of the State Eleemosynary Institutions and one from Capt. F. I. Seward of Camp Blanding, Florida, Station Hospital, stating that Lafayette Bowling has become unstable mentally and is incapacitated for further service and is in need of institutional care. They are asking that Barton County accept the man as a county patient in a state institution.

"The county court has been advised before, and in the letter of Mr. Jones, of the State Eleemosynary Institutions, it is stated 'It is our understanding

> that under the law, if a man has been in military service for six months the government is responsible for him if he breaks down mentally.' The court took this matter up with the Missouri State Headquarters of the Selective Service System and we were directed by Mr. Wm. Orr Sawyers, State Legal Advisor, to take this matter up directly with your office to determine this man's status. The legal residence of Lafayette Bowling is Lamar, Barton County, Missouri, Route 2.
>
> "We would like to be advised as quickly as possible whether or not this county is responsible for the care of Mr. Bowling so that if the county should take this burden upon itself it can advise the military authorities; however, if the county is not responsible for the care of this man the court would also like to advise the authorities to this effect. It will be noted that this man has been in the service since April 19, 1941."

Your letter says that "the legal residence of Lafayette Bowling is Lamar, Barton County, Missouri, Route 2." Therefore, we proceed with the question of his residence as being determined to be in your county. We assume also that he comes within the classification as a poor person.

Section 9590, R. S. Mo. 1939, reads as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9328, R. S. Mo. 1939, reads as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

Section 9333, R. S. Mo. 1939, reads as follows:

"When poor patients shall be in need of clothing, it shall be the duty of the steward, under the direction of the superintendent, to furnish the same, at the cost of the county court sending them."

Section 9334, R. S. Mo. 1939, reads as follows:

> "The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county court which may send to a state hospital an insane poor person, an exact account of the sum due and owing by such court on account of such insane person. Said court, at its first session thereafter, shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

Section 9343, R. S. Mo. 1939, reads as follows:

> "When a county patient is sent to the hospital, it shall be the duty of the clerk to see that the patient is supplied with the proper clothing specified in section 9329, and, if not otherwise furnished, the clerk shall purchase it; and, in such case, the same shall be paid for out of the county treasury, by order of the county court."

Under the foregoing statutes, we think it is clear that the duty of supporting indigent insane persons is upon the county wherein such persons are residents. Under similar statutes, the Supreme Court of this state, in the case of Montgomery County v. Gupton, 139 Mo. 303, l. c. 308, said:

> "The duty of supporting the indigent insane of this state is devolved by statute upon the counties of which they are inhabitants."

Since, therefore, the soldier in question is a resident of Barton County, the duty of supporting him at a state hospital is upon that county, provided, of course, he is an indigent insane person. There is nothing in the statutes which says that a county can be relieved of its responsibility to support its indigent insane if such persons happen to be temporarily away from the county at the time they become insane. The question which determines the liability of the county as to indigent insane persons is whether or not they are residents of the county at the time they become insane.

It is admitted that the soldier in question was a resident of Barton County at the time he entered the service of the United States Army. Nothing in your letter indicates that he has done anything since his induction into the army which showed any intention on his part to change his residence. It has long been held in this state that residence is largely a matter of intention, and that such intention is to be deduced from the acts and utterances of the person whose residence is in issue. (In re Lankford Estate, 272 Mo. 1.) The soldier in question was merely taken from his residence to the United States Army and is still in the army. Nothing he has done indicates that he intended to change his place of residence from Barton County to any other place.

We do not think that a person loses his residence by reason of his entering the military service of the United States. Section 7 of Article VIII of the Constitution of Missouri provides as follows:

> "For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a

poor-house or other asylum at public expense, nor while confined in public prison."

While the foregoing provision of the Constitution merely covers the question of loss of residence so far as voting is concerned, yet we see no reason why it should be held that a person loses his residence for any other purpose because he enters the military service of the United States. We think the constitutional provision above quoted shows an intention of leaving the rights of a soldier as a citizen the same as they would have been were he not in the service of the United States.

Whether or not the United States Government has a rule or regulation which provides that it will be responsible for a soldier who breaks down mentally after six months' service does not change the situation so far as your county is concerned. If there is such a regulation and the government actually does take care of the insane soldier, then your responsibility would cease because such soldier would be taken care of. However, if the United States Government does not take care of such soldier, the responsibility of your county is the same as it would have been were such soldier still in your own county as a civilian.

We enclose herewith a copy of an opinion given by this office under date of September 23, 1942, to Hon. Ira A. Jones, President, Board of Managers, State Eleemosynary Institutions, Jefferson City, Missouri, which details the procedure to follow in returning insane persons from the army to the state hospitals, which may be of some service to you in handling your particular case.

CONCLUSION

It is, therefore, the opinion of this department that a county is liable for the support of an indigent insane soldier whose residence was in that county, even

though such insanity developed after his induction into the United States Army.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

CRIMINAL LAW -
PRELIMINARY EXAMINATION - A minor over the age of 17 years has the right to personally waive preliminary examination where he is charged with a felony.

January 2, 1942

+3

FILE
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this Department, which request reads as follows:

> "The defendant in a criminal case is charged with a felony. He is over 17, and under the age of 19 years. He is a many times offender in order states. He has virtually admitted that he committed the burglary and larceny of which he is charged. He came before the justice of the peace, and in the presence of all stated that he did not need a lawyer at present, and he said that he would waive his preliminary examination. He was given the complaint and he did waive the preliminary examination. The sheriff, the justice and myself informed him of the nature and purpose of a preliminary examination on the felony charge.
>
> "The question has been raised in this case and in another case, wherein, a local attorney raised the legal question that a minor could not waive a preliminary examination. The law is that the justice does not have any power to appoint an attorney for a minor who does not have any funds to hire a lawyer in a preliminary examination.
>
> "I want to know if it is necessary to hold a preliminary examination, on a case involving a felony and a minor, even though the

minor wants to waive his preliminary examination? Is there anything in the Mo. law that makes such a waiver illegal?"

Section 3893 R. S. Missouri, 1939, provides in part, as follows:

" * * Provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

It will be noted from reading this section that the above proviso provides that the person charged with the crime may waive the preliminary examination.

In the case of State v. Pippey, 71 S. W. (2d) 719, l.c. 721, Pars. 5-7, the court said:

"* * A preliminary examination is not jurisdictional in the sense that the circuit court is without jurisdiction to try the cause unless and until such examination has been accorded the accused. Buckley v. Hall, 215 Mo. 93, 114 S. W. 954. It is well settled that the accused may waive it and if he pleads and goes to trial without calling the court's attention by timely motion or plea in abatement to the state's failure to accord him a preliminary, he does waive it. And such allegation in a motion to quash or plea in abatement does not prove itself. It must be proved and the evidence offered in support thereof with the court's rulings and the exceptions thereto can only be preserved for review by bill of exceptions. * * * "

In the case of State v. Langford, 240 S. W. 167, l.c. 169, Pars. 4-6, the court said:

> "It is evident from these rulings that the effect of the plea of the general issue is the same whether made before the justice or in the trial court. There is even more reason why this plea may be regarded as more effective before the examining tribunal than before the trial court. Before the former, the determination of the guilt or innocence of the accused not being in question, a plea in regard thereto is not required, and has no proper place in the proceeding, but, if voluntarily entered, it cannot be otherwise construed than as an admission by the accused of the probable grounds for the proceeding for the purpose of the case. It was so held in State v. Ritty, 23 Ohio St. 562, in which one brought before a justice of the peace for a preliminary examination was held, notwithstanding he pleaded not guilty, to have waived an examination of witnesses to sustain the charge, and to have submitted to be bound over without the examination. This holding was on the ground that a plea of not guilty in a case of this kind is analogous to the plea of nolo contendere at common law, and, like a demurrer, admits the charge for the purpose of the case. * * * "

In the case of State v. Pugh, 15 Mo. 349, l. c. 350, the court quoted with approval the following procedure:

> "* * The defendant being called upon to plead to the indictment, stood mute, and the court had the plea of not guilty entered for the defendant. * * * "

In the case of State v. Ancell, 333 Mo. 26, l. c. 33, 34, the court said:

> " * * Preliminary examinations are governed by statute and we must look to our statutes for the defendant's right thereto and for the procedure. * * * * * * * * * * * *
>
> "In a preliminary examination the examining magistrate does not act in the capacity of a court. He does not determine the question of the guilt or innocence of the accused. His conclusion is in no sense a judgment. (State ex rel. Board of Education v. Hast, 209 Mo. 708, 728 et seq., 108 S. W. 563; State v. Flannery, supra; State v. Nichols, supra.) * * * "

It will be noted from the reading of the case of State v. Rutledge, 13 S. W. (2d) 1061, l. c. 1067, that the defendant, a seventeen year old boy, waived the preliminary examination, for the court said:

> "* * * The case originated in the latter court, where, after waiver of a preliminary examination, relator was called to answer the charge of robbery in the first degree, preferred against him by information duly filed by the circuit attorney. * * * "

It will be further noted from a reading of the Rutledge case, at l. c. 1066, the court said:

> " * * * When a child who has passed his seventeenth birthday is brought before a court of general criminal jurisdiction, charged with having committed a criminal offense while under 17 years of age, that court may determine whether he should be dealt with

> as a delinquent, or prosecuted under the general law, and, if it decides that he should be proceeded against as a delinquent, order the cause transferred to the juvenile court. But a court of general criminal jurisdiction is wholly without jurisdiction in cases in which a child under 17 years of age is charged with the violation of criminal law; without jurisdiction to even determine which course should be pursued with respect to such child."

When this case is read in connection with the case of State v. Walker, 34 S. W. (2d) 124, wherein the court said:(l.c.28)

> "In this case no petition alleging the relator to be a delinquent child, to be tried as such, was filed in the circuit court; so it was not necessary for the judge to exercise the discretion mentioned in the closing part of 1136, but the accused was taken directly to the circuit court as provided in section 1141.
>
> "That part of section 1136, while authorizing the court to dismiss a petition alleging the child to be delinquent and entertain a prosecution under the general law, necessarily implies that, if the proceeding is begun under the general law, the court has authority to proceed with the case under that law."

It will be observed from the reading of Section 3893, supra, together with the cases cited, that preliminary examinations are governed by statute solely, and, in the absence of any exception, where the defendant is a minor, we are constrained to the view that a defendant may personally waive a preliminary examination. We do not find that the

statutes make any provision for the appointment of an attorney for a minor when he appears before the magistrate in a preliminary hearing.

CONCLUSION

Therefore, we are of the opinion, that the proceedings in the case outlined in the opinion request, having been under the general law, the defendant, even though he be of the age of nineteen, has the right to waive the preliminary examination under Section 3893, supra, and the fact that he was not represented by counsel, makes no difference, and, under the statute he is to be considered as any other defendant, and his minority affords him no special privilege.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

BRC:RW

PARDONS AND PAROLES - Judges of circuit and criminal courts may place on probation defendant under certain circumstances.

February 4, 1942

2-7

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

FILE
57

Dear Sir:

Your request for an opinion in reference to Section 9156 R. S. Missouri, 1939, has been received.

You inquire as to whether or not Section 9156, supra, overrules the holding in the cases of Ex parte Bugg, 163 Mo. App. 44, 145 S. W. 831, and Ex parte Thornsberry, 254 S. W. 1087. You further inquire as to whether there can be an execution for costs after a parole or suspension of sentence has been granted. There is quite a distinction between a pardon and a judicial parole and suspension of sentence.

Under Article 5, Section VIII of the Constitution of Missouri, only the Governor is granted the power of pardon. However, under Section 9156, supra, the several courts of this State may place on probation any defendant eligible for judicial parole.

Section 9156, supra, reads as follows:

> "The circuit and criminal courts of this State, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court or courts, may place on probation any defendant eligible for judicial parole under Sections 4199 to 4211, inclusive, of Article 18, Chapter 30, Revised Statutes of Missouri, 1939. After a convic-

> tion, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation."

This Section was enacted the first time in the Laws of Missouri, 1937, page 400, section 1. In that same Act it was provided that the appointment of members of the parole board who would have jurisdiction over inmates of the several penal institutions of the State.

In the case of Ex parte Bugg, 163 Mo. App. 44, l. c. 47, the court said:

> "On the question of the power of the court to indefinitely suspend execution after sentence and judgment, the conflict is not so great. This power has been upheld in North Carolina, State v. Whitt, 23 S. E. 452, but the weight of authority seems to be largely against this proposition and to our mind it is clear in the absence of a statute authorizing it, to permit a court after judgment is pronounced to indefinitely postpone its execution is in effect to permit the court to usurp the pardoning power which is lodged elsewhere and cannot be upheld upon either reason or authority. * *" (Underscoring ours.)

It will be noted that in the above quotation the court specifically said: "It is clear that in the absence of a statute authorizing it." The opinion in this case was handed down by the Springfield Court of Appeals on April 1, 1912.

The law authorizing a judicial parole or probation was enacted and is set out in the Laws of Missouri, 1937, page 400. The legislature in enacting Section 9156, supra, has overruled the rule of law that was set out in the case of Ex parte Bugg, supra.

You also mentioned the case of Ex parte Thornberry, 254 S. W. 1087. In that case, at page 1090, par. 11, the court said:

> "The reason for the rule if found in the nature of our systems of government, national and state. The power to grant reprieves and pardons and that to sentence for crime being distinct and different in their origin and nature, their exercise has been kept separate and distinct, the one having been confided to the executive and the other to the judicial department. The recognition of the power of a court to suspend a sentence indefinitely or to stay its execution would be to allow the judicial department to usurp the power and exercise one of the functions of the executive department. This is upon the well-grounded theory that a court's powers in the administration of the criminal law is limited, upon the conviction of the accused, to the imposition of the sentence authorized to be imposed. 8 R. C. L. p. 248, sec. 252 et seq. and cases." (Underscoring ours.)

It will be noted that in the above partial opinion the court said: "that a court's powers in the administration of the criminal law is limited, upon the conviction of the accused, to the imposition of the sentence authorized to be imposed."

The opinion in this case was handed down by the Supreme Court of Missouri en banc on October 6, 1923, and that rule of law has been overruled by Section 9156, supra, which was enacted and set out in the Laws of 1937, page 400, section 1.

In your request you also state that there can be no execution for cost or fee bill obtained by reason of such parole or suspension of sentence by the court authorized to grant such judicial parole or suspension of sentence. It has been held in this State that even upon a commutation, parole or pardon by the Governor, the parolee, or defendant, while at large, was still under sentence.

In the case of Lee v. Gilvan, Warden, 229 S. W. 1045, Par. 1, the court said:

> "By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

The criminal cost sections are Sections 4220, 4221, 4222, 4223 and 4225 R. S. Missouri, 1939. In all of the sections it does not refer to the sentence, but merely says "shall be convicted." Section 4221, supra, provides for the payment of costs by the State in certain cases, where the defendant has been convicted and has been sentenced. Under Section 9156, supra, however, and under Sections 4199 to 4211, inclusive, (R. S. Missouri, 1939)

no parole can be granted until there is a sentence of punishment.

In your request you are assuming that the courts, in granting the judicial parole have not sentenced the defendant, but the courts, in complying with Section 9156, supra, and Sections 4199 to 4211, inclusive, supra, of Article 18, Chapter 30, R. S. Missouri, 1939, must first sentence the defendant, and, if he is eligible under Section 4199 to 4211, inclusive, may then place said defendant on probation.

CONCLUSION

In view of the above authorities, it is the opinion of this Department that Section 9156, and Sections 4199 to 4211, inclusive, R. S. Missouri, 1939, are later laws and change the rules in the holdings in the cases of Ex parte Bugg, 163 Mo. App. 144, 145 S. W. 831 and Ex parte Thornberry, 254 S. W. 1087.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:RW

MINERALS: Interpretation of a mineral reservation in a deed
STATE PARKS: conveying land to the State of Missouri. Type of
DEED: mining permissible.

February 20, 1942

2-27

State Park Board
Jefferson City,
Missouri

FILE
57

Attention: Mr. E. A. Hayes,
Ass't Director.

Gentlemen:

You request a reconsideration of our opinion under date of August 18, 1941, as to rights of strip mining iron ore under Meramec State Park, in view of additional facts contrary to those heretofore given.

Our former opinion held that open or strip mining, was not permissible in removing iron ore under a reservation in said deed reserving to said grantor all lead, iron, coal, fire clay, rock and other minerals including coal oils and natural gas in or on said land, or rising or coming therefrom, or that may hereafter be found therein or thereon, with the right to mine and remove and take out the minerals hereinabove referred to, storing the same, together with right of ingress and egress over and on said lands and to and from the public road leading to the most convenient market. The said road which is to be used for ingress and egress to be established over and on the most practical route. The said parties of the first part further reserve such timber as may be needed for mining purposes, and the timber so used to be taken from the lands hereinafter specified only. The said parties of the first part also reserve a water right-of-way to the Meramec River to be used in mining operations only, to wit:

"The North ½ of the Northwest ¼,
the Southeast ¼ of the Northwest ¼,
and the Northwest ¼ of the Northeast ¼, of Section 8;

"The South ½ of the Southwest ¼, and the South ½ of the Southeast ¼, of Section 5; and

"The Northeast ¼ of the Southeast ¼ of Section 6; All in Township 40, North of Range 1 West of the 5th. P.M.

"TO HAVE AND TO HOLD THE SAME, unto the said party of the second part and to its assigns forever,

"Covenants of Warrant and Defend, excepting taxes for the year 1927 and thereafter.

Julian Pickles SEAL.
Laura Pickles SEAL."

The opinion, hereinabove referred to was premised on certain facts given this Department at the time which we now find were somewhat erroneous. Therefore, the above referred opinion has now been withdrawn and is no longer in effect. After careful investigation the following facts are now submitted to be the true and correct facts in the case.

The grantors in said deed who reserved said mineral rights when conveying said land to the State of Missouri, subsequently leased said mineral rights. We find that the iron ore in this particular locality is of the filled sink type common to Phelps, Crawford, Dent and other adjoining counties and such ore actually often out-crops at the surface in spots and will also be found at a depth sometimes of eighty-five or a hundred feet. That the most economical method of mining said ore of this particular type is by open-cut method in which the overburden of dirt is removed and said iron ore is recovered by quarry methods of mining. Eminent mining engineers and geologists familiar with said property and mineral deposits state that open-cut or quarry mining is the only practical and feasible method of mining said iron ore as it occurs at said location. Furthermore, there have been many mines opened in the above referred to counties during the past seventy-five years and iron ore has been produced from said district in practically in every instance by the open-cut method. Furthermore, tunneling for iron ore at this location is very dangerous

for the reason the roof is likely to cave in due to the fact there is no caprock for support. That said timber reserved in said deed for mining operations is used for platforms, roads, etc. Furthermore, said lessees under this deed are anxious to remove said iron ore in large quantities as quickly as possible, said iron ore to be used for the manufacture of pig iron for use by the national government for national defense.

In Korneman v. Davis, 219 S. W. 904, 281 Mo., 242-243, a fundamental rule in construing a deed is that all of the words within the four corners of the instrument must be considered together and given effect.

> "It is true that when there is a latent ambiguity in a description of land, the circumstances and situation of the parties, and the construction they have put upon the deed by their acts, are admissible in evidence. (Tetley v. McElmurry, 201 Mo. 392; Gas Co. v. St. Louis, 46 Mo. 121; Union Depot Co. v. Railroad, 131 Mo. 291) *
>
> "It is also ruled that in construing a deed all the words of the deed within its four corners must be considered together and given effect and that words stating the estimated quantity or area are part of the description of the land and must be so considered in fixing the identity of the tract conveyed. In Davis v. Hess, 103 Mo. l.c. 36, Black, J., said: 'The rule of law is well settled that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain. * * *. In deeds as well as in wills and contracts, we are to determine the intention of the parties thereto, and this is done by taking the instrument as a whole.'"

In Rudd v. Hayden, 97 S. W. (2d) 35, l.c. 36, the Court of Appeals of the State of Kentucky construed a reservation of mineral rights which reads:

> "'All minerals, coal, clays, spars, oilgases and every other kind and character of mineral cement, oil, gases, &c not included in the above general description, in on and under the after described land, together with the exclusive right to mine same and a right of way across said premises and ingress and egress over said land, for the purpose of operating any mine or mines and privilege of using water in their operation and in fact the full mining right and privilege in and to the followwing described land, viz.:'"

Under the above reservation it was the desire to mine the limestone which, to a certain extent, was similarly located as said iron ore on and in said land, and this is what the court had to say:

> "Although the question was presented in a reservation of minerals instead of in a grant, the reason for the rule is aptly stated in Beury v. Shelton, supra: 'It is a well known fact, and known of course to the parties to the deed here involved, that the section where this deed was to operate was a limestone country, where the land is everywhere underlain with limestone, and where it crops out on practically every tract of land that is not bottom land, and where it makes its appearance in manner varying from huge cliffs, as in the case here, to small outcroppings on various parts of the land. It is on the land everywhere, either breaking through it, or lying under it at different depths. In this country it is a

> part of the soil, and a conveyance that reserves the limestone with the right to remove it would reserve practically everything and grant nothing.'
>
> "* * * * * * * * * * * * * * * * *
>
> "Certainly the 'ordinary and popular' significance of the work 'cement' as used in this deed would be a substance containing the chemical ingredients to be found in limestone, and we are unable to escape the conclusion that the word as used in the deed before us was intended to include 'cement rock' or limestone, from which one or more of the various types of cement might be manufactured."

It was also contended that only such minerals were intended to be conveyed as are mined. The court defined not only the word "mine" as not being limited to cases where a shaft is sunk into the ground but may include "open-cut", "strip" or "hydraulic" methods of mining, and then in discussing the words used to convey said minerals found <u>in</u>, <u>on and under the property</u> said:

> "* * * * * * * * * Furthermore, the term 'mine' is not limited to those cases where a shaft is sunk into the ground, but may include 'open cut,' 'strip,' or 'hydraulic' methods of mining. Also, it will be observed that the deed conveys the minerals, in, on, and under the property. There could be no possible reason for sinking a shaft to obtain minerals found on the surface. We think it is clear that the phrase used in the deed before us was not intended to have the narrow application for which appellant contends."

The terms in the above mineral reservation, construed by the Kentucky Court of Appeals, in many respects are the same in the reservation we are attempting to construe and likewise the facts in the above case are analogous to the facts in the instant case.

In view of the facts, the only practical and economical method to mine said iron ore at the time the State of Missouri purchased said land, and now, is by open or quarry mining; that for the last seventy-five years there was considerable mining for iron ore in this particular district and in most every case said mining was done in this manner; that to tunnel for said ore would be hazardous, slow and expensive and very apt to result in the caving in of said mine. Also, in view of the authority construing a similar provision to that construed in the mineral reservation in question holding that it was proper to open-cut or quarry mine limestone which is located similar to the iron ore in Meramec State Park, it was evidently the intention of the parties at the time said deed was executed and mineral rights reserved to open-cut and quarry mine said iron ore. Furthermore, while this is not a determining factor as to the type of mining which may be used, it is a factor that should be considered, namely, that the national government is anxious to obtain said iron ore for use in manufacturing mechanized equipment, munitions, arms, etc., for national defense.

Therefore, it is the opinion of this Department that such reservation in said deed conveying said land to the State of Missouri permits said iron ore to be removed by such methods known as the open-cut, quarry or strip mining. However, such iron ore should be removed in the manner and at the least possible damage to the owner of the surface, who is the State of Missouri.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:EAW

CONSERVATION COMMISSION: Construing Section 8943 and Regulation #17.
FEES: Fees for Conservation Agent making arrest.

March 3, 1942

3-5

FILE
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 16, which reads as follows:

> "The law as written is found in what is carried forward in the R. S. Statutes of Mo., 1939, as section 8943. The same law was in the Conservation Commissions regulations, see the enclosed sheet.
>
> "The new regulations read as shown on page 19, section 17 of the yellow book for 1942.
>
> "A game commissioner in this county arrested a defendant and he pleaded guilty to the charge, and a commitment was issued to put the defendant in jail for the non payment of the fine and costs. In this criminal action I find that the deputy game commissioner has charged fees and mileage for serving the warrant and for serving the commitment.
>
> "In your opinion who gets these fees charged. The county school fund, or

> the deputy game commissioner who served the papers? It looks to me as if the new section which went into force on Jan 1, 1942 cut out fees for the deputy game commissioner. I was under the impression that under the decision in Marsh v. Bartlett, Mo., 121 S. W. (2) 737, that all the sections were repealed except section 8967 of the R. S. of Mo. 1939."

One of the primary rules of statutory construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent which should be done from words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. (City of St. Louis vs. Pope, 126 S. W. (2) 1201, l. c. 1210.)

Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744-745, referred to in your letter, did not repeal all prior statutory enactments pertaining to the enforcement of the game and fish laws in this state, but only such provisions as were inconsistent with the constitutional amendment (Article 14, Section 16, Constitution of Missouri) which created the Conservation Commission. While the court in the above case did not attempt to determine what provisions of the statutes were repealed by the Conservation Commission Amendment, they did hold that Section 8311, R. S. Missouri 1929 had not been repealed and furthermore that any provision heretofore enacted by the legislature providing for a penalty, or penal in nature, was not repealed as such authority can be assumed only by the legislature. In so holding the court said:

> "There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith. We think the question here is whether there remain sufficient exist-

ing laws not inconsistent therewith. And the correct answer is determinative of self-enforcement. The answer is yes, conditioned upon whether there still exist fixed penalties established by statute and now applicable to violations of rules and regulations established by the Conservation Commission. It has been held that such a provision for such additional legislation as may 'aid' the operation of the constitutional amendment does not hold it in abeyance until such legislation is enacted, the word 'aid' signifying to support, help or assist. State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; see 12 Cyc. sec. 106.

* *

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the Grimaud Case, supra, punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

In view of Marsh vs. Bartlett, supra, apparently Section 8943, R. S. Missouri 1939, was repealed when the Conservation Commission promulgated Section 17 of the Wildlife and Forestry Code, 1942. Since said provision is not in the nature of a penal statute it is inconsistent with the new regulation and under the Amendment is repealed. Section 17, supra, reads as follows:

> "No representative of the Conservation Commission shall accept any fees, directly or indirectly, incident to the arrest and prosecution of any fish and game law violator; provided, however, that such representatives may be allowed statutory fees and mileage when required to appear as witnesses in the trial of any such case elsewhere than within their respective territories."

You inquire who gets the fees, the school fund or the agent of the Conservation Commission. This Department rendered an opinion to the Hon. Leo A. Politte, Prosecuting Attorney of Franklin County, under date of March 8, 1938, holding fines collected for the violation of the fish and game laws go to the county school fund. Also, under date of October 10, 1939, an opinion was rendered to the Hon. G. C. Beckham, Prosecuting Attorney of Crawford County, holding under Section 8287, R. S. Missouri 1929 (same as 8943, R. S. Missouri 1939) that the Conservation Commission agent is entitled to said fees, copy of which we are enclosing.

Those fees for the agent do not constitute a penalty, but are merely costs in the case, more in the nature of compensation in this instant, for services rendered. In Ryan vs. McGregor, 58 Ontario Law Reports 213, l. c. 216, the court held costs as between party and party are given by the law as an indemnity to the person entitled to them, they are no imposition as a punishment on the party who pays them nor given as a bonus to the party who receives them. In the case of Ryan vs. McGregor, supra, the court said:

> "The fundamental principle is thus

> clearly stated by Baron Bramwell in the case of Harold v. Smith (1860), 5 H. & N. 381, 385: 'Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.'* * * * * * * * * * * * * * * * *"

In Seaboard Air Line Ry. v. Maxey, 60 Southern 353, the court held costs properly incurred are an incident to a judicial proceeding and are not part of the damages claimed or demand or penalty being adjudicated.

> "Costs properly incurred are an incident to the judical proceeding and are no part of the damages claimed or demand or penalty being adjudicated; consequently costs do not affect the jurisdiction of the court."

Also, see Silberman v. Skouras Theatres Corporation, 169 Atlantic 170, l. c. 171.

Therefore, in view of the above opinions heretofore rendered and authorities holding fees are not fines or penalties but merely a part of costs in the case, unquestionably said fees were never intended to go to the county school fund but it was intended that said fees go to the Conservation agent as his personal property, unaccountable to anyone for same. Assuming that said fee was claimed prior to the Conservation Commission's promulgating regulation #17, supra, said regulation not being retroactive, the Conservation agent would be entitled to said fees if requested, otherwise no one would be entitled to same and it would be as any claim not called for by claimant. In the future no claim shall be filed by the Conservation agent for such fees in view of regulation #17, supra, repealing Section 8943, supra, and so providing that he shall no longer be entitled to same.

Respectfully submitted

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ROY McKITTRICK
Attorney General

SCHOOL FUND MORTGAGES: Who shall execute deed upon foreclosure, and kind of deed to be executed.

March 17, 1942

3-47

FILE 57

Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

Dear Mr. Marr:

We have your letter of the 10th in which you submit the following for our opinion:

> "The County Court as trustee for the school funds of the county belonging to the common school and the township school funds, has ordered sales of land under section 10387 R. S. 1939. These sales are held and the County has been buying in some of this land and taking title to the premises in the name of Morgan County, Missouri. In a case under question the county has found a buyer for one of these farms and is seeking to make a deed for a cash sale, and the questions have arisen 1- How and who will make the deed for Morgan County? 2- What kind of a deed will be executed and delivered, a warranty deed, a special warranty deed, or a quit claim deed?
>
> "I want to call your attention to section 10389 R. S. 1939, which provides that the County Court can appoint an agent to take charge of, rent out, lease and otherwise manage same under direction of the county court. Can the agent thus appointed, also make a deed to resell this land?

In this case the county clerk is appointed the agent to look after these lands.

"Or, does the county court have to appoint a deed commissioner under section 13784 R. S. 1939, in order to make a title to these lands to the prospective purchaser?

"In the case of a kind of deed, if the county makes a warranty deed, then will the county be liable for all expressed and implied warranties in such a deed? What authority has a county court to guarantee the title, the possession of a piece of land? I cannot find any authority for this.

"It just seems to me, and I am asking for an opinion, that under Miller vs Bayless 194 Mo. 650, 92 SW 482, a special warranty deed would be the one to use. The form is approved in this decision. It would keep the county from being liable for any damages that the county officers and the county did not cause. Or would you advise that a quit claim deed be used?"

We shall answer your questions in order.

I.

Who should make the deed for Morgan County?

Section 10389, R. S. Mo. 1939, after providing when the title to the land in question may be taken in the name of the county, provides as follows:

> " * * * The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

By the foregoing section the county court is given the power to take charge of and manage the land in question, and to dispose of it when in the court's judgment such disposal would be advantageous to the school or schools interested therein. The statute does not direct by whom the deed should be executed, but the county court is given express power to sell the land. This grant of express power necessarily carries with it the implied grant of such power as is necessary to enable the county court to carry out the sale of the land. This is true because of the familiar rule that whenever a duty or power is conferred by statute upon public officials, all necessary authority to render the performance of such duties effectual is conferred by implication. The rule has been stated thus:

> "But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public official, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication." (State ex rel. Bybee v. Hackmann, 276 Mo. 110, l. c. 116.)

Therefore, we must conclude that the county court has the power to cause a deed to be executed since such power is necessary to effectuate the sale of the land.

The question still remains, however, as to who shall execute the deed, and as to whether Section 13784 of the Statutes applies to the transaction in question.

Said Section 13784 reads as follows:

> "The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

It will be noted that the above section governs the sale by the county court of any real estate belonging to their county. The land bid in in the name of the county under the provisions of Section 10389 does not belong to the county. The county court is trustee for the school fund (see Sections 10376 and 10378, R. S. Mo. 1939, and also Saline County v. Thorp, 337 Mo. 1140, 88 S. W. (2d) 183), and when it causes title to land foreclosed under school fund mortgages to be taken in the county, it is merely placing the legal title in the county, but the beneficial title to the land is in the school funds interested. Therefore, we think that Section 13784 does not apply to the sale in question.

Reverting to the rule that the grant of express power to public officials carries with it the implied grant of such powers as are necessary to effectuate the power expressly granted, we must conclude that Section 10389 impliedly authorizes the county court to cause a deed to be executed by anyone it chooses. No doubt it could authorize anyone to execute the deed, whether such one be called a commissioner, or agent, or whether some officer of the

court be authorized to execute the deed. However, even though it is our opinion that Section 13784 does not apply in this case, yet the most convenient method for causing the deed to be executed would be for the court to appoint a commissioner, just as if they were selling land belonging to the county, and thereby any question of whether said section applied would be erased. The appointment of a commissioner to execute the deed would certainly be authorized by Section 10389, and such procedure would likewise eliminate any question that might be raised as to the applicability of Section 13784. Therefore, out of an abundance of caution, we would suggest that the county court appoint a commissioner to execute the deed in question.

CONCLUSION

It is, therefore, the opinion of this department that the county court can and should appoint a commissioner to execute the deed to lands bid in in the name of the county at a foreclosure sale under a school fund mortgage.

II.

What kind of a deed should be executed and delivered, a warranty deed, a special warranty deed, or a quit claim deed?

As pointed out above, the county does not really own the land to which it has legal title by virtue of Section 10389. The county court is trustee of said lands. The terms of the trust are set out in said section and, aside from management and control, are to resell the land. It would discharge this trust by passing to the purchaser what title it received to the land.

It is a well established principle that county courts are courts of limited jurisdiction and can only act within the powers granted to them by the Legislature. There is nothing in the statutes which would authorize the county court to

warrant the title to the land in question to a purchaser. The execution by the county court of a deed containing warranties of title would amount to incurring obligations against either the county or the school fund, and before such could be done there would have to be statutory authority for same. Since there is no such authority in respect to the sale of the land in question, we must conclude that the county court does not have that power.

CONCLUSION

Therefore, it is the opinion of this department that the county court should cause to be executed a quit claim deed to convey land which was bought in in the county's name at a foreclosure sale of a school fund mortgage.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

OFFICERS:
REMOVAL:
TRUSTEES:

Trustee under Jones- Munger Act may be removed at the pleasure of County Court.

April 14, 1942

4-15

FILE
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you request an opinion from this Department, on the question of when and how a person who has been appointed by the county court to act as trustee under the Jones-Munger Act, may be removed.

The law providing for the appointment of such a trustee is as follows:

Section 11131 R. S. Mo. 1939

> "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the

> taxes against all such lands or lots so sold. * * * * * "

It will be noted here, that this statute does not fix the term for which such person is appointed as trustee. That being the case, we think the following rule applies. Volume 22 R. C. L. page 562 Section 266, provides in part as follows:

> "When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law the office is held during the pleasure of the authority making the appointment. Hence in the absence of all constitutional or statutory provision as to the removal of public officers, the power of removal is considered as incident to the power of appointment. In such cases no formal charges or hearings are required in the absence of some statute on the subject. * * * * * * * * *"

This same rule is announced in Volume 46 C. J., page 984 Section 146, 147; also in Volume 91 A. L. R. 1093, this rule is announced. Among the various states which have applied this rule is the State of Missouri. At l. c. 1099, the annotator makes the following statement:

> "In Hortsman v. Adamson (1903) 101 Mo. App. 119, 74 S. W. 398, where a clerk of court who was alleged to have appointed a deputy clerk for a four-year period was held not liable to him by reason of discharging him after less than two years' service, the court noted that the statute failed to define the period for which the deputyship should continue, said that 'where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked

> and applied at pleasure, without notice, and without legal liability for the results;' and added that 'subject to the supervisory control conferred by the law on the court, the discretionary right of appointment by the statute is unrestricted, and the like boundless authority of terminating the appointment by discharge must necessarily exist in the appointing official.'"

As stated above, this statute providing for the appointment of the trustee does not fix the term of office nor does it fix the qualification of such person, the entire matter rests in the discretion of the county court, which is the appointing power under the statute.

CONCLUSION

We are, therefore, of the opinion that the county court which is the appointing power under the statute, may at its discretion appoint such person as trustee and terminate such term at such time as it sees fit, and without notice or stating a reason for such termination.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

CRIMINAL PROCEDURE: Defendant in preliminary examination is entitled to have process for witnesses outside county where examination is held.

May 14, 1942.

5-25

Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

FILE

Dear Sir:

Your request for an opinion addressed to the Attorney-General has been referred to me. This request is as follows:

> "A local justice of the peace has pending before him a felonious complaint, and the date for the preliminary examination is set. The witnesses has requested a subpoena for witnesses in order to make out his defense on the preliminary examination. Some of these witnesses live in Morgan County, some in Miller county, adjoining county, and some in distance counties within the State of Missouri.
>
> "The preliminary examination is conducted under sections 3857-3890, R. S. 1939, and nothing is said about process for witnesses. It does say that a warrant for a defendant in another county must be certified, see section 3860 R. S. 1939. Is the subpoena of justice of the peace good outside the county, not being from a court of record?
>
> "Suppose the justice issues a subpoena on a witness in Cole county and in Jackson County, counties not adjoining Morgan County. Would they be valid subpoenas? Suppose the sheriff or other officer in Cole county or Jackson county would not serve these subpoenas, what recourse is possible?

> "Suppose the witnesses would not come from such long distances, and the justice court not being a court of record, how could the subpoena be enforced against the witness refusing to come? Ordinarily, an attachment for witnesses who fail to appear is issued by a court of record.
>
> "Would it be legal and would the sheriff of Morgan County, get his mileage for serving a subpoena on a witness in Cole County and in Jackson County?
>
> "What are the bounds of discretion in the costs that might be run up in a preliminary examination by a defendant who would and has attempted to run up immense costs, but subpoenaing witnesses from distance points?"

The principal question embodied in your request is, whether or not a subpoena on the part of an accused, issued by a justice of the peace in a preliminary examination on a felony charge, has any force and effect outside the county in which the justice of the peace is commissioned.

First, I wish to cite Article II, Section 22, of the Constitution of Missouri, which provides as follows:

> "In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

There are certain provisions in the Constitution that are self-enforcing. We will cite you to the following case, State v. Wymore, 119 S. W. (2d) 941, in which the court said:

"The opinion then directed attention to Sec. 4814, R. S. 1909, Mo. St. Ann. sec. 4362, p. 3022, enacted after the adoption of the above constitutional amendment. Under said section the acceptance of a free pass is a misdemeanor and conviction forfeited the the office. In other words, the legislature presumed to amend the constitutional amendment by requiring a conviction before forfeiture. The opinion then eulogized the statutes providing for forfeiture on conviction as being the legislative policy of the state. In doing so it ignored the fact that the people did not approve of such policy, and for that reason adopted the self-enforcing amendment to the constitution prohibiting officeholders from accepting free passes. The rule is stated in State ex inf. Norman v. Ellis, 325 Mo. 154, loc. cit. 160, 28 S. W. 2d. 363, loc. cit. 365, as follows:

"'"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"'"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." * * *

"'"A constitutional provision designed to remove an existing mischief should never be construed as dependent for

> its efficacy and operation on the legislative will."' 12 C. J. pp. 729, 730."

We are of the opinion that Article II, Section 22, supra, is one of the "self-enforcing" sections mentioned in the above opinion; further, that it was to go into immediate effect and that ancillary legislation was not necessary.

If this is a self-enforcing provision of the Constitution, then it becomes necessary to determine whether or not a preliminary examination is a "criminal prosecution" within the meaning of Article II, Section 22 of the Constitution of Missouri. In support of our contention that it is a part of a "criminal prosecution" or "criminal proceeding," we will call your attention to Ex Parte Bedard, 106 Mo. 616, l. c. 623. In this case the court said:

> ""'* * * * If the proceedings had before the committing magistrate are not a "prosecution" in the legal sense, where would be the authority for detaining the accused in legal custody, or what would be the legal value of the bond furnished by the accused for his appearance before the criminal court? It is elementary in our jurisprudence that such proceedings are the basis and primary inception of the prosecution, and that the order of the committing magistrate accepting the bond of the accused is a judicial act which is the basis of the judgment of the criminal court in case of a forfeiture of the bond.'
>
> "That the preliminary examination before the committing magistrate is a criminal prosecution is conceded, without argument, by this court, in the opinion of the majority of the court, and the dissenting opinion of Judge Ryland in the case of State v. McO'Blenis, 24 Mo. 402. * * * *"

As can be seen by reading the above, a preliminary examination is held to be a criminal prosecution. In such hearing, the defendant or accused is not placed in jeopary,

it is true. However, he is detained; he is forced to sign a recognizance, and his failure to file a satisfactory bond will deprive him of his liberty as he will be placed and held in custody until his preliminary examination. In case he does post a good and sufficient bond, but fails to appear at his preliminary examination, such bond can be forfeited and the sureties forced to pay the amount on the face of the bond. Can we say that these acts are acts which might come under "civil procedure?" We think not. It is our opinion that when a warrant for arrest is issued by a justice of the peace, that such act is a part of a criminal prosecution and that the preliminary examination is another step in a proceeding which eventually places a defendant in jeopardy in a court of record.

The preliminary hearing was conceived for the benefit of the accused. In State v. Langford, 240 S. W. 167, l. c. 168, Pars. 4-6, the court said:

> "This court has recently, in State v. Flannery, 263 Mo. 579, 173 S. W. loc. cit. 1055, in harmony with earlier cases, defined the object and purpose of a preliminary examination as intended to obviate the possibility of groundless or vindictive prosecutions which might otherwise occur where informations are authorized to be filed and the deliberations of a grand jury dispensed with; * * * * * * * * * * *"

If such is true the accused would not gain very much, if the law was that he could not secure his witnesses in a preliminary examination. In this day and age, many crimes happen on the highways of the State, and many witnesses who are material to both an accused and the State, live in counties other than that where the crime is committed. If the defendant were not permitted to secure these witnesses, if needed, the preliminary examination would avail him nothing, in spite of the provisions of Article II, Section 22, of the Constitution.

The process of a justice of the peace in felony cases is recognized outside of his own county in the case of a warrant for arrest. Section 3860, R. S. Mo. 1939, provides as follows:

> "If the person against whom any warrant granted by a judge of the county court, justice of the peace, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant, or any officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed, if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

If a warrant for arrest is to be recognized outside of the justice of the peace county, we feel that the subpoenas for the defendant's witnesses in preliminary examinations should also be recognized, especially where there is a constitutional provision such as we have here which is self-enforcing.

Although there are no specific statutes which deal with this matter, there are several statutes which deal with the power of a justice of the peace to issue subpoenas in civil cases. However, in this question, there is involved the question of criminal prosecutions. The legislators, although never dealing with it specifically, have inferred that the defendant should be given the right to secure his witnesses. Section 4007, R. S. Mo. 1939, follows Article II, Section 22, of the Constitution, and reads as follows:

> "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for

> witnesses in his behalf; and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

Although this section has reference to a trial in a court of record, it is helpful in showing the intention of the legislature to give the defendant every chance to prove himself guiltless. We feel that such intention should be construed in favor of the defendant in preliminary examinations as well as in courts of record. In fact, Section 3869, R. S. Mo. 1939, provides that the order of conducting the preliminary examination with reference to examining witnesses should conform to the rules in courts of record. Such section is as follows:

> "The order of conducting the trial or hearing, with respect to the introduction of the evidence and the examination of witnesses, shall be the same as govern in the trial of causes in courts of record, as far as practicable."

Two other sections which we might cite, which tend to reflect the intention of the legislators in this matter, are as follows: Section 3864, R. S. Mo. 1939 provides:

> "A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires, not exceeding ten days at one time, and to

> the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Also Section 3871, R. S. Mo. 1939, providing,

> "After the examination of the complainant and the witnesses on the part of the prosecution, the witnesses for the accused may be sworn and examined, and the prisoner may, at his request, be sworn and examined as a witness in his behalf, under the restrictions applicable to the examination of defendants in the trial of criminal cases."

In view of the decisions above, the fact that the counties where witnesses were to be served, did not adjoin the county wherein the crime was committed and the subpoena issued, would make no difference. If the accused is entitled to have subpoenas issued for witnesses in an adjoining county, then he would be entitled to them in any county in the State.

As to your question of the refusal of the witnesses to answer the subpoena, there is only one way to enforce the attendance of these witnesses. In misdemeanor cases the justice of the peace is empowered to enforce the attendance of witnesses. This is set out in Section 3812, R. S. Mo. 1939, which provides as follows:

> "It shall be the duty of the justice in all cases to summon the injured party as

> a witness, when he is not present and his presence may be procured; and at the request of the defendant or prosecuting attorney, or prosecuting witness, he shall summon all persons as witnesses whose testimony may be deemed material, and enforce their attendance by attachment, if necessary: Provided, that in cases which first have been submitted to the prosecuting attorney before the issuing of a warrant, as provided in section 3808 of this article, if the prosecuting witness shall order subpoenas for witnesses in addition to those ordered by prosecuting attorney, he shall be liable for the costs of all such witnesses not used on a trial of said cause, and it shall be the duty of the justice to tax such prosecuting witnesses with all costs of subpoenaing, serving and attendance of such witness, and the state nor county shall in nowise be liable for any such costs."

Again referring to Article II, Section 22, we find that the accused has the right "to have process to compel the attendance of witnesses in his behalf." It seems that the Constitution gives the accused the right to have his witnesses brought into the preliminary hearing and therefore since the justice of the peace has the power to compel the attendance of witnesses in misdemeanor cases, we think that the constitutional provision above carries with it the power for the justice of the peace to compel the attendance of witnesses by attachment in preliminary examinations. The defendant is also given the right to have compulsory attendance of his witnesses in Section 4007, R. S. Mo. 1939.

You further ask about the sheriff serving the subpoena in another county. Section 1907, R. S. Mo. 1939, provides as follows:

> "Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person

> who would be a competent witness in the cause, and the sheriff, coroner, marshal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held."

We think that subpoenas for witnesses outside of the county should be sent to an officer in the county where the witness is at the time of trial. This section provides that if the subpoena is from a trial court an officer may serve it in an adjoining county. But in the case of a preliminary examination where the subpoena is not from a trial court, it would have to be sent out as stated aforesaid.

This Department is unable to arrive at any rule that will govern the "bounds of discretion" in the amount of costs which might be "run up" by the defendant in summoning witnesses from distant points. The rule is that, in criminal prosecutions the accused shall have the right to have process to compel the attendance of witnesses in his behalf and the court cannot restrict the number of subpoenas. See State ex rel. v. Gideon, 119 Mo. 94, 24 S. W. 748.

Conclusion

It is, therefore, the opinion of this Department, that in view of Article II, Section 22, of the Constitution of Missouri, which we think self-enforcing, and the fact that we think a preliminary examination is part of a criminal prosecution or proceeding, the subpoenas for witnesses issued by a justice of the peace on the part of the defendant in a preliminary examination, are enforceable in counties other than that where the justice of the peace is commissioned and where the crime was committed.

It is further our opinion that the accused is entitled to witnesses in such hearing from any part of the State and that in view of Article II, Section 22, supra, the justice of the peace shall issue attachment for any witnesses that refuse to answer a subpoena.

Further, that a subpoena issued by a justice of the peace, shall be sent to an officer in the county where the

witness resides or is at the time of the hearing.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

CRIMINAL LAW - AND COSTS: State or county not liable for costs until sentence has been pronounced.

May 14, 1942

5-16

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

FILE
57

Dear Sir:

We are in receipt of your letter of May 12, 1942, in which you request an official opinion, as follows:

> "Section 9156 R. S. Mo 1939, provides that after a conviction by a jury or a plea of guilty, the circuit judge has power to either suspend sentence or put the defendant on probation. Now suppose a defendant is given a suspended sentence, what happens to the costs? Suppose the defendant comes up term after term, and his suspended sentence is continued, and he pays only a few dollars on his fine and costs between terms, who is supposed to finally pay the costs? The sheriff, the officers, the witnesses, for both sides, make life miserable for the prosecuting attorney, and the circuit clerk, when they continually ask for their fees that they have earned. Can I get out a fee bill either against the state or against the county to pay these costs, when and while this sentence is suspended? After a defendant has been paroled and put on probation, very often, a criminal cost bill is issued and the costs paid either by the state and/or county while the defendant is out on probation. Under this new

> law in sec 9156 supra, is the law such that under a suspended sentence, the officers can get their fees and costs?

Section 9156 R. S. Missouri, 1939, reads as follows:

> "The circuit and criminal courts of this State, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court or courts, may place on probation any defendant eligible for judicial parole under Sections 4199 to 4211, inclusive, of Article 18, Chapter 30, Revised Statutes of Missouri, 1939. After a conviction, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation."

This section first appeared in Laws of Missouri, 1939, page 400. This section specifically grants the courts and boards of parole the right not only to suspend the imposition of the sentence, but also to suspend execution after sentence is imposed.

The cost statutes applicable to your request are, Section 4221 and 4222 R. S. Missouri, 1939. Section 4221, supra, reads as follows:

> "In all capital cases in which the defendant shall be convicted, and in

> all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 4222, supra, reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

In both of the above sections which require the state and county respectively to pay costs upon conviction, the word "sentence" is used. Unless the defendant is sentenced neither the state nor county is liable for cost until sentence has been pronounced. It was so held in the case of State ex rel. v. Carpenter, et al, 51 Mo.555, l. c. 556, where the court said:

> "The atatute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them. (1 W. S., pp. 348-9, secs. 1,2.)
>
> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.
>
> "The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined

thereby.

"But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.

"Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

This is a very old case, but is the latest case on the subject.

A judgment, that is a verdict or plea of guilty, is not final until sentence is pronounced. It was so held in Ex parte Hartley, 49 S. W. (2d) 119, l. c. 120, where the court said:

" * * * In State v. Watson, 95 Mo. 411, 414, 415, 8 S. W. 383, and in

> State v. Schierhoff, 103 Mo. 47, 50, 15 S. W. 151, we have definitely ruled otherwise, on the theory that there is no final disposition of a cause until there is a final judgment, and a court does not lose jurisdiction of a case until final judgment is entered, though such be not done until a subsequent term. This is generally recognized in criminal cases. Where on appeal it appears that the defendant was convicted but not sentenced, the appeal is treated as premature, and the cause remanded to the trial court, with directions to pronounce sentence and enter up judgment against the defendant on the verdict of the jury returned in the cause, though the conviction was had at a previous term. State v. George, 207 Mo. 16, 105 S. W. 598."

Also, in the case of State v. Seats, 21 S. W. (2d) 758, the court held that:

> " * * * No sentence was pronounced nor any judgment entered by the court. The appeal was premature. No judgment having been rendered, there was nothing from which to appeal. * * * "

Of course if sentence is pronounced and execution is suspended, as set out in Section 9156, supra, either the state or the county would be liable for costs, in accordance with Sections 4221 and 4222, supra. The suspension of execution is not a part of the case proper so as to effect the sentence. It was so held in the case of a parole in the case of Lee v. Gilvan, 229 S. W. 1045, where the court said:

> "By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

This section has not been passed upon by the Appellate Courts of this State, but the Supreme Court of the State of Kentucky, in distinguishing between the suspension of sentence and suspension of execution held that Courts have inherent power for many reasons to suspend sentence, and for some reasons at least to suspend execution of judgment; "suspension of sentence" contemplates only postponement of rendition of judgment, while "suspension of judgment" or "suspension of execution of judgment" contemplate withholding for time of performance by defendant of an already rendered judgment. (Huggins v. Caldwell, 3 S. W. 1101, 1102, 223 Ky. 468.)

The court can withhold sentence over the term in which a defendant plead guilty or was convicted by a jury. It was so held in the case of State v. Turpin, 61 S. W. (2d) 945, 948, where the court said:

> " * * * True enough it is the general rule that a court is powerless to modify, amend, or revise judgment and sentence after the lapse of the term at which the same were pronounced. 16 C. J. sec. 3099, p. 1315. But this is on the

> theory that with respect to such final orders the court's jurisdiction is exhausted with the expiration of the term. In the instant case, however, by the entry made at the August term, the court expressly continued the cause, thereby retaining jurisdiction of it. As is said in Aetna Insurance Co. v. Hyde, 327 Mo. 115, 118, 34 S. W. (2d) 85,87: '"So far as the correction or amendment of the judgment or decree itself is concerned, at least in matters of substance, the power ceases with the end of the term, unless otherwise provided by statute." * * * Of course, this general rule is subject to the well-recognized qualification that, if a court has retained and continued its jurisdiction in a particular cause by a reservation or other act, through a motion or other proceeding during the term, its power and control over its final judgment or decree survive(s) the end of the term at which it was rendered or granted.'"

CONCLUSION

In view of the above authorities, it is the opinion of this department that after a defendant has been paroled and put on probation a criminal cost bill may be issued and the cost paid either by the State or by the County, as set out in Sections 4221 and 4222 R. S. Missouri, 1939.

It is further the opinion of this department that neither the State nor the County is liable for the payment

of a criminal cost bill where sentence has not been pronounced, and has been suspended by the court or board of paroles, as set out in Section 9156 R. S. Missouri, 1939. In no event can a cost bill be issued until sentence has been pronounced.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CRIMINAL LAW: Ward under guardianship by reason of unsound mind can be prosecuted criminally.

May 28, 1942

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

FILE
57

Dear Sir:

We are in receipt of your request for an opinion, under date of May 26, 1942, which reads as follows:

> "Lafayette Light is a resident of this county, and is a ward of the public administrator of Jackson County, Missouri. He is a veteran of World War 1, and is getting compensation from the Federal Government. He is in reality a charge and a ward of the Federal Veterans Bureau. The Veterans Administration really look after him, although his present legal representative is the public administrator of Jackson County. Any estate he has is the compensation paid him by the Federal Government. Light does own a farm on which he does live. The Federal Government from time to time has had him confined in Federal institutions.
>
> "Wherever Light lives, he is a nuisance because of his dispositions and his mental derangement. Now he works in his garden with only his shoes and hat on. He kills and eats trespassing chickens of his neighbor. He tears

down a division fence that he has erected and when the neighbors cows come over, he milks the cows for his own use and then drives the cows home. He crashes through wooden gates with his truck across private passage ways leading into his farm. He threatens to close another private passage way across his land, that might be excepted out of his conveyances. At the most, he seems to be guilty of misdemeanors. He uses foul and violent language, makes threats of a blood curdling nature, and then retreats behind the fact that he is insane, and challenges the parties offended to do something about the situation. A representative from the Veterans Bureau at Excelsior Springs, Mo., has been down to investigate some of the facts and the causes for complaint.

"The neighbor offended has been trying to get some action out of my office. Right now I at a loss to know what can be done.

"Sections 4046, 4047, Mo. R. S. 1939, seems to concern a case wherein the defendant, became insane from the time the crime was committed and before the trial of the case and was insane at the time of the trial. Sections 9348-9351 incl., R. S. Mo., 1939, provide for the handling of insane parties charged with a crime. Therein, a defendant has not been adjudicated insane. In the Light case, the defendant is a person of unsound mind, and has been adjudicated and has a legal guardian. Section 9340 R. S. Mo., 1939, provides that if a person be dangerous to be at large, then an order can be obtained to have him confined.

"In case that Light should be apprehended for his misdemeanors; should he be prosecuted or should he be tried for his liberty, in the probate court on the theory that he is a dangerous person to be at large and should be confined. Should that complaint be made to the Morgan County probate court, or the Jackson county probate court?

"Is this man a pauper and would make the county liable for the costs, or with his compensation from the Federal government should he pay his own costs in a state institution?

"Is this man a legal resident of Morgan County, Mo.?

"If he is a ward of the Federal government, how can we obtain superior jurisdiction unless we just assume it? I have taken this matter up with the guardian, the public administrator of Jackson County, and he referred me to the Veterans' Administration. They seem to be very slow about any action, and they might not take any action. This man has caused endless trouble, and he has been found by the Federal government not to be crazy and violent enough all the time to be confined in some Federal institution. In the meantime the adjoining neighbor complains to me and the sheriff about the treatment, he is called upon to suffer from this man Light."

We are assuming from the facts stated in your request that the Public Administrator of Jackson County, Missouri, was appointed guardian of the ward, LaFayette Light, in accordance with Section 447, Article 18, Chapter 1, R. S. Missouri, 1939, which reads as follows:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Under Article 18, R. S. Missouri, 1939, and by reason of Section 474 of said article, the probate judge may make an order of restraint for the safekeeping of the ward. Under this section it is discretionary with the probate judge to make such an order.

Also, under Section 497, of Article 18, R. S. Missouri, 1939, it is mandatory that the guardian confine the ward if he is so far disordered in his mind as to endanger his own person or the person or property of others. The fact that the ward is not now confined, is in your county, and there is no evidence that he has escaped from any confinement, shows that no order has been made as set out in Sections 474 and 497 R. S. Missouri, 1939.

The hearing as to insanity or as to the unsoundness of mind, as above described and set out in Section 447, supra, is a proceeding to protect the property of the ward and is not conclusive as to his criminal condition.

Section 9348 R. S. Missouri, 1939, reads as follows:

> "When a person, tried upon indictment for any crime or misdemeanor, shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two following sections."

It will be specifically noticed that the above section specifically states: " * * * tried upon indictment for any crime or misdemeanor, * * * ." Since Section 9348, supra, merely sets out the form of verdict of the jury in case the defense is insanity, we are suggesting that an information for misdemeanor, if filed, be filed in the circuit court, and that the defendant be given a jury trial.

It has been repeatedly held that the issue of insanity is tested on the question of whether or not the defendant knew he was doing wrong at the time of the commission of the act, and if at that time he knew the difference between right and wrong. It was so held in the case of State v. Miller, 225 S. W. 913, l. c., 915, where the court said:

> "The question of the sanity or insanity of a defendant who has committed a crime is limited to the time of its commission. 8 R. C. L. p. 64, par. 14; 16 C. J. p. 100, par. 75; State v. Miller, 111 Mo.

loc. cit. 551, 20 S. W. 243; State v. Wright, 134 Mo. 404, 35 S. W. 1145; State v. Palmer, 161 Mo. 152, 61 S. W. 651; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; State v. Riddle, 245 Mo. loc. cit. 458, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884; State v. Rose, 271 Mo. loc. cit. 18, 195 S. W. 1013."

Also, in the case of Eisenhardt et al v. Siegel et al, 119 S. W. (2d) 810, l. c. 812, where the court said:

"Plaintiffs had no case, except on the issue of murder, and there was no murder if John was insane, even though it be assumed that John killed Herman under such circumstances as would constitute murder by a sane man. It would be more than an anomaly to say that plaintiffs could proceed on the theory of murder, but that defendants could not interpose the defense of insanity, which is one of the generally recognized defenses of one charged with the commission of crime. Citation of authority is not necessary, but see Wharton on Homicide (3d Ed.) Sec. 536; 1 Wharton & Stille's Med. Jur. (5th Ed.) Sec. 162; State v. Rose, 271 Mo. 17, loc. cit. 27, 195 S. W. 1013. And the test in determining the issue of sanity is: Did the accused at the time of the commission of the alleged crime 'know that he was doing wrong?' State v. Rose, supra.

> "We shall rule the present case on the theory that the trial court found that John shot and killed Herman, and under such circumstances as to constitute murder, if John were sane, but also found that at the time of the killing, John was not criminally responsible because of his insanity."

And, in the case of State v. Jackson, 142 S. W. (2d) 45, l. c. 49, where the court said:

> "* * * 'This testimony is given for the purpose of showing that the defendant, Chester Jackson, is not a normally minded person; that he is mentally deficient, and that he has the mind of a child, and that he does not have the willpower to overcome his passions, or his desires.' Still later counsel further stated that the pain and fever from appellant's illness seventeen years before so scarred and injured him that the growth of his mind was arrested and he never became a normal child. Continuing, he said the doctor would testify that appellant's mind had not grown since his illness and is still undeveloped; that he is a degenerate, and does not have the mind of more than a ten year old boy. Following that, the statement was repeated that appellant's will power was so weak that he was unable to control his desires, impulses and instincts when aroused.
>
> "None of that proves insanity in the sense required by our law. As already stated, the defense of irresistible impulse is not recognized in Missouri. And in practically all jurisdictions mere retarded mental development or subnormality is not a defense. The prevailing rule on this question is thus

> set out in 14 Am. Jur., supra, sec. 32, p. 788: 'Criminal responsibility does not depend on the mental age of the accused or upon the question whether his mind is above or below that of the ideal, average or normal. Mere weakness of mind, ignorance, or deficiency in any mental function is not in law equivalent to a want of capacity and will not excuse the perpetration of a criminal act, unless the mentality of such a person is of such subnormal character as to render him incapable of distinguishing between right and wrong, in which case it is undoubtedly a defense. The law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor or a mind unimpaired by disease or infirmity.' See, also, 10 L. R. A., N. S., 999, note; 44 A. L. R. 584, annotation."

If the defendant is acquitted by reason of insanity at the time of the commission of the act, and the jury returns a verdict that he is still insane, then the court, if the prisoner is not a poor person, and the court believes from the nature of the offense that it would be unsafe to permit the prisoner to go at large, shall make an order that he be sent to a state hospital, designating it, and further order that the costs of the confinement be paid out of the estate of such person.

If the defendant is a poor person the proper county is liable for the costs of his detention and the payment shall be made in accordance with Section 9350 R. S. Missouri, 1939. Under this section the expenses are paid by the proper county.

It is a question of fact, in each individual case, as to the residence of the defendant, and as to which

county should pay the costs of the defendant's restraint in case he is a poor person.

In the case of Thomas v. Macon County, 175 Mo. 68, l. c. 73, the court, in construing what is now Section 9348, supra, stated:

> "Then sections 4885 and 4887 make provision for another case, that is, when a person is tried for a criminal offense and acquitted on the ground that he was insane and he remains in that condition, the court is to order him to be kept in custody 'at the expense of the proper county, until the county court shall cause him to be removed to the asylum, as in cases of insane poor persons.' The statute then directs that the county court shall proceed in the matter as directed in sections 4874 and following, except that it is not to enter on the inquiry as to insanity, that fact having already been adjudged by the circuit court.
>
> "The sections above referred to contain the only provisions to be found in our statutes expressly authorizing the cost of keeping a patient in the asylum to be charged to a county and in each of those cases it requires that the person be a resident of the county and that the county court should take the prescribed action in the premises."

Also, in the case of The State ex rel Yarnell v. The Cole County Court, 80 Mo. 80, the court, in passing upon a question of fact as to the residence of an insane person, at page 84, said:

> "* * * It seems to have been the purpose of the legislature to provide that before the support of an insane poor person of one county can be shifted to or cast upon another county, such insane person must have ceased to reside in the former county for the period of one year. The same policy has been indicated in the law regulating the support of the poor, (2 R. S., p. 1289, secs. 6579, 6581,) where it is provided that poor persons shall be received, maintained and supported by the county of which they are inhabitants; and that no person shall be deemed an inhabitant, within the meaning of the chapter, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

In view of the facts set out in your request, the question as to which county should pay the costs of the defendant's restraint in case a jury, by its verdict on an information filed, found that the defendant was still insane, is not involved in your request. We say that for the reason that the public administrator is not appointed for poor persons without some estate, and for that reason the costs of the defendant's detention would be at the cost of the defendant's estate.

We have no statute in this state which prohibits the filing of a charge, or a trial, under the criminal law where the defendant has been adjudicated insane in a

civil proceeding. This general rule of law has been followed in many states and by the Federal Court. In the case of Whitney v. Zerbst, 62 F. 2d 970, the Circuit Court of Appeals, Tenth District, stated the rule as follows:

> "We cannot subscribe to the doctrine that a person committed for insanity who escapes and commits a criminal act is, because of such commitment, immune from prosecution therefor.
>
> "Where, after an adjudication of insanity and commitment to an asylum in a civil proceeding, a person so adjudged and confined commits a criminal act, a court having jurisdiction over the offense may take him into custody and try him for such offense in the absence of statutory provision to the contrary. Myers v. Halligan (C. C. A. 9) 244 F. 420; In re McWilliams, 254 Mo. 512, 164 S. W. 221.
>
> "While insanity, in the sense that term is used in the criminal law, at the time the criminal act was done may be asserted as a defense to the criminal charge and present insanity may be asserted as a bar to trial on such charge, the issues with respect to such a defense or bar are for the determination of the court having jurisdiction of the criminal offense. In re McWilliams, 254 Mo. 512, 164 S. W. 221. The court may submit the issue of present insanity as a bar to trial to a jury impanelled for that purpose, or may determine the issue itself. Insanity at the time of the commission of the offense is a defense and presents an issue un-

> der the plea of not guilty for the determination of the jury at the trial for the offense. Ex parte Charlton (C. C. N. J.) 185 F. 880; Charlton v. Kelly, 229 U. S. 447, 462, 33 S. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397; Youtsey v. United States (C. C. A. 6) 97 F. 937.
>
> "While an adjudication of insanity is admissible in evidence upon the trial of an issue of insanity at a time subsequent to such adjudication (State v. McMurry, 61 Kan. 87, 58 P. 961; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Hempton v. State, 111 Wis. 127, 86 N. W. 596), it is not conclusive and may be rebutted by other evidence. Hale v. Harris, 169 Mich. 172, 134 N. W. 1111; Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 57, 7 A. L. R. 553."

In the above quotation the court has cited In re McWilliams, 254 Mo. 512, 164 S. W. 221, which also follows this rule.

CONCLUSION

In view of the above authorities, it is our opinion that a ward of a public administrator of Jackson County, Missouri, who commits a misdemeanor in Morgan County can be prosecuted for his criminal acts, even though a guardian has been appointed for him.

It is further the opinion of this department that the ward can set up insanity as a defense, but it is a question of fact for the jury to pass upon. The question involved is whether or not, at the time of the com-

mission of the act, the ward knew the difference between right and wrong.

It is further the opinion of this department that if the jury should return a verdict to the effect that the defendant was insane at the time of the commission of the act, and has not permanently recovered from such insanity, the judge of the circuit court may order his confinement through the proper institution at the cost of the ward's estate.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PENAL INSTITUTIONS: Permission for autopsy in State Penitentiary must be received from Secretary of the Missouri State Anatomical Board.

June 22, 1942.

6-25

FILED
57

Dr. Hugh W. Maxey
Prison Physician
Missouri State Penitentiary
Jefferson City, Missouri

Dear Dr. Maxey:

Your letter of June 18th addressed to this Department, requesting an opinion, has been referred to me. Your request, omitting the caption and signatures, is as follows:

> "I have been informed that my predecessor, Dr. Marshall W. Kelly, requested your office for an opinion as to performing autopsies within the Prison. This information has evidently been misplaced for I am unable to find it in our files.
>
> "I am very much in need of this information and I would appreciate it if your office would give me an opinion as to performing autopsies within the Prison. Is it permissible? If so, how do I get permission to perform an autopsy within the Prison."

On April 23, 1935, Mr. J. E. Taylor, who at that time was an Assistant in this office, wrote an opinion touching this matter, but in 1939 the Legislature repealed the provisions of the Revised Statutes of Missouri for 1929 dealing with this subject and in lieu thereof enacted new provisions which can be found at page 510 of the Laws of Missouri for 1939.

Section 9998, R. S. Mo. 1939, provides as follows:

> "That the heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the State of Missouri which are now or may hereafter become incorporated, and in which said educational institutions human anatomy is investigated or taught to students in attendance at said educational institutions, shall be and hereby are constituted the Missouri State Anatomical Board, hereinafter referred to in this article as the 'Board.' The Board shall have exclusive charge and control of the disposal and delivery of deed human bodies, as hereinafter described, to and among such educational institutions as under the provisions of this article are entitled thereto. The Secretary of the Board shall keep an accurate record of all bodies received and distributed by the Board, showing the dates of receipt and distribution, the sources from which they came to the Board, and the name and address of the educational institution to which the same were sent, which record shall be at all times open to the inspection of each member of the Board and of any prosecuting attorney or circuit attorney of any county or city within the State of Missouri."

In the Revised Statutes of Missouri, 1939, Section 10,000, will be found the following:

> "Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poor houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body

of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the Board, or the person duly designated by the Board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six (36) hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the Board and permit the Board or its agent or agents to take and remove all such bodies, or otherwise dispose of them: Provided that each educational institution receiving a body from the Board shall hold such body for at least thirty (30) days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment. Each educational institution securing a dead body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to the secretary of the Board or his agent, which notice shall be by telegraph, when necessary to insure immediate notice. A correct record of all such bodies, including the name and date of death, shall be kept in a book provided for that purpose by the county clerk of the county in which such person died, and by the city Health Commissioner of the City of St. Louis, and such record shall be promptly furnished said officer by the person or persons reporting said

> bodies to the secretary of the Board or his agent. Whenever any person fails to give the notice and deliver the body of a deceased person as required by this act, and by reason of such failure such body shall become unfit for anatomical purposes, and is so certified by the duly authorized officer or agent of the Board, such body shall be buried at the expense of the person so failing to notify and deliver such body."

Section 10002 of the R. S. of Missouri, 1939, provides as follows:

> "Bodies required to be buried at public expense shall be under the exclusive custody and control of the Board. It is hereby declared unlawful for any person or persons to hold any autopsy on any dead human body subject to the provisions of this article without first having obtained the consent of the secretary of the Board or his accredited agent. The consent of any person for an autopsy on his or her body shall not in any way prevent or affect the application of this article."

In your letter you did not state as to whether or not the autopsies are to be performed upon the bodies of paupers incarcerated in your institution. But for the purpose of this opinion we will assume that such is the fact.

Under the authority cited above it would appear that upon the death of any inmate, where the body is not claimed by relatives and which body is to be buried at public expense, it is your duty to notify the Secretary of the Missouri State Anatomical Board and deliver such body within thirty-six hours to said Board. It also appears from Section 10002 aforesaid that the exclusive custody of the bodies of inmates dying in your institution shall be in such Board. The law provides that if any autopsy is performed upon any dead human body without first having obtained permission of the

Secretary of the aforesaid Board or his accredited agent that the parties performing such autopsy shall be deemed guilty of a misdemeanor. It is also provided that the fact that the consent of the person is obtained before his death for such autopsy will not affect the provisions of this article.

Conclusion

Therefore, it is the conclusion of this Department that in the case of a pauper dying in the Missouri State Penitentiary an autopsy cannot be performed upon such inmate's body until permission has been granted for such autopsy by the Secretary of the Missouri State Anatomical Board or his accredited agent, and the consent of the deceased given before his death to such autopsy will in no case affect the provisions stated above.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

CRIMINAL LAW: Prosecuting Attorney may introduce evidence, even when defendant waives preliminary.

October 12, 1942

10-19

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your request for an opinion in reference to the holding of preliminary examination, has been received.

Your main question is whether or not there is any law that forbids the holding of a preliminary examination by the State, even though the defendant waives such examination.

The section applicable to your question is Section 3893 R. S. Missouri, 1939, which reads as follows:

> "No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. And if upon such hearing the justice shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave: Provided, a preliminary examination shall in no case

> be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

There is nothing in the above section that would prohibit the prosecuting attorney from introducing his evidence before the justice of the peace where the defendant, or defendants, have waived preliminary examination.

In some states, such as Texas, the statute expressly authorizes an examining magistrate to proceed with the preliminary examination, although accused waives his right to such examination. (Porch v. State, 51 Tex. Cr. 7, 99 SW 1122.)

In 16 C. J. p. 317, it is stated:

> " * * * The state is not barred from holding a preliminary examination even though defendant waives his right thereto, * ."
> (State v. Brunot, 104 La. 237, 28 S. 996; Quinton v. State, 10 Okl. Cr. 520, 139 P. 705; Ponosky v. State, 8 Okl. Cr. 116, 126 P. 451.)

The Federal Court, in the case of Van Buren v. U. S., 36 Fed. 77, 82, held:

> "There are considerations of public policy upon which, in the absence of express provision to the contrary, it must be held to be in the discretion of the examining officer to suspend the examination or not, upon a waiver by

the accused, as he shall deem best for the public interest. If an arrest be made without good ground, an examination will show the fact, and save the expense of an inquiry by the grand jury. The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry, and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one. Ordinarily, I doubt not, an offer of the accused to waive an examination should be accepted; but if the commissioner be convinced that the public interest will be better subserved by an investigation, and especially if the district attorney request it, he may and should proceed to a full hearing."

CONCLUSION

It is, therefore, the opinion of this department that you may proceed to introduce evidence in the preliminary, even though the defendants at the time waived preliminary examination.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY COURTS: May apply reasonable annual rental of road machinery
PAUPERS: on purchase price of said machinery. Inmates of county alms houses who are able to support self should not remain there under certain conditions. County court may grant relief to persons without regard to residence.

October 15, 1942

FILED NO. 57

Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

FILED
57

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this Department under date of September 17, and a supplemental request under date of October 7, 1942. The two requests read as follows:

> "This county has been operating at a loss for several years, that is the expenditures have been exceeding the revenue. The county court has been levying a 10% illegal tax to try to take care of the deficit. The county court has been donating to the county agents office and other worthy causes in excess of $1000.00 per year.
>
> "Please advise me if the county court can lawfully make donations to the county agent and other worthy cause so long as the current revenue for any year will not take care of the expenses which the county must pay according to law.
>
> "There is now in the county alms house at least one person who has not resided in the county for one year and there are also in said alms house people who can make their own living if they are discharged from said alms house. Please advise me if the county court can lawfully keep one not a resident of this

county and further if the can lawfully support one who is able to earn their own living.

"This county is not under Township organization. It has about half of the county incorporated in special road districts and the rest of the county is in one large road district. In 1938 the county court budgeted $7000.00 for the purpose of buying road machinery to be used primarily in the common road district. The money used to buy this machinery came from general revenue and the county exceeded its income that year by more than $8000.00 and still owes most of it. What steps can and should be taken to force the county court to put the money back where it belongs,"

"Referring to the contents of your letter I find that the county clerk did not give me the correct information. The facts are that the county court in 1937 bought road machinery under a lease agreement with the machinery company. The understanding was that when a certain amount had been paid the machinery belonged to the county. If default was made in the payment of the lease rental the company would take the machinery back.

"I investigated the record and find that in 1938 in class 3 the amount of $1700.00 was set up to pay on grader note. In 1938 two items were set up in class 3. One for $1456.00 for payment on grader and one for $375.00. These amounts were paid out of general revenue set up in class 3. The balance of the payments made were from the funds found and placed to the credit of the common road districts. At the time these items were set up the county was in debt in all classes so far as I can find out.

"Another question has come up. A bridge has washed out. There are no funds now on hand to fix it with. The court wants to know if they can have the bridge repaired and pay it

> in five yearly installments. They want to issue warrants or enter into a contract to that effect. I told them it could not be done but they want your opinion."

Your first inquiry deals with the authority of the county court to donate or contribute to the county agent's office and other worthy causes so long as the current revenue for any year will not take care of the expenses for the county under the law. Article X, Section 12 of the Constitution of Missouri is a direct prohibition against spending more money than received by the county, or can be reasonably and honestly anticipated as revenue. This section in part reads as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof.
> *."

The County Budget Law, Sections 10910 to 10935, R. S. Missouri 1939, inclusive, placed counties more or less on a cash basis in that the anticipated revenue for a current year must be classified in five main classes and based on a budget approved by the county court and all parties participating in paying out such funds must sacredly preserve priorities. It is our opinion that the action of the county court or other officer participating in the issuance of warrants in excess of anticipated revenue of any current year and budget estimate is void and of no binding effect. No county court should ever participate in such donations in excess of the anticipated revenues and no warrant should issue for same, and if it does issue it subjects such officials to a suit upon their official bond. (Section 10917, R. S. Missouri 1939.)

In the third paragraph of your first request we find your next inquiry which reads:

> "There is now in the county alms house at least one person who has not resided

> in the county for one year and there are also in said alms house people who can make their own living if they are discharged from said alms house. Please advise me if the county court can lawfully keep one not a resident of this county and further if they can lawfully support one who is able to earn their own living."

Section 9590, R. S. Missouri 1939, provides that the county shall support and maintain poor persons who are inhabitants of their county and reads:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9591, R. S. Missouri 1939, defines poor persons and reads:

> "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

In King vs. Maries County, 297 Missouri 488, l.c. 496, the court announced a well established rule as to the power of the county court and said:

> "It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. * * * * * * * * * * * * * This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * * * * *"

You state that there are persons in the county alms house who if discharged are able to make their own living and inquire if the county court can lawfully keep such people at the expense of the county. Of course this is a question of fact to be determined by the county court. If such a fact can be established then, unquestionably, the county court under Section 9591, supra, is exceeding its statutory authority in supporting such persons.

Section 9592, R. S. Missouri 1939, defines inhabitants as follows:

> "No person shall be deemed an inhabitant within the meaning of this article, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such poor person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

The above provision requires one to have resided in the county twelve months next preceding the time any order is made respecting such persons.

Section 9594, R. S. Missouri 1939, however qualifies Section 9592, supra, by granting the county court authority to use its discretion and grant relief, without regard to residence, when such persons require assistance.

> "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

Therefore, we must conclude that the county court may exercise its discretion in granting relief to a person who under Section 9592, supra, cannot qualify as an inhabitant.

The last paragraph of your letter of September 17, deals with the purchase of road machinery and reads:

> "This county is not under Township organization. It has about half of the county incorporated in special road districts and the rest of the county is in one large road district. In 1938 the county court budgeted $7000.00 for the purpose of buying road machinery to be used primarily in the common road district. The money used to buy this machinery came from general revenue and the county exceeded its income that year by more than $8000.00 and still owes most of it. What steps can and should be taken to force the county court to put the money back where it belongs."

This Department has heretofore ruled on the right of the county court and road commissioner to purchase road machinery under almost every condition. However, in all cases the facts seem to be a little different. It is well settled now that the county court cannot contract for such road machinery, the payments for which are to be made over a period of several years. In support of this contention we refer you to Hawkins et al., v. Cox, 66 S. W. (2d) 539. In that case the special road district desired to purchase road machinery amounting to $2500.00, paying $500.00 cash and agreeing to pay $500.00 a year and interest thereafter. The special road district at the time had only $600.00 on hand and the revenue for the year of the purchase of such road machinery was approximately $600.00. The court held that the special road district could not purchase such road machinery on the above terms for the reason the commission could not obligate the revenue for future years without a vote of the people in the district. It would be void because in violation of Article X, Section 12, supra, which prohibits the incurring of an indebtedness in excess of anticipated revenue for that year without a vote of the people. It was also held in Ebert vs. Jackson County, 70 S. W. (2) 918, that a rental contract extending over a period of four years to pay rent in advance on the first day of each month for use of certain properties created a debt within the meaning of Article X, Section 12, supra, in that it was anticipating future revenue and exceeding the anticipated revenue for the year in which the contract became effectvie and was void. In so holding the court said, (l.c. 919-920):

> "And in Trask v. Livingston County, 210 Mo. 582, loc. cit. 594, 600, 109 S.W.

656, 659, 37 L. R. A. (N.S.) 1045, we also said:

"'It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year. Any other construction would render section 12 of article 10 nugatory; for, if the county court of Livingston county in September, 1889, could anticipate the revenue of 1890, it could also anticipate the revenues of 1891 and 1892, and would leave the power of the county, with reference to indebtedness, what it was before the Constitution of 1875 was adopted. * * *

"'Clearly the county court was not authorized to appropriate revenues, which were to be derived from taxation in the year 1890, when such taxes had never been assessed, levied, or collected. While the county court may in any one year draw warrants, after the revenue has been provided, and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years. If not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution, to the effect that its purpose was to put counties upon a cash system, instead of the old credit plan, has been in vain.'

* *

"In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff $4,320 for the use of the room for four years,

> beginning August 1, 1925, payable $90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.
>
> "The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

Therefore, if the contract for the purchase of the road machinery amounts to an unconditional promise to pay a fixed sum at some future specified date, the contract is void and the court would not be authorized to enter into same.

The situation in this case is somewhat different in that, apparently, under the lease the county is only renting the road machinery from year to year with the privilege of sometime in the future, if they so desire and have sufficient revenue, purchasing such road machinery and applying the rentals heretofore paid on the purchase price of the road machinery. There is apparently no unconditional promise to purchase or rent said road machinery. It is within the discretion of the county court as to whether they shall or shall not purchase or rent said machinery. In case the decision is to not purchase said road machinery all the county court has expended is a fair rental for said machinery. The writer is of the opinion that this is legal, providing that it is not a mere subterfuge to circumvent the prohibition in Article X, Section 12, supra. This is a question of facts. If the annual rental is in excess of a fair rental value for the use of said machinery and in fact constitutes a payment on said machinery instead of a rental charge then the contract would be void. It appears to the writer

that if the county court has the opportunity to save the county money and the contracting company is willing to credit the annual rentals heretofore expended on such road machinery against the purchase price of said machinery, that the county should not be penalized, when in fact all they are doing is paying a normal annual rental charge for the use of said machinery without any further obligation whatsoever.

In Hight vs. City of Harrisonville, 328 Missouri 549, l.c. 559, the city of Harrisonville entered into a contract with Fairbanks, Morse and Company to purchase two engines and other equipment for use in its light plant. In part payment of said equipment it was agreed that the city would adopt a resolution providing for the creation of a special fund in which all the receipts for the products and services of said plant should be deposited and to credit such fund at regular established rates for all products or services of such plant used by the city or any department thereof for any and all public purposes. The court held that this was mere subterfuge to evade Article 10, Section 12 of the Missouri Constitution for the reason that the city had no fund available for such purposes and if it purchased its own current then funds for this purpose must come from funds raised by taxation or from funds which must be replenished by funds raised by taxation. In so holding the court said:

> "It is also evident that the parties knew this payment by the city must be from funds raised by taxation, or from a fund which must be replenished by funds raised by taxation. Therefore, they resorted to this subterfuge in an effort to evade the constitutional prohibition. The trick is so transparent that we do not wonder at the failure of defendants to undertake a defense of this provision of the contract. 'Whenever courts see such attempts at concealment "they brush away the cobweb varnish," and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is

> the subject of construction; and if it is found to be in substance within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked.' (Maxwell, Interp. State., 133, 134.)
>
> "The bar to the constitutional prohibition is clear, and we should not permit it to be evaded. The contract must be held invalid. The chancellor held it so for this reason and for other reasons. * * * * * * * * * * *"

In the case of Bell vs. City of Fayette, 325 Missouri 75, l. c. 92, Fairbanks, Morse & Company were selling the City of Fayette diesel engines for a municipal power plant. It was agreed that they were to be paid from the profits earned by the diesel engines. The court held that such expenditures did not constitute a debt under Article X, Section 12; that no tax could be levied to collect said payments; that it was a contingent liability which might or might not accrue. In so holding the court said:

> "Since there is no evidence offered, and no fact in the record to the contrary, we must assume that the plan provided in the contract for ascertaining that saving, the direct earnings of the engines, is practical, adequate and sufficient for the purpose. It is not contended otherwise. So the ordinance and contract to pay those installments in the manner provided is not a debt within the prohibition of Section 12, Article X, of the Constitution. In no event can a general tax be levied to pay the installments; these payments constitute no lien upon the power plant nor upon its revenue. It is a contingent liability which may or may not accrue. It can be paid only on the con-

> tingency that, over and above the net revenue which the city derives from the consumers of water, power, light, etc., as the plant was operated before the purchase of the engines there shall accrue an additional profit caused by the operation of the engines. There is no aspect of that situation which could make the agreement to pay in the manner provided a debt of the city. It is a contingent purchase, the property to be paid for only out of the net earnings which it produces: the seller takes its chance on that contingency."

If the arrangements made in the above case did not constitute a debt to the city under Article X, Section 12, of the Constitution of the State of Missouri then how could a lease or contract for the use of road machinery, where the title is always in the corporation and the county being under no obligation whatsoever, constitute a debt? We think that it does not. If the amount paid annually as rental exceeds the normal rental value for such road machinery or if there is an unconditional promise to purchase or rent said road machinery in the future it is not a legal transaction and void. Furthermore, as hereinabove stated, priorities of classes in the budget must be sacredly preserved. Section 10910, R. S. Missouri 1939, reads in part:

> "* * * * * * * * * * * * * * * The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

There is no way that the current revenue can be used to replace any money improperly used in 1938 and subsequent years. However, any officials responsible for such expenditures are subject to a suit on their official bond under Section 10917, R. S. Missouri 1939.

In your supplemental letter of October 7, you further inquire if the county court in the absence of any funds on hand

may repair a bridge that has been washed out and pay for such repairs over a period of five years. In view of what has already been said it is the opinion of this Department that such repairs cannot be paid for in this manner.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

CRIMINAL PROCEDURE - DEPOSITIONS:

Depositions can only be taken after a criminal proceeding has been filed.

November 25, 1942

11-30

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "I want to know when the issues are joined in a criminal case under section 4010, 1939, so that the defendant can take a deposition.
>
> "In one case, the complaint in a rape case had been filed, but the preliminary hearing had not been heard. The defendant served notice to take the deposition of a witness who was just about to be inducted into the army, and leave the county for parts unknown. That deposition was then filed in the case.
>
> "In the last case, the victim was shot in a felonious wounding and is and has been at the point of death. The party doing the shooting came up and gave himself up to the sheriff and confessed that he shot the man with a shot gun. Then and as now, no charges had been filed waiting to see whether the victim died or not. Then the attorney for the defendant served notice to take the deposition of a witness for the defendant who was being taken in-

to the army and was leaving the county. No charges had been filed, and was the issues made up in this case?

"I have a rape case, in which, several attempts have been made to take the depositions of witnesses who will testify to specific acts of misconduct with third parties on the part of the girl complaining of a rape. These hearings, are for the purpose of intimidating the complaining witnesses, and in bluffing her into withdrawing her charges, on the theory that she will be attacked for alleged other acts of sexual intercourse. She denies to me and to her parents any such acts of sexual intercourse with other third parties. It is not my job to suppress evidence, or conceal facts, or prevent justice, but this taking of deposition racket, seems like going too far. It seems to me that this kind of evidence is not admissible for any purpose or any cause, and it is running up costs, for which there is not reason. Can I object that the issues are not made up, and the depositions are not admissible as being taken prematurely?"

Section 4010 R. S. Missouri, 1939, reads as follows:

"When any issue of fact is joined in any criminal case, and any material witness for the defendant resides out of the state, or residing within the

> state, is enciente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a commission to examine such witness upon interrogatories thereto annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sentence for a felony shall be taken where such witness is confined."(Underscoring ours.)

The above section, which is the criminal section allowing the taking of depositions, specifically states that the taking of depositions in a criminal case shall be under the same terms and same proof as provided by law in civil cases for the taking of depositions.

This section also provides:

> "When any issue of fact is joined in any criminal case, * * * * ."

In a criminal case the issue of fact is joined upon the filing of a complaint, for the reason that it is unnecessary for the defendant to answer the complaint, information or indictment in writing, except as to certain procedure which would be an attack upon the pleading itself. In

a criminal action the cause is pending when the complaint, information or indictment is filed. The civil section, in reference to the taking of depositions is Section 1917 R. S. Missouri, 1939, which reads as follows:

> "Any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally."

This section merely states, "suit pending", which is the same as the filing of a complaint, information or indictment in a criminal matter.

In the first question in your request you refer to a rape case which has been filed, but the preliminary hearing has not been had. Since a complaint has been filed the defendant has a right to take depositions of witnesses who may testify against him. It was so held in the case of Ex parte Welborn v. R. L. Faulconer, 237 Mo. 297, l. c. 302, where the court said:

> "The commission was not invalid because issued on an oral instead of written and verified application. The right to take depositions in criminal cases is statutory and the statute required no affidavit or written application. Since the defendant may have witnesses examined, conditionally, in his behalf exactly as in civil cases (Sec. 5173, R. S. 1909), save that a commission must issue, and since in civil cases a party to a pending suit 'may obtain the deposition of any witness, to be used in such suit, conditionally,' (Sec. 6384, R. S. 1909), the commission under section 5173 issues on demand as a matter of right without any preliminary showing.

> "The deposition of any, consequently every, witness may be taken, and the sole prerequisite to the issuance of a commission under section 5173 is that defendant desires one and asks for it. An affidavit or written application setting forth such desire could serve no useful purpose. The Legislature saw no reason for it and neither do we. When it deemed them necessary, that body expressly required petitions and affidavits preliminary to the issuance of commissions (Secs. 6398, 6420), and the omission to make such requirements in section 5173 was clearly deliberate.
>
> "Decisions in cases arising in connection with the taking of depositions under statutes and rules of court in which a limitation is fixed upon the taking of the deposition are not in point. Not the taking but the use of depositions taken under section 5173 is limited, and the fallacy of the argument to the contrary, based upon the word 'conditionally' in the section mentioned was long since accurately pointed out. * * * * * * *" (Underscoring ours.)

In the above opinion the court held that depositions could be taken even on an oral application, and the defendant should not be required to make a written application for the taking of depositions. The criminal procedure of this State follows the civil procedure, except where, under the criminal procedure, a special procedure is set out for criminal cases. The courts of this State in allowing the taking of depositions, both in civil and criminal cases do not refer to the state of the pleadings in the case, but only look into whether or not the

case has been regularly instituted. It was so held in the case of Bennett v. Strodtman, 42 S. W. (2d) 43, where the court said:

> " * * * We say this for the reason that the germane issues of the cause are not definitely or unalterably fixed by the state of the pleadings at a given time in the course of the taking of depositions; that, in fact, the taking of depositions has no necessary reference to the state of the pleadings at the time of the taking; that it is rather a provision against contingencies for the possible condition of the cause at the trial thereof; that, as a general proposition, it is not even essential that there be any issues, provided only that the case has been regularly instituted, and is not finally disposed of; and that consequently the subjects of proper inquiry are those that pertain generally to the subject-matter of the action, and not merely those that are encompassed within the limits of the pleadings at the time. Ex parte Munford, supra; State ex rel. v. Shot, 304 Mo. 523, 531, 263 S. W. 804; Ex parte Alexander, supra." (Underscoring ours.)

The defendant, or parties to a civil action, may take depositions when a suit is pending. This is the only prerequisite condition made in the statute. It was so held in State v. Killoren, 229 S. W. 1097, l. c. 1098, where the court said:

> "Relatrix's suit, to set aside the said judgment and decree of divorce, was commenced when the petition therein was filed with the clerk of said circuit court. After the filing of said petition the suit was pending. The right to take depositions is given when a suit is pending, this is the only prerequisite condition made in the statute."

In the second question in your request, you refer to a case of felonious wounding, in which no complaint has been filed, for the reason that the victim is in a dangerous condition, and may die, which would necessitate the filing of a murder charge. Under the above authorities, since there is no case pending, depositions cannot be taken by the defendant at this time. The taking of such depositions may be prohibited by way of a writ of prohibition, or upon the refusal of the witness to testify before the officer taking the depositions. It was so held in the case of Bennett v. Strodtman, supra, par. 2, where the court said:

> "Of course there is the exception that, if the testimony desired could in no possible or conceivable event or contingency be read as evidence at the trial, or that if it be made clearly to appear that the testimony is sought to perpetrate a wrong, or to abuse the process of the court of the officer, or for what is obviously an unjustifiable purpose, then the witness may lawfully be protected in his refusal to answer, and the officer will not be sustained in his order of commitment for contempt."

Also, that prohibition would lie was held in the case of State v. Killoren, supra.

In answer to your third question in your request, in which you refer to the attempt to take depositions of witnesses who will testify to specific acts, will say that in view of the authorities above set out, and since the case is pending, the defendant should be allowed to take depositions.

Section 4012 R. S. Missouri, 1939, further provides for the taking of depositions and reads as follows:

> "The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

It will be noticed in the above section that the word "conditionally" is used. This means that the depositions may be taken, but that if proper objections are made to the evidence submitted in the depositions, or if the depositions were unlawfully taken, then they cannot be used as evidence in the case.

Since we have held that the issues are made up at the time the complaint, information or indictment is filed, the depositions cannot be objected to on the ground that the issues have not been made up in this particular case.

CONCLUSION

It is, therefore, the opinion of this department that when a complaint, information or indictment is filed, any defendant may take depositions of witnesses which depositions, if properly taken may be submitted as evidence in the trial of the case.

It is further the opinion of this department, that if no proceeding has been instituted, where a crime has been committed, then there is no defendant, and depositions of prospective witnesses cannot be taken.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

EXECUTORS OF WILLS :
TRUSTEES OF ESTATES :
CIRCUIT COURT JUDGES:

Judge of Circuit Court may act as executor of will and trustee of estate.

March 25, 1942

3-27

FILE
58

Honorable J. C. McDowell
Judge, 28th Judicial Circuit
Charleston, Missouri

Dear Judge McDowell:

Your letter of March 20, 1942, requesting our opinion, is as follows:

> "An old friend of mine in the County here died leaving a considerable estate and, in the will, he willed about $50,000.00 to me to hold in trust for a certain heir. He also made me executor of the Will. There was considerable question in my mind about me acting in that capacity and I would appreciate an opinion from you about the matter. I doubt whether any litigation would ever come up but, if it did, it would come up in my Court."

The limitations placed upon the non-judicial actions of a citizen who has become Judge of a Circuit Court are contained in the following statutes:

Section 2024, R. S. Missouri, provides:

> "No judge of any court of record, * * * * * * * * * * shall practice or act as counselor or attorney in any court within this state, except as otherwise permitted by law: * * * * * * * * * * *."

Section 2026, R. S. Missouri, 1939, provides:

> "No judge * * * * * * * * of any court shall have any partner practicing in the court of which he is judge * * * * * *."

Our examination of the statutes does not disclose any other law which places restrictions upon any non-judicial activity in which a Circuit Judge might desire to engage, except, of course, the implied restraint on his personal non-judicial actions that arise from the powers vested in the General Assembly to impeach a Circuit Judge "for high crimes or misdemeanors and for misconduct, habits of drunkenness or oppression in office." (Art. 7, Sec. 1, Mo. Const.)

These being all the restraints, express and implied, upon the non-judicial action of a Circuit Judge, it is obvious that there is no legal prohibition to his acting as executor of a will and trustee of the estate created thereby.

The law pertaining to appointment of executors contains no limitation that would affect the right of a Circuit Judge to serve in that capacity. The only limitation is contained in Section 6, R. S. Missouri, 1939, which provides:

> "No judge or clerk of any probate court, in his own county, or his deputy, and no male or female person under twenty-one years of age, or of unsound mind, shall be executor or administrator. * * * * * * * * * * * * * *."

Other than this limitation the suitability of a person named executor in a will seems to rest largely with the Probate Court.

Section 11, R. S. Missouri, 1939, provides:

> "After probate of any will, letters testamentary shall be granted to the persons therein appointed executors. * * * * * * * * * * Unless it shall be shown to the satisfaction of the court, or the judge in vacation, that the person or persons so named are incompetent, unsuitable or improper persons to execute said will, in which case some other person than the executor named may be appointed."

It would seem that under this section it is incumbent upon the probate judge to respect the wishes of the deceased and grant letters testamentary to the person named in the will, unless there is an affirmative showing that that person is "incompetent, unsuitable or (is an) improper," person to execute the will. As heretofore shown, there is no law rendering a Circuit Judge disqualified to act in this capacity and the above qualities seem to relate more to personal ability to perform the tasks and absence of adverse interest than anything else. (Arrington v. McCluer, 34 S. W. (2d) 67, 71 (Mo. Sup.).)

While it is true any litigation arising over this will and the trust estate created would be cognizable in the Court of which you are judge, and that any action to remove the trustee of a trust so created (City of St. Louis v. Wenneker, 145 Mo. 230) and to appoint another trustee in case of vacancy (Brendell v. Kerr, 242 Mo. 317), would also be cognizable in said court, we do not think that fact creates a disqualification.

Section 2012, R. S. Missouri, 1939, provides:

> "No judge of any court of record, who is interested in any suit * * * * * pending

> before him, shall * * * * * * * * * * *
> sit on the trial or determination
> thereof."

Adequate provision is made by other sections of the statutes for calling in another judge in case the regular judge may be disqualified for the causes stated in Section 2012.

It thus appears that the Legislature has expressly recognized that cases might arise in which a Circuit Judge would have an interest, and thus tacitly have permitted (by silence and failure to prohibit such functions) such judge to engage in non-judicial activities which may culminate in litigation in the judge's court. Indeed, it is difficult to see the need of barring a Circuit Judge from engaging in all non-judicial activities merely because such activities might result in litigation being instituted in the court of which he is judge, when, as here, provision is already made for the judge's disqualification from sitting on such case, and provision is made for obtaining an impartial special judge to take his place.

CONCLUSION.

It is, therefore, our opinion that merely because one is judge of a Circuit Court does not disqualify such person from acting as executor of a will and trustee of an estate created by such will.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

llb/rv

NEPOTISM: One is guilty of violation of nepotism section even when appointee receives no compensation.

January 23, 1942

1-24

FILE

Honorable Robert A. McIlrath
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We are in receipt of your request for an official opinion, under date of January 7th, which reads as follows:

> "I would like to have an official opinion from your department as to whether or not a sheriff who receives pay only through fees can hire as one of his deputies a person within prohibited degree of kinship within the nepotism provision, Section 13 of Article 14 of the Constitution of the State of Missouri."

Section 13, Article XIV, of the Constitution of Missouri, reads as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In your request you state that a sheriff who only receives compensation by fees, intends to appoint a deputy who is a relative within the fourth degree. Under the above section it is not necessary that the relative who is appointed receive compensation in any manner. The section is violated by the appointment and not by the fact that he is to receive compensation.

A sheriff is a public officer for the reason that he comes within the definition of a "public officer" as set out in the case of State ex inf. Ellis v. Ferguson, 65 S. W. (2d) 97, l. c. 99, where the court said:

> "This section is self-enforcing as has hitherto been held by our court. State ex inf. Norman v. Ellis, 325 Mo. 154, 28 S. W. (2d) 363. It has recently been under construction by our court in the case of State ex inf. McKittrick, Atty.-Gen. v. Whittle, 63 S. W. (2d) 100, at the May term, last, wherein it was held that school districts are political subdivisions of the state, and school directors are public officers within the contemplation and meaning of said nepotism section.
>
> "The first question in this connection is: Is the mayor of a city of the third class a public officer? The answer must be yes. A public office is well defined to be: 'The right, authority and duty created and conferred by law, by which for a given period, fixed by law, * * * an individual is invested with some portion of the sovereign functions of government, to be exercised, for the benefit of the public,' and a public officer is one who receives his authority from the law and discharges some of the functions of government. Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700, 701."

The above case also holds that Section 13, Article XIV, of the Constitution of Missouri, is self-enforcing, and for that reason the Legislature has not enacted any law carrying out the prohibiton set out in that section.

The case of State ex inf. Ellis v. Ferguson, supra, was affirmed by the United States Supreme Court in State of Missouri ex inf. Ellis, 54 Sup. Ct. 559, 219 U. S. 682, 78 L. Ed. 1070.

Conclusion

In view of the above authorities it is the opinion of this Department that a sheriff cannot appoint as deputy a relative within the fourth degree, either by consanguinity or affinity. It is further the opinion of this Department that if a sheriff makes such an appointment, he forfeits his office, and the fact that the deputy does not receive any pay does not alter the situation.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:EG

COUNTY BUDGET LAW: VII

County Court cannot purchase supplies for Probate office unless there is a surplus in class five or six.

March 16, 1942

FILE 60

Honorable H. C. Meade
Probate Judge
Eminence, Missouri

Dear Sir:

This department is in receipt of your letter of March 9, 1942, in which you make the following request:

> "I am writing you for an opinion, I made out in my budget for supplies as Probate Judge for this year, and encluded in that budget for a Probate Court Record, as I have only four and one half sheets of Probate Court Record, and the County Court cut my budget down to $25.00 for expense for my office for this year, and I wont have any record book to write my records on.
>
> I would like to have an opinion form you on this matter."

The question which you here present is whether or not the County Court may purchase supplies for your office after the estimated budget for that purpose has been exhausted. In the first instance, article 10, section 12, of the Constitution of Missouri is a direct prohibition against, in effect, spending more money than received by the county, or can be reasonably or honestly anticipated as revenue. The first of said section reads as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any

year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof * * * * * * * * * * * * * * *."

The County Budget Law of 1941, after setting out classes 1, 2 and 3, provides as follows:

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1,2,3,4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes

"Class 6. After having provided for the five classes of expenses hereto-

fore specified, the county court may expend any balance for lawful pur - pose: Provided, however, that the county court shall not incur any ex- pense under class six unless there is actually on hand in cash funds suf- ficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be out- standing warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

In the case of Missouri-Kansas Chemical Corporation v. New Madrid County reported in 139 S. W. 2d 457, being a case where the sheriff bought supplies in excess of the budget allowance, the court said as follows:

"* #New Madrid county has less than 50,000 inhabitants. It is admitted of record that the budget of New Madrid county for 1934, 1935 and 1936 for the purchase of disinfec- tant, etc. for the county jail, with the exception of the $200 paid on account, had been exhausted at the time the several respective purchases here involved were made and that the balance sued for consists of items purchased in excess of the budget al- lowances therefor in the respective years. Plaintiff's representative testified he had been informed the budget "was low," and, as we read the record, some statements were dated as of the year following the actual de- livery of the supplies. On the re- cord made any order of the county court seeking to effect the payment of the balance due, under the quoted provision of Sec. 8, supra, would be void and of no binding force and ef- fect. Now, absent exceptional cir-

cumstances, a sheriff's authority to obligate his county is restricted to his budget allowances. The directed verdict for the county was proper."

In the case of Gill v. Buchanan County reported in 142 S. W. 2d 665 the court said as follows:

"* * *This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S. W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power.* * * *"

CONCLUSION

In view of the foregoing, we are of the opinion that the county court would not be authorized to exceed the estimated budget in or-

der to purchase a record book for your office unless there is a surplus in either class five or six.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

ELECTIONS: Candidate's receipt alone is not sufficient for placing name on the ballot.

July 20, 1942

7-27

FILED
60

Hon. Robert I. Meagher
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 17, 1942, which reads as follows:

> "Enclosed please find letter from Frank Wray County Clerk of Madison County, Missouri, certified copies of candidate's declarations, and sample ballots. Both Mr. Wray and I are anxious to obtain a ruling from your department as to what correction if any may be necessary to be made before the ballots are printed. Under section 11558 R. S. of Mo. for year 1939 I note the corrections must be made and the ballots printed on or before 10 days before the primary election, therefore, we urge you to let us have a decision at an early date.
>
> "The question boils down to this: Is the filing of a receipt as was done in the case of Sam J. Toler sufficient declaration of a candidate and where a candidate files a declaration for Associate Judge of County Court in the Second District can he legally be placed on the ballot in the First District, as was done in the case of Robert Barron?

We understand your request to be under the following facts:

First: That Robert Barron, according to the attached certified copy of a receipt signed by the Treasurer of the Democratic Committee of Madison County, Missouri, dated June 5, 1942, and a certified candidate's declaration, filed on June 5th, 1942, made a candidate's declaration for the office of the Associate Judge of the County Court, Second District, when, in truth and in fact, and according to the candidate's declaration, he was a resident and qualified elector of the First District; and

Second: Attached to your request is the certified copy of a filing fee receipt, showing fee paid by Sam J. Toler, to the Treasurer of the Madison County Republican Committee. We see no candidate's declaration of Sam J. Toler, attached to this receipt.

Section 2474 R. S. Missouri, 1939, reads as follows:

> "The county court shall be composed of three members, to be styled judges of the county court, of whom the probate judge may be one, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

Section 2475 R. S. Missouri, 1939, partially reads as follows:

> "At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; * * * "

Section 11550 R. S. Missouri, 1939, reads as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:
>
> "I, the undersigned, a resident and qualified elector of the (____ precinct of the town of _____), or (the _____precinct of the _____ ward of the city of ____), county of _____ and state of Missouri, do announce myself a candidate for the office of _____ on the _____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, ____, and I further declare that if nominated and elected to such office I will qualify.
>
> "(Signed) _____."

(Underscoring ours.)

It will be noticed that under the above section, it is specifically provided that "the name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, * * * ." There is no question but that it is mandatory that a written declaration must be filed.

Since Section 11550, supra, specifically sets out conditions under which the name of the candidate shall be printed on the official ballot, and specifically states that no name shall be printed unless a certain procedure is followed, this section should be considered as mandatory. A mandatory statute is one where the omission to follow the procedure renders the proceeding to be illegal and void. (State ex rel Ellis v. Brown, 33 S. W. (2d) 104, 326 Mo. 627)

It is presumed that the legislature intended every part and section of a statute or law to have effect and to be operative, and did not intend any part of section of a statute to be without meaning or effect. (Graves v. Little Tarkio Drainage District, Number One, 134 S. W. (2d) 70, 345 Mo. 557.)

Section 11550, supra, specifically sets out that he must state in his declaration: "office for which he proposes as a candidate."

Under the facts in your request he has declared himself to be a candidate as Associate Judge of the County Court, in the second district, and that is the only office for which he can be a candidate under his declaration.

Under Section 3475, supra, it is not provided that the Associate Judge be a resident of either of the two districts therein set out, and it is our opinion that any resident of the State, who is a qualified voter can be elected as the Associate Judge of any district in any county in this State.

In your request you mentioned Section 11558 R. S. Missouri, 1939, which refers to the correction of the sample ballot. In other words, it authorizes the county clerk on or before the 10th day before the holding of any primary election to correct any errors or omissions in the ballots. This section does not apply to errors made in a candidates declaration.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the name of Robert Barron cannot be placed upon the Democratic ballot for the primary election of August 4, 1942, as a candidate for Associate Judge in the first District, but must be placed upon said primary ballot as an Associate Judge for the second district.

It is further the opinion of this department that the name of Sam J. Toler, cannot be placed upon the Republican ballot for the primary election of August 4, 1942, for the reason that he has not complied with the mandatory Section, 11550 R. S. Missouri, 1939, which specifically prohibits the clerk from placing, upon the ballot, the name of any candidate who has not filed the candidate's declaration set out in said section.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

WJB:RW

CONSERVATION COMMISSION: Right of Conservation Agents to inspect persons
FISH AND GAME: and motor vehicles on the highways.

December 18, 1942

12-31

FILED
60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Monett, Missouri

Dear Sir:

This will acknowledge receipt of your request under date of December 2, for the following opinion. Your letter reads as follows:

> "I am having a great deal of complaint and trouble with the agents of the Conservation Commission, who are stopping all cars at the cross roads, including ambulance and people traveling through the state peaceable. These agents are searching the cars for game. I would like to have your opinion whether or not they have the right to search cars when they have no evidence that the party has violated the game law without a search warrant.
>
> "The case 315 Missouri page 1267 State vs. Benton seems to give them a good deal of authority, but I am not clear on this matter and would appreciate an opinion."

The people of this state amended the Constitution of Missouri by adopting Section 16, Article 14 of the Constitution. Said amendment in effect abolished the old Fish and Game Commission and created in lieu thereof a body known as the Conservation Commission of the State of Missouri and further granted said body almost unlimited authority to control, regulate, manage, restore and conserve all wildlife in this state. Said Section 16 reads:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources

of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows; one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is

> exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the Director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment. The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

This constitutional amendment specifically provides that the General Assembly may enact laws in aid of but not inconsistent with the Amendment and further that all present laws inconsistent shall no longer remain in force and effect.

In Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744, the court said:

> "There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith. We think the question here is whether there remain sufficient existing laws not inconsistent therewith.

> And the correct answer is determinative of self-enforcement. The answer is yes, conditioned upon whether there still exist fixed penalties established by statute and and now applicable to violations of rules and regulations established by the Conservation Commission. It has been held that such a provision for such additional legislation as may 'aid' the operation of the constitutional amendment does not hold it in abeyance until such legislation is enacted, the word 'aid' signifying to support, help or assist. State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; see 12 Cyc. sec. 106."

Section 8951, R. S. Missouri 1939, reads:

> "It is hereby made the duty of every person participating in the privileges of taking or possessing fish, birds, animals, and game, as permitted by this article, to permit the game and fish commissioner or his deputies to inspect, and count such fish, birds, animals, and game, to ascertain whether the requirements of this article are being faithfully complied with. Any person who shall refuse to comply with a demand to permit such inspection and count by any authorized officer of this state, or who shall interfere with such officer or obstruct such inspection or count shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred and fifty dollars ($150.00)."

The above statutory provision is one provision that is not inconsistent with the Amendment in that regulations #31 and #33, promulgated by the Conservation Commission and found in the Wildlife and Forestry Code of Missouri follow said provision and read:

> "All permits shall be signed by and carried upon the person of the permittee, or posted in the place of business of the holder thereof when so required, and shall, on demand, be exhibited to any officer charged with the enforcement of these regulations, or to any transportation company or postal employee to whom is presented any wildlife for shipment."

> "The acceptance of any permit shall be deemed an acknowledgement by the permittee of his duty to comply with these regulations and prevailing amendments thereto, and shall be deemed also a consent by the permittee that the title to all wildlife is, and shall remain, in the state, subject to the control, management, restoration, conservation and regulation by the Conservation Commission, and that any permit is revocable by the Commission for cause."

Furthermore, said Section 8951, supra, has been incorporated in said Code and the Commission has on page 12 of said Code gone on record as considering said statutory provision to be consistent with the Conservation Amendment and therefore still in full force and effect. Not only is this true but said statute is in the nature of a punitive provision and the Supreme Court has held that the legislature only, shall enact any such punitive laws. Therefore, the Conservation Commission is without authority to adopt regulations pertaining to penalties and punishment for violations of its rules and regulations. In so holding, the court said in Marsh vs. Bartlett, 121 S. W. (2) 737, l. c. 744-745:

> "It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the Grimaud Case, supra, punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. Hence it follows that unless there be existing statutes that are not inconsistent with the Admendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

Another thing that we must not overlook is the fact that title to wildlife in this state is in the sovereignty of the State of Missouri. The cases are unanimous on this point of law. Worington vs. Richart, 41 S. W. (2) 410, holds that title to continued game being in the state for the purpose of regulating use thereof, ownership cannot be considered in replevin to recover possession from game warden . In State vs. Weber, 205 Missouri 36, l. c. 48, the court held the title to deer raised and kept in captivity is no better than the title to wild deer which is killed or captured and reduced to his possession. State vs. Heger, 194 Missouri 707, l. c. 711, held that the ownership of wild game is vested in the state and such is not subject to private ownership.

It is fundamental that every individual is immune from unreasonable search. However, it is also well established that such immunity being a purely personal right that same may be waived at any time by said individual. Section 11, Article 2, of the Constitution of Missouri provides persons shall be secure against unreasonable searches and reads:

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 23, Article 2, of the Constitution of Missouri reads in part:

> "That no person shall be compelled to testify against himself in a criminal cause,* ."

In Carrol vs. United States, 267 U. S. 132, 69 L. Ed. 543, 39 A. L. R. 790, l. c. 796, the court said:

> "* * *There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law, and agreeable to the Constitution, search may, in many cases, be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but

> it does forbid unreasonable search. This provision in regard to search is, as a rule, contained in the various state constitutions, but, notwithstanding that fact, search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation."

In State vs. Owens, 302 Missouri 348, l. c. 358, the court in holding that searches may be made if not unreasonable searches, said:

> "While the Fourth and Fifth Amendments to the Federal Constitution are not involved here, Sections11 and 23, Article II of the Constitution of Missouri, are almost identical in purport and in language with those amendments, and the construction of them by the United States courts is important authority for us in construing the like sections of our State Constitution. Many cases of prosecutions for the violation of prohibition laws lately have received consideration by courts of various states with reference to the production of evidence obtained by illegal search of the person or the premises of the defendant, and these will be noticed.
>
> "Whether a search is legal or illegal is not always determined by the presence or absence of a search warrant. The Constitution protects against an unreasonable search. A search may be unreasonable when made by an officer with a valid search warrant in his hands, or a search may be reasonable and entirely within the rights of an officer when he has no search warrant. Whether or not a search is reasonable is a judicial question. It is not within the power of the Legislature to enact a statute which will permit an unreasonable search. * * * * * * * * * "

In State vs. Woods, 292 S. W. 1033, the court held that constitutional provisions relative to search and seizure apply only to unreasonable search and seizure. In so holding the court said:

> "In its contention 7 relator invokes state and federal constitutional provisions against

> unreasonable searches and seizures and guaranteeing the equal protection of the law and due process of law, and also invokes the Missouri constitutional provision for the administration of right and justice without denial. U. S. Constitution, section 1 of amendment 14, and amendment 4. Missouri Constitution, Section 11, art. 2, section 30, art. 2, and section 10, art. 2. Only unreasonable searches are prohibited.* * * "

Willis on Constitutional Law, page 535, said:

> "* * * *It is constitutional without a warrant to search automobiles and other moving vehicles and to seize goods therein on reasonable suspicion without any previous arrest, because in such cases it is not feasible first to procure a warrant. Likewise, it is constitutional without a warrant to search a cave in an open field."

Cornelius on Search & Seizure, Section 23, page 69, is as follows:

> "The defendant may waive his constitutional rights at the time the search and seizure is made or afterwards and if he does so, he can not afterwards secure possession of the property and the same may be used in evidence against him. Thus, where the books and papers of a defendant were seized under a search warrant improperly executed, and the defendant subsequently knew that the government had the books and papers in its possession and further states that he was perfectly willing that same be examined, the court held he had waived his constitutional rights."

Cornelius on Search & Seizure, Section 20, page 67, is as follows:

> "While under both state and federal constitutional provisions the people are entitled to immunity from unreasonable searches and seizures, a defendant may nevertheless waive such

> constitutional rights, so in the sections following we shall discuss in detail the subject of such waiver."

Also, Cornelius on Search & Seizure, Section 25, page 72, reads as follows:

> "The courts almost universally hold that the constitutional right to be immune from unreasonable searches is personal and can not be waived by any one except the defendant himself. Thus in illustration of this principle it has been held that one in charge of another's office can not waive the constitutional rights of the owner by consenting to a search."

In State vs. Fuhman, 42 Federal (2) 733, l. c. 734, the court in holding the right to protection against unreasonable searches and seizures is a personal one which may be waived, said:

> "* * *The right to protection against unreasonable searches and seizures is a personal one which can be waived. When the defendant in this case ascertained that the officers knew about the still, he voluntarily led them to where it was, some half mileaway, and by so doing he waived his right to assert or claim that the searches and seizures made were unreasonable.* * * "

It was held in Zukowski vs. State of Maryland, 167 Maryland 549, l. c. 555, that where it was a prerequisite to obtaining license for the sale of alcoholic beverages that licensee give consent to licensor to search premises licensee waived any rights he might have had to complain of search of premises.

> "The search which resulted in the discovery of the defendant's illegal possession of liquor was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining the license. In thus authorizing the search he debarred himself from contending successfully that it was unlawful. (Cases cited.)* * * * * * "

Also, in State vs. Davis, 108 Missouri 666, l. c. 666-667, the court held that under a statute it was the duty of a druggist to preserve prescriptions, which duty was imposed upon him to prevent abuses of authority to sell and a condition upon which sale was authorized.

> "* * * * *In the same section the druggist and pharmacist is required to preserve all prescriptions compounded by him; in other words, the druggist and pharmacist is licensed or commissioned by the state, and, after being so licensed or commissioned, the same power that licenses or commissions him also requires him to preserve all prescriptions compounded by him; that is, he must keep a record of his official acts, so to speak. These prescriptions or public records do not belong to the druggists; they are the property of the state, and when the state calls for these prescriptions or public records they should be produced. * * * * * * * * * * * * * * *"

In Jones vs. State, 294 Pacific 210, l. c. 211, the court held that the defendant's consent to search of automobile by officers dispenses with necessity of a search warrant. In so holding the court said:

> "He argues at length that the evidence was inadmissible, for the reason that the officers searched the defendant's car without a search warrant. This argument would have merit were it not for the fact that the officers and the defendant testify that the defendant gave them permission to search his car. It is not necessary after the defendant gave the officers permission to search his car that they have a search warrant. The defendant by his action waived his right to require the officers to have a search warrant before searching his car."

In State vs. Bennett, 315 Missouri 1267, l. c. 1275, the court in holding Conservation agents may inspect permit and count of game of any permittee for the reason he consented to same when he purchased a permit, said:

> "* * * * *and furthermore, that the defendant

> cannot play fast-and-loose; that by accepting a hunter's license and exercising the privilege under the restrictions and limitations of the statute, one of which was his duty to submit to the inspection and count of the quail in his possession by the game warden, he waived the constitutional rights invoked so far as applicable to the facts in this case."

In the following case we find similar facts with this exception, the law in this case is different from the case at Bar in that in this case the law required the Conservation agent to have probable cause to believe the law had been violated or was about to be violated before such search could be made. In People vs. Hill, 227 NYS 285, l. c. 287, the Conservation officers attempted to stop an automobile on the highway to search same and determine if the Conservation Law had been violated, or was about to be violated, and said defendant continued to drive on without stopping. An indictment was returned for violating another section, "resisting and obstructing an officer." The defendant was acquitted for the reason it did not indicate that said officers had probable cause to believe the law had been violated, or was about to be violated. The Conservation Law provided for such search of an automobile when upon having reasonable cause to believe game is unlawfully possessed in violation thereof.

Not only do we have regulations and laws whereby the licensee agrees to permit Conservation agents to inspect and count wildlife at any time and check hunting and fishing permits at any time, but the permit on its face reads:

> "Not valid until signed in ink by permittee. Signature constitutes acceptance by permittee of laws and regulations pertaining to this permit, of conditions set forth on reverse side hereof, and his certification that he is a bona fide citizen of the United States and a resident of Missouri."

and on the reverse side further reads:

> "OBLIGATIONS OF PERMITTEE:
>
> "1. To exhibit this permit for inspection to any transportation company or postal employee to whom wildlife is presented for

transportation and upon demand to any agent or officer authorized to enforce the laws and regulations pertaining to wildlife.

"To permit any such agent or officer to inspect and count any wild life in permittee's possession and to ascertain whether requirements of said laws and regulations are being complied with.

"3. Acknowledges this permit to be subject to suspension or revocation by the Conservation Commission, for cause, as provided in the regulations."

Therefore in view of the foregoing authorities holding that the title to all wildlife is in the State of Missouri, that authority is granted to Conservation agents to inspect permits and count game of all persons possessing hunting and fishing permits under statute and regulations to determine if the law is being violated, the written waiver of persons possessing hunting and fishing permits of their constitutional right to immunity from search, it is the opinion of this Department that Conservation agents may at reasonable times stop motor vehicles on the highways and inquire if the driver possesses a hunting or fishing permit and further if he has been hunting and fishing, if the answer is in the negative and there is nothing to indicate he has been hunting or fishing he should not be restrained longer. If his answer is in the affirmative or there is evidence that he has been hunting or fishing then the Conservation agent has a legal right to inspect the permit and count whatever game he may have in his possession. There should be no great delay to anyone on the highway and at any time such inspection should be made and conducted in a manner so as to prevent congestion and hazardous conditions. However, in case any person driving upon the highway does not have a hunting or fishing permit and has not violated any provision of the Wildlife Code then said person has violated no law by failing to stop for such inspection.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:EAW

OFFICERS: County judge cannot be employed as deputy county assessor.

December 21, 1942

12-78

FILED
60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 17, 1942, which reads as follows:

> "I would appreciate an opinion from your office in regard to county court members working in the office of county assessor. I would like to know if it is permissable for the assessor to employ county judges to work on his books."

In a careful research we fail to find any statute or any section under the Constitution which prohibits a person from holding two county offices, or serving as a deputy county officer. The Constitution does prohibit a state officer holding an office under the United States as it appears in Section 4, Article XIV of the Constitution of Missouri. The Constitution of Missouri also prohibits, in counties or cities having more than two hundred thousand (200,000) inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set

out in Section 18, Article IX of the Constitution of Missouri.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, which was passed upon by the Supreme Court of this state June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The case of State ex rel. Walker, Attorney General, v. Bus, supra, was followed in the case of State ex rel. Langford v. Kansas City, 261 S. W. 115, and in that case the court held that the office of a deputy sheriff was not incompatible with the office of city clerk. In paragraph 1 the court said:

> "The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator

> as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159.

In that case the court, at page 116, said:

> "In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

> "'The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two -- some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

Since the matter set out in your request must be considered according to the common law, it results that the ruling must be made in accordance with the facts in each separate case.

The question involved in your request is whether or not the office of judge of the county court, and a deputy county assessor are incompatible and against public policy. Under Section 13824 R. S. Missouri, 1939, the powers of the county court are specifically set out. Their principal power is to audit, adjust and settle all accounts to which the county shall be

a party.

Under the facts in your case the judge of the county court would be auditing and allowing his own claim against the county.

Section 13495 R. S. Missouri, 1939, reads as follows:

> "The number of all deputies required by any county office shall be submitted to the county court, and the county court shall by order of record, permit each number as in their opinion the necessary duties of the office require, and it shall be the duty of each officer to submit the names of the deputies appointed not to exceed in number the number allowed by the county court, and such names shall be made a matter of record by the county court."

Section 13496 R. S. Missouri, 1939, reads as follows:

> "No deputy shall be employed unless the principal in such office devotes his entire time to the duties of his office."

Under the two above sections the county court approves the number of deputies in any county office, and provides that no deputy shall be employed unless the principal in such office devotes his entire time to the duties of his office. Therefore, the judge of the county court is not eligible as a deputy county assessor.

Section 13497 R. S. Missouri, 1939, sets out a penalty for the violation of the Act.

The judge of the county court, in paying his salary, as a deputy county assessor, would be issuing a warrant and receipting for same, which practice, in some offices, is prohibited by statute.

The legislature enacted what is now Section 13799 R. S. Missouri, 1939, which provides that sheriffs, marshals, clerks, collectors or the deputies of any such office shall not be eligible to the office of treasurer of any county. The Supreme Court construed that section in the case of State ex inf. Noblet, ex rel. McDonald v. Moore, 152 S. W. (2d) 86, 347 Mo. 1170, when it held that:

> "The purpose of the statute providing that no sheriff, marshal, clerk, or collector, or the deputy of any such officer shall be eligible to the office of treasurer of any county was to obviate the situation where one could be chosen treasurer and take and hold the office when, in all probability, public money in his hands in his former official capacity would have to be redeemed and receipted for by himself in his new official capacity."

CONCLUSION

It is, therefore, the opinion of this office that county court members cannot be employed to work on the books of the county assessor, for the reason that the duty of the county judge, and the duty of a deputy assessor would be incompatible, and against public policy.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MOTOR VEHICLE FUEL TAX: Use tax under H. B. 516, Laws 1941,
GASOLINE TAX: p. 418, applies to interstate commerce.

February 16, 1942

2-23

FILE
61

Honorable George Metzger
State Inspector of Oils
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 31, 1942, in which you request our opinion on the following:

Is the tax imposed upon motor vehicle fuels in House Bill 516, Laws of 1941, p. 448, collectible when said fuel is used upon our highways in vehicles engaged solely in interstate commerce?

Section 3, Laws of 1941, p. 450, provides:

> "There is hereby levied and imposed an excise tax of two (2c) cents per gallon on all users of fuel upon the use of such fuel by any person within this state only when such fuels are used in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this state, * * * * * * * * * * *."

There is no question but what the terms of this section are broad enough to and do include persons engaged solely in interstate commerce. The law applies to "any person" who uses such fuel "within this state" in an internal combustion engine "to propel motor vehicles upon the public highways of this state."

Section 5, Laws of 1941, p. 450, provides for the tax reports and computation of the tax. For the purposes of this opinion it is sufficient to say that Section 5 only contemplates accounting for and payment of a tax upon the fuel actually used in propelling vehicles upon our highways. Under the Act no tax is attempted to be imposed upon fuel which may be placed into the tank of the vehicle and carried outside this state in said tank and used on the highways of another state.

Interstate commerce, under the Constitution of the United States, has no exemption as such from state taxation. It is only when the law of the state operates to place a burden on interstate commerce in addition to that placed upon intrastate commerce that the commerce clause of the Federal Constitution is offended. In other words, there must be discrimination against interstate commerce. In Gevin et al. v. Henneford, 305 U. S. 431, 83 L. Ed. 272, 281, it is stated:

> "A state's taxes are not discriminatory if the state treats those engaged in interstate and intra-state business with equality and justice."

And, in McCarroll v. Dixie Greyhound Lines, 309 U. S. 696, 60 Sup. Ct. 504, it is said, l. c. 506:

> "The often announced rule is that while generally a state may not directly burden interstate commerce by taxation she may require all who use her roads to make reasonable compensation therefor."

Where the tax has this purpose the court further said, l. c. 506:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made."

The tax imposed by Section 3, supra, applies equally to interstate and intrastate business, and thus they are treated with "equality and justice." It is a charge exacted by the use of the highways, and bears a reasonable relationship to use of the highways since it is only exacted upon the actual consumption of fuel used to propel vehicles upon the highways within this state.

The above, we think, clearly demonstrates that this tax applies to those engaged solely in interstate commerce and that the Federal Constitution permits the states to exact such a tax from interstate commerce. Thus there remains only the effect of Section 14, Laws of 1941, p. 452, to be considered. This section provides:

> "No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be permitted under the Constitution and the laws of the United States."

That section obviously does not exempt interstate commerce as such, but only operates to exempt it if a tax thereon is not permitted by the Constitution of the United States or some Act of Congress. Such language frequently appears in state legislation, when dealing with interstate commerce and the design of such is to permit the state authorities to keep pace with the United States Supreme Court as it recedes from its previous views as to the immunity of interstate commerce from state taxation.

CONCLUSION.

It is therefore our opinion that the tax imposed in House Bill 516, Laws of 1941, p. 448, upon the use of motor fuels to propel vehicles upon the highways of the state, may be collected from those who use sudh fuel while engaged solely in interstate commerce.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

MOTOR VEHICLE FUEL: Authority granted the Oil Inspector to waive penalties on the use tax imposed on diesel, butane and propane does not authorize him to waive a penalty on the excise tax imposed upon the sale of gasoline.

GASOLINE TAX:

March 17, 1942

3-19

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

FILE
6-1

Dear Sir:

This will acknowledge receipt of your letter of March 10, 1942, which is as follows:

> "Upon the assessment of penalties against distributors who have been delinquent in making payment of motor fuel tax, in several instances we have been referred to paragraph (c) Section 5, House Bill No. 516, effective October 10, 1941.
>
> "Several persons have stated that this Act amends the Motor Fuel Law and gives the Inspector authority to waive all penalties.
>
> "We would appreciate an opinion on this matter."

As we understand the foregoing letter, when you refer to the "Motor Fuel Law" you have reference to House Bill No. 516, appearing in Laws of 1941, page 448, and Article II, Chapter 45, R. S. Missouri, 1939. We do not think there are any grounds for the contention that the provision of House Bill No. 516, Section 5, subsection c, gives the Oil Inspector authority to waive the penalties which may accrue under the provisions of Article II, Chapter 45, R. S. Missouri, 1939. This becomes apparent when it is understood

what was to be accomplished by the amendments to the Motor Vehicle Fuel Law appearing in Laws of 1941, pages 447 and 448.

House Bill No. 515, Laws of 1941, page 447, repealed and reenacted Section 8411, R. S. Missouri, 1939, and redefined the term "Motor Vehicle Fuels," so as to apply a scientific definition. The definition there given excludes from its scope certain products which are commonly known as diesel, butane and propane. The underlying reason for this exclusion was the fact that only a small percentage of these petroleum products are used in propelling vehicles upon the highways, yet under the former definition of motor vehicle fuels, these products were subject to be used in computing the tax due from the licensed distributors and then the state and taxpayer were burdened with having the tax paid on ninety-five percent or more of this fuel, subject to be refunded under the provisions of Section 8423, R. S, Missouri, 1939, because most of it is used for domestic purposes, such as heating and lighting, and the operation of stationery engines.

However, due to the fact that a small persent of said products were used to propel motor vehicles upon the highways of this state, the Legislature enacted House Bill No. 516, appearing in Laws of 1941, page 448. In Section 1 of that Act the term "fuel" is defined and the scientific defintion there given includes all products excluded from the definition contained in Section 8411, Laws of 1941, page 447. The tax levied under House Bill No. 516, is a tax separate and distinct from that levied on gasoline under the provisions of Article II, Chapter 45, R. S. Missouri, 1939. The penalties under the Act last cited accrued by reason of the provisions of Section 8419 and 8420, R. S. Missouri, 1939, while the penalties on the tax imposed under House Bill No. 516, accrued by reason of Section 5 of that Act appearing in Laws of 1941, page 450. In connection with the penalties imposed in House Bill No. 515, the Act provides that if:

> "* * * if be established that such delay was due to accident or justifiable oversight, the Inspector is authorized to waive the ten (10%) per cent penalty."

It is at once apparent that the authority there granted to waive penalties is confined solely to the penalties which accrue by reason of failure to report and pay the tax that is imposed under House Bill No. 516. We find no rule of construction which supports or authorizes a conclusion that that authority would authorize the Inspector to waive penalties which would accrue under the provisions of Sections 8419 and 8420, R. S. Missouri, 1939.

CONCLUSION.

It is, therefore, our opinion that the authority granted the State Oil Inspector, under the provisions of Section 5, subsection c, Laws of 1941, page 450, with respect to waiving penalties that accrue for failure to pay the tax there imposed, does not authorize said Inspector to waive the penalties that accrue, under Sections 8419 and 8420, R. S. Missouri, 1939, for failure to pay tax that is imposed under Sections 8413 and 8414, R. S. Missouri, 1939.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney-General

LLB/rv

MOTOR VEHICLE FUEL: Persons selling gasoline to cost plus a fixed fee contractor constructing National Defense Projects is exempt from useing said said gasoline to measure his tax.

GASOLINE TAX:

Person who is a cost plus a fixed fee contractor constructing National Defense Projects is exempt from tax imposed upon diesel, butane and propane.

March 17, 1942

3-19

FILE 61

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 25, 1942, which is as follows:

"Recently the writer had a discussion with a Mr. Sidney B. McClanahan, relative to a National Defense Project being erected at the Emerson Electric Plant in St. Louis,County, Missouri. In connection with the work on this plant, they operate a station wagon, which is required at different times to travel to various parts of the City and County, picking up materials and supplies which are necessary for the progress of this project.

"It has been brought to my attention also that at the Weldon Springs project, numerous station wagons are put to use for the above mentioned purposes, and also to convey employees of the Fraser-Brace Construction Company and the Atlas Powder Company to and from various points, daily.

"I was given to understand that regardless of the fact that these station wagons were used for such purposes, the motor fuel used in them was to be considered 'tax Exempt', if purchased by the contractor.

> "I would, therefore, appreciate receiving your opinion covering Section 8422 of House Bill No. 515 and Section 11 of House Bill No. 516."

As we understand the facts, the project under construction is the erection of a building and the installation of equipment at the Emerson Electric Plant in St. Louis County, Missouri, and that the motor vehicle fuel consumed is used in an automobile in connection with this work, both in picking up materials and supplies and delivering them to the job and in conveying to and from the job the workmen who are engaged in the work.

The question which seems to be presented is whether or not the motor vehicle fuels used in said automobiles are exempt from being used to compute the state tax.

Section 8411, Laws of 1941, page 447, subdivision c, contains a definition of "motor vehicle fuel." The definition there contained includes what is commonly called gasoline. The tax that is imposed upon the fuel, as defined in Section 8411, is, under the provisions of Article II, Chapter 45, R. S. Missouri, 1939, imposed upon the person who sells or receives the same in this state as a license tax in a sum equal to two cents (2¢) on each gallon sold or received during a month.

Section 8422, Laws of 1941, page 448, provides in part as follows:

> "* * * Nor is any tax imposed under the provisions of this act on any licensed distributor, dealer or person who shall sell motor vehicle fuel to another person for use in construction of National Defense Projects; provided said person purchasing the gasoline shall have in effect with the United States a cost-plus-a-fixed-fee or fixed percentage contract for the work being performed."

You have informed us that the persons purchasing this gasoline have in effect with the United States a cost-plus-a-fixed-fee or fixed percentage contract for the work being performed, and that being so, there is no question but that Section 8422 exempts the seller of this gasoline from having to use the same in measuring his license tax owed to the State.

In Section 8411, supra, the Legislature, in defining motor vehicle fuel, excluded from the definition such products commonly known as diesel fuel and liquefied gases commonly known as butane and propane. At the same session of the General Assembly there was enacted a law appearing in Laws of 1941, page 448, to tax those products excluded under the definition contained in Section 8411. In Section 1 of this Act the word "fuel" is defined, and the definition there given includes all types of motor vehicle fuel excluded from the definition contained in 8411. The tax levied by the Act appearing in Laws of 1941, page 448, respecting diesel, butane and propane, is imposed upon the person who uses such fuels to propel motor vehicles upon the highways of this state, rather than upon the seller. Section 11 of that Act, Laws of 1941, page 452, is as follows:

> "No tax is imposed under the provisions of this act on any licensed user who shall use fuel in construction of National Defense Projects; provided said person using the fuel shall have in effect with the United States a cost-plus-a-fixed-fee or fixed percentage contract for the work being performed."

Under this exemption it appears that any person using this fuel, who has in effect with the United States a cost-plus-a-fixed-fee or fixed percentage contract for the performance of contruction work, is excused from paying the tax there levied.

CONCLUSION

It is, therefore, our opinion that a person using motor vehicle fuel, such as diesel, butane and propane, in a motor vehicle upon the highways of this state, which vehicle is engaged in picking up and delivering supplies and employees to a construction project which is being constructed by the person using said fuel under a cost-plus-a-fixed-fee or fixed percentage contract with the United States, is not subject to the motor vehicle fuel tax imposed under the Act appearing in Laws of 1941, page 448.

It is further our opinion that a person selling motor vehicle fuel, such as gasoline, to a person who is using said fuel to deliver materials, supplies and employees to construction projects which are being constructed by the purchaser of said gasoline under a cost-plus-a-fixed-fee or fixed percentage contract with the United States, is excused from using the fuel so sold in computing the license tax due the State of Missouri.

Of course, in both of the above instances, it is understood that the project under construction must be a National Defense Project before the exemption applies.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

MOTOR VEHICLE FUELS: Payment to be made on or before the 25th day of the month, mailing payment on last day is not sufficient.
GASOLINE TAXES:

March 24, 1942

H-3

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

FILE
61

Dear Sir:

This will acknowledge receipt of your letter of March 21, 1942, which is as follows:

> "The Motor Fuel Law requires payment of the 2¢ road tax to be made on or before the 25th day of the month, and Section 8419 fixes a penalty of five per cent thereof for each calendar month or fraction thereof that the distributor is delinquent in the performance of any duty imposed by Sections 8416, 8417, 8418 and 8437, said penalties to be cumulative to the amount of twenty-five per cent of such tax.
>
> "The question has been raised as to whether a person, distributor or dealer has complied with the law if he places his report and remittance in the mail on or before the 25th of the month, regardless of the date on which the report and remittance reach this department.
>
> "I would like to have your opinion as to whether placing the report and remittance in the mail on or before the 25th is sufficient to comply with the requirements of the law."

Under the provisions of Article 2, Chapter 45, R. S. Missouri, 1939, which is known as the Motor Vehicle Fuel Tax Law, there are two types of taxpayers. One may be classed as the person paying his gasoline tax on the "sales" basis and who under the provisions of Section 8418, R. S. Missouri, 1939, "must on or before the 25th day of each month * * * * * * pay to the State Treasurer the amount of license tax shown by such statement to be due for the month for which the statement is made."

The other type of taxpayer is the person who pays his taxes on the "receipts" basis. Section 8437, R. S. Missouri, 1939, fixes the day upon which this person must pay his taxes in the following language: "* * * if such person, distributor or dealer shall thereafter on or before the 25th day of each and every month make and file with said inspector * * * a statement under oath of the total number of gallons of motor vehicle fuels so received * * * * * during the preceding calendar month accompanied with a draft payable to the State Treasurer for the payment of taxes thereon, * * * * * *."

It thus appears that the time for the payment of this tax on either type of taxpayer is fixed as on or before the 25th day of the month. As to the taxpayer who pays his tax upon the "receipt" basis, it will be noted that the statute requires him to "file" a statement accompanied by a draft, while on the taxpayer who pays his taxes on the "sales" basis, is only required to "pay" the taxes to the State Treasurer. We think there is no essential difference in either of these methods, and that each requires that a draft be placed in the hands of the proper official on or before the last day, and that mailing on the last day is not sufficient. Our authority for this is found in Words and Phrases (perm. ed.) Vol. 16, wherein the word "filed" is defined. We hereinafter set forth some of those definitions:

> "Mailing to State Industrial Commission of claim for compensation under the Workmen's Compensation Law, which was not received, was not such filing

as is required by section 28. Cheesman v. Cheesman, 139 N. E. 775, 236 N. Y. 47.

"Motion for new trial deposited with postal authorities for delivery to court clerk is not 'filed' until delivery to clerk and any delay is that of movant. 12 Okl. St. Ann. Sec. 653. City of Maud v. Tulsa Rig, Reel & Mfg. Co., 25 P 2d 792, 165 Okl. 181.

"Deposit in mail of claim addressed to Veterans' Bureau for benefits under war risk policy held not 'filing' of claim in bureau within provision suspending limitation while claim is pending in bureau. 38 U.S.C.A. Sec. 445. Weaver v. U. S., C.C.A.N.C., 72 F. 2d 20, 21.

"The term 'filed,' as used in subdivision 1 of section 4360, requires that the paper sought to be filed must be deposited with or placed in the custody of the officer whose duty it is to receive it, and is not complied with by depositing such paper in the postoffice addressed to the officer. Pendry v. Brennan, 169 P. 174, 175, 31 Idaho 54.

"The filing of a document is not complete until it is received by the proper officer, evidence that it was properly mailed to him, not being evidence that it was filed; and the word 'file' as used in Ky. St. sec. 571, requiring corporations to file certain statements in the office of the Secretary of State means their actual delivery in the office of the Secretary of State to some one authorized to receive them. Commonwealth v. O'Bryan Utley & Co., 155 S. W. 1126, 1128, 153 Ky. 406.

"Running of statute of limitations against claim of veteran under war risk policy is suspended when claim is 'filed' in Bureau of War Risk Insurance of Veterans' Administration and not when it is deposited in mails * * * * * * * * * * World War Veterans' Act 1924, sec. 19, as amended, 38 U.S. C.A. sec. 445. Tyson v. U.S.C.C.A.N.C., 76 F. 2d 533, 534.

"Under Conservancy Act authorizing property owners to file exceptions to an appraisal within ten days, receipt of exceptions by proper officer within time prescribed was necessary to constitute 'filing' in compliance with statute, and Conservancy Court properly refused to consider exceptions not so received, notwithstanding that they were mailed within such time that they would ordinarily have been received, and that an unprecedented flood condition prevented their delivery. Gen. Code, secs. 6828-32. Muskingum Watershed Conservancy Dist. v. Steinmetz, 15 N. E. 2d 164, 166, 57 Ohio App. 502.

"Under Gen. St. 1913, Sec. 339, providing for an affidavit initiatory of a candidacy for office at the primary election and requiring it to be 'filed' at least 40 days before the date of the election, an affidavit which was mailed on the last day for filing, but which did not reach the State Auditor's office until the next day was not 'filed' within the required 40 days and hence was ineffective. State v. Erickson, 188 N. W. 736, 152 Minn. 349."

CONCLUSION

It is, therefore, our opinion that a person who is liable for the license taxes imposed under the provisions of Article 2, Chapter 45, R. S. Missouri, 1939, does not discharge his tax liability within the time required by law by placing his remittance to cover said tax in the mails on the 25th day of the month. In order for that liability to be discharged within the time required by law, the remittance must be in the hands of the State Treasurer of Oil Inspector on or before the 25th day of the month.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

MOTOR VEHICLE FUELS: Money appropriated to pay refund claim on motor vehicle fuels may be used to pay refunds of taxes paid on diesel, propane and butane.

March 24, 1942

3-276

FILE 61

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 28, 1942, which is as follows:

> "I would appreciate receiving your opinion relative to Section 9 of House Bill No. 516.
>
> "We are particularly interested in knowing whether tax which has been erroneously paid can be refunded out of the appropriation made for refunds, covering motor vehicle fuel tax, for the present biennial period."

Section 9, Laws of 1941, page 451, provides in part as follows:

> "In the event it shall appear to the Inspector that any taxes or penalties imposed by this act have been erroneously or illegally collected from any user, a refund shall be made * * * for the tax thus erroneously or illegally collected.
> *
> The Inspector shall cause any such refund, that he deems proper and correct, to be paid by a warrant drawn by said Inspector upon the state road fund, which shall be

> audited and allowed by the State Auditor and shall be paid by the State Treasurer out of any funds appropriated for that purpose."

The refunds authorized by this section pertain to the tax imposed in Section 3, Laws of 1941, page 450, upon the use of "fuel," as defined in Section 1, Laws of 1941, page 449, to propel motor vehicle upon the public highways of this state.

In Laws of 1941, page 207, there appears Section 56 of H. B. 581, which is an appropriation to the Oil Inspection Department. This act appropriates $2,116,000.00 out of the Highway Department Fund to pay the salaries, wages, and per diem of the officers and employees for general expenses of the Oil Inspection Department and for other purposes and for the refund of gasoline taxes for the years 1941-1942." This act then breaks the sum down into certain classes specifying the amount in each class and the purposes for which it may be spent. The last specification is:

> "To pay the claims for refunds of taxes paid on motor vehicle fuels as provided by law . . . . . $2,000,000.00."

It will thus be noted that the appropriation act first states that the money appropriated is to be used, among other things, for payment of refunds of "gasoline taxes," and then specifies it is to be used for payment of claims for refunds of "taxes on motor vehicle fuels."

No act of this state relating to taxes defines the word "gasoline" which is used in this appropriation act, in first stating the purpose to which this money is to be put. Our information is that what is commonly called "gasoline" might fall within the definition of "fuel" in Section 1, Laws of 1941, page 449, or it might fall within the definition of "Motor Vehicle Fuels" in Section 8411 (d) Laws of 1941, page 448, depending on its grade, quality and

distillation range.

As heretofore pointed out, the tax imposed in H. B. 516, Laws of 1941, page 448, is upon the user of "Fuels" and reference to Article 2, Chapter 45, R. S. Missouri, 1939, as amended H. B. 515, Laws of 1941, p. 448, shows that the tax there imposed is upon the person selling or receiving "Motor Vehicle Fuels." Thus the reference to "gasoline taxes" as used in Section 56 of H. B. 581 (the appropriation act), can not be taken as intending to place any limitation upon the use of those funds for the payment of refunds of "gasoline taxes" when, as we have shown, there is no act imposing "gasoline taxes" in this state. Nor do we think it would make any difference if such phrase was determinative of the purpose to which the money appropriated could be applied. Our reason has heretofore been stated and is, that what is commonly called "gasoline" might, depending on its grade, quality and distillation range, fall within the legal definition of either "Fuel" or "Motor Vehicle Fuel."

Article 10, Section 19 of the Constitution requires every appropriation act to,

> "* * * distinctly specify the sum appropriated, and the object to which it is to be applied; * * * * * * * * * * * * * * *."

Under this constitutional provision, Section 56 of H. B. 581, Laws of 1941, page 207, if it had only contained that portion beginning with the words "There is hereby appropriated" and ending with the words, "for the years 1941-1942," would have clearly been unconstitutional because no sum is "distinctly specified" to be applied to payment of refunds of "gasoline taxes". This being so, we think we may disregard the expression "gasoline taxes" and rely solely upon the last specification stating that said money may be used to pay refunds of taxes paid on "motor vehicle fuels."

There is no question but that the products defined in Section 1 of H. B. 516, Laws of 1941, p. 449, as "Fuel" are motor vehicle fuels when used to propel a motor vehicle upon the public highway and thus any tax paid thereon is included

within the terms of Section 56 of H. B. 581, Laws of 1941, page 207.

CONCLUSION.

Therefore, it is our opinion that the money provided in Section 56 of H. B. 581 (Laws 1941, p. 207) for payment of claims for refunds of taxes paid on motor vehicle fuels may be used to pay refunds of taxes under the terms of Section 9 of H. B. 516, Laws of 1941, page 451.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

MOTOR VEHICLES: Inspector not liable on bond unless loss results and is neglect and proximate cause;
GASOLINE TAX: Inspector's function of revoking license is discretionary.

May 1, 1942

5-4

FILE 61

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

Dear Sir:

In your letter of March 12, 1942, our attention is directed to that portion of Section 8438, R. S. Missouri, 1939, which pertains to your authority to revoke licenses. As concerns your duties under the statute, you ask, (1) as to your liability on your bond for any dereliction of duty on your part in connection with the revocation of a license, and (2) is the abatement of penalties by any state officer sufficient reason for you to refuse to revoke a license? We assume the facts to be that a penalty has been determined to be due by the Oil Inspector, a statement thereof sent to the Treasurer as provided in Section 8419, R. S. Missouri, 1939; that the Treasurer has determined such penalty not to be due and refuses to collect the same.

Section 8438, R. S. Missouri, 1939, provides:

> "* * * Any license issued by said inspector, as herein provided, shall be revoked by him whenever such licensee * * * * * * * * * * * shall fail, neglect or refuse to pay any penalty * * * * * as provided by law, and be and remain in default thereof for a period of fifteen days after the time such * * * penalty * * * should have been paid. * * * * * * * * * * * *."

Section 8419, R. S. Missouri, 1939, is quite lengthy, but, in substance, it provides that, if any licensed dis-

tributor shall fail to pay, within the time required by law, any tax the inspector shall prepare a statement showing the amount of tax due, "adding to the amount of such license tax a penalty of five per cent (5%) thereof for each calendar month or fraction thereof during which such distributor shall be delinquent." This statement is to be sent to the Treasurer for collection. If not paid to that officer within thirty days after such statement is placed in his hands, he is to certify "such fact and the statement and all other papers and information in his hands concerning the matter to the Attorney-General", who is to bring suit to collect the items due.

Taking up the liability on the bond question, we find that such bond was given under Section 14686, R. S. Missouri, 1939, and is "conditioned for the faithful performance of the duties of his office." In San Bruno v. National Surety Co., 5 P. (2d) (Cal.) l. c. 953, we find this rule:

> "It is well settled that a mere dereliction without damage is insufficient to sustain an action on an official bond, and that the liability on such bond extends only to cases where the neglect or misconduct is the proximate cause of the loss."

Again, in Murfree's Official Bond, Section 487, it is stated:

> "although the state may maintain a civil action on a * * * official bond for official delinquency * * * * *, yet unless some damage results from the breach of the bond, the action cannot be sustained."

As we understand this rule, it means that before liability arises on an officer's bond it must be shown that some damage resulted and that his dereliction was the proximate cause of the damage or loss. Applying this rule

to the instant question it appears that first, there is doubt as to whether there is a loss sustained, that is, the Inspector thinks the penalty was owed and the Treasurer holds a contrary view; and, second, whatever loss or damage, if any, resulted, did not result from a dereliction of the State Oil Inspector. In this situation there can be no liability on the bond of the Oil Inspector.

Your second question turns on the meaning to be ascribed to the above quoted portion of Section 8438. The statute says that the license "shall" be revoked. The determining factor is, we think, whether the word "shall", as there used, is mandatory or permissive.

In State v. City of St. Louis, 2 S. W. (2d) 713 (Mo. Sup.) the statute under consideration stated that "such mayor and common council shall direct the proper officer to give notice." The question was whether the use of "shall," underlined above, made the statute mandatory or directory, that is, permissive. The court held it to be permissive, saying l. c. 727:

> "The word 'shall' when used in a statute, is often construed to mean 'may.' It is imperative where the public or persons have rights which ought to be exercised or enforced; but, where no right or benefit depends upon its imperative use, it may be held directory only."

In State v. Heath, 132 S. W. (2d) 1001 (Mo. Sup.) the rule is thus stated, l. c. 1003:

> "'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory."

Applying these rules to Section 8438, it nowhere appears that the public or persons have any right or benefit depending upon the revocation of a license, but rather the right or benefit depends upon the existence of the rights under the license unrevoked.

Examination of the whole of Article II, Chapter 45, R. S. Missouri, 1939, pertaining to "Motor Vehicle Fuel Tax", does not disclose that the law prescribes the result that is to follow if the inspector should fail to revoke a license, even assuming that the tax or penalty was due. In this situation we are of the opinion that Section 8438, pertaining to the inspector's duties on license revocations is directory and that in every instance of delinquency the inspector is not under the mandatory duty to proceed to revoke the license of the delinquent.

Further, in the case of State v. City of St. Louis, supra, at l. c. 727, it is stated:

> "The word (shall) is held to be permissive and not mandatory when necessary to sustain or accomplish the purpose of the legislativeaact."

We think the act, in other provisions, indicates this revocation provision was not intended to be mandatory. Section 8419 provides that the penalties are to be cumulative to twenty-five per cent (25%), at the rate of five per cent (5%) for each month or fraction thereof. These penalties, of course, are imposed to coerce payment of the tax on the date fixed. But if the law contemplated that, on every delinquency that the license must lose his license, why graduate the penalty over a period of five (5) months. This graduation of penalties indicates that the licensee might pay up, say, at the end of the third month with the three penalties, and continue on in business. If this were not the intent of the law, and every licensee must lose his license on being delinquent, then there can be no reasonable purpose attached to the graduation of penalties over five months. If this was not contemplated, the Legislature can only be said to have had in mind the additional funds

that the state would get from the penalties. That could have been obtained by fixing a flat penalty of twenty five per cent (25%), with no need of extending the period of cumulation over a five month period.

It is, therefore, our opinion that that portion of Section 8438, pertaining to license revocations, is only directory and that the inspector is under no duty to revoke a license in every case of delinquency. This being so, the question of whether the Treasurer's view, that the penalty was not owed, furnishes reason for you to refuse to revoke a license, needs to be restated, in that, we think it affords reason for you to determine to refrain from revoking the license, it being a discretionary function of the inspector.

Yours very truly,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/rv

OIL INSPECTION:
DIESEL FUEL: Railroads and municipalities who use such must have same inspected and pay fees thereon.

- -

May 28, 1942

6-4

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

FILE
61

Dear Sir:

This will acknowledge receipt of your letter of March 31, 1942, which is as follows:

> "In checking the records of common carriers, the Deputy Inspectors of this department have secured information covering tank car shipments, also transport deliveries of a large volume of Diesel Fuel to railroad companies and municipal-owned-and-operated light plants. This fuel is being used in combustion engines to generate power.
>
> "Some of the department deputies have had personal interviews with individuals and officials connected with various railroad companies and light plants, with the view of having them file monthly inspection reports and pay inspection fees on all such fuel received. These officials have informed our deputies that their companies have never filed such reports or paid such fees in the past, and that they have been of the opinion that they were not required to file report and pay fees on the Diesel Fuel they receive.
>
> "In view of these facts, will you please let me have your opinion covering Section 14688, Article 2, Chapter 109, R. S., 1939."

Section 14688 R. S. Missouri, 1939, provides:

> "All petroleum, kerosene, gasoline, benzine, or other fluid or substance, by whatever name known, which is a product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constituent element, or any other motor vehicle fuel, whether manufactured in this state or not, shall be inspected as provided in this article before being offered for sale or used for consumption for illuminating, heating or power purposes in this state, or which is of such a character that it may be used for either of said purposes. * * * * * * * * * * * * * * * * * and provided further, that heavy oils, commonly known as 'distillates', 'gas oil' and 'fuel oil', or like products of whatever name known, when sold for heating or household purposes, shall not be subject to inspection. * Crude oil, insecticides, germicides, lubricating oils and medicants shall not be subject to the provisions of this article. * * * * * * * * * * * * * * *." (Underscoring ours)

As we understand "Diesel Fuel" it is a product of petroleum commonly known as a "distillate", or "fuel oil." From your letter it appears this diesel fuel is being used for power purposes and is of such character that it may be used as such. When so used it could not be "sold for heating or household purposes" so as to be exempted under that provision. Consequently, it is clear that the diesel fuel used by municipalities to generate electrical power and by railroads in combustion engines is comprehended within the terms of the above statute.

Section 14688 further provides:

> "* * * * * It is hereby made the duty of every dealer, distributor, producer or compounder in such oils or fluids, immediately on receipt of a consignment of the same, at his own expense, to express to the state inspector of oils, at his principal office, a properly identified sample of not less than eight fluid ounces of such oil so secured, and said inspector shall determine whether or not such oil is subject to inspection and payment of inspection fees: * * * * * * *."

This is the only provision in the act imposing any duty upon anyone (except as hereafter noted) to submit samples for inspection. That duty is imposed on the "dealer, distributor, producer or compounder" in such oils. While we are certain that a railroad or municipality receiving tank car shipments of diesel fuel for their own use are not "producers or compounders" in such oils, it remains to be seen whether they fall within the classification of "dealer or distributor" in such oils. The act nowhere defines these terms, therefore, we must ascertain what the legislature intended when it so used them. In this connection we must keep in mind that "one of the cardinal rules of statutory interpretation and construction is that words in common use are to be construed in their natural, plain and ordinary significance and acceptation." (Bellerive Inv. Co. v. Kansas City, Mo. Sup., 13 S. W. (2d) 628, 638).

In Words & Phrases Perm. Ed., Vol. 11, the following appears:

> "'Dealers' are the middlemen between the manufacturers or producers and consumers. Commonwealth v. Vetterlein, 63 A. 192; 193, 214 P. 21."

> "A 'dealer' in the popular sense of the word is one who buys to sell again. * * * * * In re I. Rheinstrom & Sons. Co. 207 F. 119, 136."
>
> "'Dealer' in the popular and therefore the statutory sense of the word, is not one who buys to keep or makes to sell but one who buys to sell again. * * * * * Commonwealth v. Vetterlien, supra."
>
> "A person whose business is to buy and sell is a 'dealer.' State v. Silverman, 70 A. 1076, 1077, 75 N. H. 50."

Webster's New International Dictionary 2d Ed., defines "dealer" as follows:

> "1.a - One who divides, distributes or delivers. * * * * * d. One who does business; a trader; a trafficker; a middleman; esp., a person who makes a business of buying and selling goods."

The same authority defines "distributor" as follows:

> "1. One who or that which distributes; a distributor.
> 2. An agent or agency for marketing, usually in a particular territory, some manufactured goods or other commodities."

In Words & Phrases Perm. Ed. Vol 13, the following appears:

> "The term 'distributor' connotes a wholesaler or jobber of goods, but it may include a retailer. Port Chester Wine &

> Liquor Shop v. Miller Bros. Fruiterers, 1 N. Y. S. (2d) 802, 805."
>
> "To 'distribute' is to divide among several or many. Great Atl. & Pac. Tea Co. v. Morrissitt, 58 Fed. (2d) 991, 993."
>
> "'Distribute' is defined as 'to divide among several or many; to deal out; to allot.' State ex rel. Shaw v. Thompson, 131 N. W. 231, 235."

Under these definitions it can hardly be asserted that municipalities and railroads receiving diesel fuel for their own use are "dealers or distributors" in such oils. They are not buying for resale nor do they divide, deal out or allot any of such fuel.

Section 14691, R. S. Missouri, 1939, provides:

> "It shall be unlawful for any person, firm or corporation, to use, sell or offer for sale in this state any of the oils or fluids specified in this article unless the same shall have been inspected and approved by the inspector of oils."

Section 14693, R. S. Missouri, 1939, makes it the duty of "every person, firm or corporation receiving" any of the described fuels to file a report thereof and pay the inspection fees thereon as fixed in Section 14695, R. S. Missouri, 1939, at the rate of one and one-half cents per fifty gallon barrel.

Section 14697, R. S. Missouri, 1939, provides:

> "Whenever any person, partnerhsip or corporation shall receive from any other state any of the oils, gasoline or fluids mentioned in this article that has not been inspected under the laws of this state, and inspection fees thereon paid, it shall be his or its duty to cause to be inspected the said oils or gasoline, as provided in this article, before the same is offered for sale; and shall pay the same inspection fees as is provided in this article." (Underscoring ours)

From the foregoing, it seems that the situation is that while diesel fuel (to be used-not sold) is within the definition of what fuel is subject to inspection before use, there is no duty imposed upon the user of such fuel to submit the same for inspection, yet, it is made unlawful for anyone to use such fuel unless it is inspected (a misdemeanor under Sec. 14710). A duty is imposed on any person receiving such fuel to report and pay the inspection fees, and a duty is imposed on the person receiving fuels from without the state to cause the same to be inspected and the fees paid before offering it for sale.

In view of this confused condition in which we find the law, we hesitate to attempt to reach any conclusion. What could the Legislature have intended by making certain oils subject to inspection, before use, but imposing on no one the duty to submit the same for inspection, yet making a person guilty of a crime if he used the same without inspection; then imposing the duty on the person who receives such fuel to report and pay the fees thereon (with no reference to sale or use), but conditioning the duty to have inspected and the fees paid thereon with reference to outstate imports to before the fuel is offered for sale?

In Viquesney v. Kansas City, 266 S. W. 700, 703, it is said that the act with which we are dealing "is a pure police regulation," and we think the purpose of the Legislature appears in Section 14688, supra, in that the Legislature

intended that all such fuel sold or used in this state must be inspected before such sale or use, in order that the public might be protected from using inferior and dangerous products. It is common knowledge that some fuels, while suitable for one purpose, would not do for another. Examples of this purpose appear all through the act. Section 14689 lays down certain standards for kerosene or illuminating oils and provides for the rejection of such if the standards are not met. Section 14690 fixes the standard for gasoline and provides: "If, on analysis by the department chemist, it should develop that such blending or addition of any ingredients to said gasoline or motor fuel should, in any manner, endanger the life and health of the users of the same" it is to be rejected and its sale prohibited. Provision is also made for properly labeling those products too highly inflammable to be kerosene. Section 14688 makes it unlawful to sell distillates, fuel oil and gas oil for domestic heating purposes if it ignites at a lower temperature than kerosene. Section 14692 deals with marking the containers in which certain fuels are kept and treats them as explosives.

Considering all this, it is apparent the legislative purpose was to furnish protection to the public and see that fuel designed for one purpose was not sold or used for another where it might be dangerous. With this in mind, it would be difficult to understand why the Legislature would not reach all such fuel, and as will be hereafter demonstrated, we think it did.

By excepting "distillates," "gas oil" and "fuel oil", when sold for heating or household purposes, the Legislature recognized that these products were not inherently dangerous when so used. They did, however, make provision even for the inspection of those products, even when so used, by making provision for this inspection if the user should desire. By not excepting such products when sold or used for illuminating, heating or power purposes, the Legislature, we think, recognized that inferior products might be harmful and the public should be afforded protection. That protection is not afforded if, as heretofore pointed out, only "dealers and distributors", as heretofore defined, are under a duty to submit samples for inspection.

It has been said that where necessary to conform to the legislative intent, words will be given a different meaning than the dictionary definition. State ex rel. Bess v. Schult, 143 S. W. (2d) 486, 489; State ex rel. Todlock v. Moneyham, 253 S. W. 1098, 1100; State ex rel. Consolidated School Dist. v. Hockman, 258 S. W. 1011. It is also well established that the context and setting in which words are found are determinative of what they were intended to mean.

The setting in which we find the words "dealer or distributor" here is that they immediately follow the sentence in Section 14688 that describes the fuel which must be inspected before being used or sold. That being true, when coupled with the purposes of the act, leads us to believe said terms, as here used, include the person who buys such fuels for use as well as the person who buys the same for sale.

This view settles the question as to the liability of railroad companies to cause to be inspected the diesel fuel they use, but one other point remains as to the municipalities. That is: Are they exempt because they are political subdivision of the state? There is a rule that the state is not subject to general law unless expressly named, but that rule seems to apply to the state, not its political subdivisions.

That distinction between the State and a political subdivision of the state is maintained in Emery v. Holt County, 132 S. W. (2d) 970, where it was held that the statute of limitations ran against a county. The court said, l. c. 971:

> "Defendants cite State v. Fleming, 19 Mo. 607. That was an action by the state to recover school lands. We ruled that the maxim 'nullum tempus occurrit regis' applied and that the statute of limitations did not apply to the state. We did not rule that the maxim applied to political subdivisions of the state."

In County of St. Charles v. Powell, 22 Mo. 525, this distinction is given express recognition in connection with the question of limitations. It is said, l. c. 525:

> "In 6 Bacon's Abr. Tit. 'Prerogative' E. S., it was said that where a statute is general, and thereby any perogative, right, title, or interest is divested or taken from the king, in such case the king should not be bound, unless the statute is made by express words to extend to him."

The State, under our form of government, stands in the stead of the sovereign and the court further said, l. c. 528:

> "The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state."

This would seem to put at rest the question of the application of the statute to a municipality.

CONCLUSION

It is, therefore, our opinion that railroad and municipalities who use diesel fuel for power purposes are required to submit sample of the same for inspection, before such use, and are subject to pay the inspection fee due thereon.

APPROVED:

ROY McKITTRICK
(Attorney-General)

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

MOTOR VEHICLE FUEL TAX; — Three questions relative to time within which payment of tax can be made; whether delivery to P.O. box is sufficient.

December 29, 1942

12-31

FILED
61

Honorable George Metzger
State Inspector of Oils
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 2, 1942, which is as follows:

"On March 24, 1942, you wrote an opinion, approved by the Attorney General, the concluding paragraph of which read as follows:

> 'It is, therefore, our opinion that a person who is liable for the license taxes imposed under the provisions of Article 2, Chapter 45, R.S. Missouri, 1939, does not discharge his tax liability within the time required by law by placing his remittance to cover said tax in the mails on the 25th day of the month. In order for that liability to be discharged within the time required by law, the remittance must be in the hands of the State Treasurer or Oil Inspector on or before the 25th day of the month.'

"I would appreciate receiving an opinion from you, covering the following questions with regard to the said paragraph:

"(1) What is your interpretation of: 'The remittance must be in the hands of the State Treasurer or Oil Inspector on or before the 25th day of the month.' Should this be construed to mean that the remittance must be received during the regular business hours of the day? If so, has there been an opinion rendered, or is there some provision in the state laws defining what consti-

tutes the regular business hours of a day?

"(2) Would you consider as having been received on time any mail placed in the Post Office box of this department after the regular business hours and before 12 o'clock midnight of the 25th day. If in your opinion the remittance should be in the hands of the State Inspector of Oils before the close of business on the 25th day of the month, would it be proper to assess a penalty on a remittance placed in this department's Post Office box during the period between the close of business and 12 o'clock midnight of said 25th day of the month?

"(3) Upon opening the office of this department at 8o'clock on the morning of the 26th day, we invariably find that several notices have been shoved underneath the door, informing us that the Post Office is holding one or more pieces of registered or special delivery mail. There is no way of determining whether these notices were placed there before or after 12 o'clock midnight of the 25th day. On the morning of the 26th, we receive these articles at the register-and special-delivery window, for which we sign a recipt. Would it be proper to assess a penalty against these remittances, as being delinquent?

"All mail addressed to this department ordinarily is deposited in box rented for this purpose at the Post Office in Jefferson City.

"Business hours of this office are from 8 A.M. to 5 P.M., daily, except Saturday, on which day the hours are from 8 A.M. to 12 o'clock noon."

Directing our attention to your first question, it appears that Section 8418 R. S. Mo. 1939 dealing with distributors reporting on the sales basis, and Section 8437 R. S. Mo. 1939 dealing with distributors reporting on the receipts basis, each requires that the tax payments be made "on or before the 25th day" of the month. In 62 C. J. Section 27 page 978, it is said:

> "As a general rule, in the computation of time, a day is to be considered as an indivisible unit, or period of time, which has its beginning coincident with the first moment of the day, and the law will not, unless there is a sufficient reason therefor, recognize or take cognizance of fractions of a day, * * * * * * * * * * *"

And at page 979 it is further stated:

> "Under this rule, a person who is required to perform an act on or by a particular day is entitled to the whole of that day in which to act, * * * * * * *."

The above rule has been applied in Missouri. In Williams v. Williams 30 S. W. (2d) 69 (Mo. Sup.) at l. c. 71, it is stated:

> "The natural or solar day consists of twenty-four hours, the space of time which elapses while the earth makes a complete revolution on its axis; as ordinarily considered, it is the space of time which elapses between two successive midnights. * * * * * * * * *
>
> "But ordinarily the law does not consider fractions of a day. A day is an indivisible point of time; it has neither length nor breadth, but simply position, without magnitude. * * * * * * * * * * * * * * *"

The rule that the law knows no fractions of a day has been applied to the time within which a debt may be paid. (Anglo-American Provision Co. v. Prentis, Ill., 42 N.E. 157, 161; National Park Bank v. Concordia Land and Timber Co. La., 105 So. 234, 242). Also said rule has been applied to the payment of taxes. (Fenlason v. Shedd, Me., 84 Atl. 409). Our examination of the statutes applicable to Motor Vehicle Fuel Taxes does not disclose any provision attempting to break down into divisible parts the last day on which tax payments may be made.

Therefore, in answer to your first question, we are of the opinion that the taxpayer has until midnight of the last day within which to pay his taxes.

In answer to your second question, we find that in Hartford Accident & Indemnity Co. v. Middletown National Bank 10 Atl. (2d) 604 (Conn.) a similar situation was considered. There, a check was mailed to one Doreen, P.O. Box 315, Chester, Connecticut. The box designated, belonged to Callander but Doreen had given that box as her address. Doreen was a fictitious person, while one Pulver was a person who had been introduced to the bank as Doreen, by Callander. All this was part of a scheme to defraud the State of Connecticut on false bills for goods not delivered. The check was delivered to the Post Office box, received by Callander and handed over to Pulver, who endorsed it as Doreen and cashed the same. In the suit to recover, it was contended that there was no delivery to Doreen (Pulver). The court stated, l. c. 606:

> "* * * There is no good ground for the plaintiff's contention that delivery of the checks was not made to Pulver, as the court concluded, but to Callander because they were mailed, as directed by her, to a post office box which proved to have been rented by Callander, * * * * * * * *."

As we understand this, the court ruled that delivery of a check by mail to a Post Office box designated by a person as a place to send his mail, was delivery of the same to such person.

Therefore, in answer to your second question, we are of the opinion that a remittance placed in your Post Office box before midnight of the last day on which the tax can be paid, is <u>delivered</u> to you in so far that it would bar the assessment of any penalty for delinquency.

Your third question presents more of a factual question than a legal one. We have consulted with the Assistant Postmaster of the Jefferson City Post Office and are advised that

where a party holds a box, no notice slip, on registered mail, would be sent out to the office address of such person; that in those circumstances the notice slip is invariably placed in the Post Office box. However, we are also advised that if attempted delivery was made of such notice slip and the addressee is not present to receive the same, that the date and approximate hour of such attempted delivery is noted upon the notice slip that is left. We should think that preservation of these notice slips until the parcel is actually received, should be sufficient proof upon which you can determine whether there was constructive delivery to you before midnight of the last day on which the taxes can be timely paid. If the notice slip shows constructive delivery before that time, we are of the opinion that the taxpayer is not subject to penalties.

Respectfully Submitted

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:AW

TAXATION: Section 11329, R. S. Mo. 1939, applies only to merchants commencing business after the first Monday in June and not to a person who is in business between the first Monday in March and the first Monday in June next preceding.

January 10, 1942

1-16

FILE
62

Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of January 5, 1942, which is as follows:

> "A former merchant of Appleton City, who had been in business 38 years, sold out and quit business August 22, 1941. The dry goods stock had been assessed for the 1941 ad valorem tax at $4000 and was advertised later as a $7500 stock of goods.
>
> "Since the sale the merchant, through an attorney, has requested the local Collector of Revenue to reduce the tax stating that 'under Sec. 11329 R. S. Mo. 1939,' only the portion of the tax from June 1, 1941, to August 22, 1941, should be due.
>
> "The Collector referred the matter to me and I wrote the attorney that in my opinion the section cited by him applied only to new businesses which commenced after June 1st, in any specified year.
>
> "However, he thinks my construction of the law too harsh, so I am writing for the views of your office in the matter."

Section 11309, R. S. Missouri 1939, partially provides as follows:

> "On the first Monday in June in each year it shall be the duty of each person, corporation or copartnership or persons, as provided by this article, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares and merchandise, which he or they may have had on hand at any one time between the first Monday in March and the first Monday in June next preceding; * * * * * * * * "

Under the above section it is mandatory to furnish the assessor a statement of the greatest amount of goods, wares and merchandise which he has on hand between the first Monday in March and the first Monday in June next preceding before he can obtain a merchant's license.

Section 11329, R. S. Missouri 1939, provides as follows:

> "When any person or corporation shall commence the business of merchandising in any county in this state after the first Monday in June, in any year, he shall execute a bond as provided for in section 11306, conditioned that he will, on the first day of January next succeeding, furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay the same rate of tax as other merchants, to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year."

This section is only applicable where the merchant has commenced business after the first Monday in June for the reason that the merchant could not comply with that part of Section 11309, supra, for the reason that he was not in business between the first Monday in March and the first Monday in June next preceding.

That this section is not applicable to merchants who are already in business was inferred in the case of State ex rel. v. Rodecker, 145 Mo. 450, l. c. 460, where the court said:

> "It may be true as alleged that they had ceased to do business as merchants in said county before the first day of June, 1894, and yet not have discontinued business more than one day before that time. That part of the answer is not inconsistent with this view, and if at any time between the first Monday in March and the first Monday in June of that year, Rodecker and Cohen were engaged in selling goods, wares, and merchandise at Bates county it was their duty on the first Monday in June in that year to file in the office of the clerk of the county court of that county a statement of the greatest amount of goods, wares, and merchandise which they may have had on hand at any time between those dates, whether they were in fact engaged in the mercantile business on the first Monday of June, 1894, or not."

CONCLUSION

In view of the above authorities it is the opinion of this department that under Section 11329, R. S. Missouri 1939, merchants who were in business between the first Monday in March and the first Monday in June of the year next preceding must pay the full amount of the tax even if not in business or cease to operate after the first day of June.

It is further the opinion of this department that Section 11329, R. S. Missouri 1939, is only applicable to a merchant when he commences business after the first Monday in June and not to a merchant who has commenced business between the first Monday in March and the first Monday in June.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WJB:DA

BURIAL ASSOCIATION: Former officers of defunct burial association cannot exceed the powers conferred by judgment of ouster.

- -

February 7, 1942

2-16

FILE 62

Hon. Willis H. Mitchell
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Mr. Mitchell:

This will acknowledge receipt of your letter of February 4th, 1942, requesting an opinion as follows:

> "We would like to have some legal information relative to funeral Ins. etc.
> For Instance, take the Barry Co. Ass'n. they have chartered in Ark. as an Inc.
> Is there any way at all they can receipt the old members they were carrying here before they were put out of business.
> Or will these old people have to lose what they have paid in all these years, if they do not take out the burial Ins.
> As I understand the Barry Co. was not a real Ins. organization but supplement goods and service in place of paying the money as an Ins. Co. would.
>
> The Barry Co. was not an Ins. but they have chartered in Ark. now, what we want to know is, can these old people still pay in their money to the burial Ass'n? and be protected."

Your first question, "Is there any way at all they can receipt the old members they were carrying here before they were put out of business" is best answered by the judgment

rendered quite recently in the case of State of Missouri, ex Inf. Roy McKittrick, Attorney-General vs. Mrs. W. D. Koon, et al., decided by the Supreme Court, which is as follows:

> "The Court, having made the Findings of Fact as aforesaid; It is Therefore Ordered, Adjudged and Decreed as Follows:
>
> "1. That each and all of the Respondents are ousted from purporting, claiming and holding themselves out to be a corporation under the name and style of the Barry County Burial Association, of Cassville, Barry County, Missouri, and from claiming, usurping and exercising the right, franchise and privilege of carrying on the business of writing and selling funeral and burial insurance; such judgment of Ouster to become effective and to be in force on the 5th day of April, 1942;
>
> "2. That the Respondents be restrained and enjoined from soliciting or accepting any new burial contracts on and after the 5th day of January, 1942;
>
> "3. That the Respondents, Mrs. W. D. Koon, Wilson Bradley and W. D. Koon, President, Vice-president and Secretary-treasurer, respectively, of the Barry County Burial Association of Cassville, Barry County, Missouri, shall hold in trust all of the assets of the said association for the benefit of the holders of said outstanding burial contracts and shall carry out and perform each and every one of said outstanding burial contracts according to the tenor thereof so long as said funds are sufficient so to do;
>
> "4. That the costs relative to this suit together with the expenses necessary and incidental to the performance of the duties of the trustees as aforesaid shall be paid out of the unexpended proceeds of past assessments of the said association."

The respondents in the above entitled case were the managing officers of the Barry County Burial Association and the Barry County Burial Association. From this judgment it is apparent the persons who were operating the Barry County Burial Association only have authority in Missouri to carry out the existing contracts of the defunct association until the funds on hand at the time of the rendition of the judgment are exhausted.

Your second question is: "The Barry Co. was not an Ins. but they have chartered in Ark. Now, what we want to know is, can these old people still pay in their money to the burial Ass'n? and be protected." In considering this question it will be necessary to take into consideration the laws of the State of Arkansas, the Charter of the Association and the contract between the Arkansas corporation and thepolicy or certificate holders. This would be a question of private contract between the Arkansas corporation not authorized to do business in Missouri and the individuals who contracted with the corporation in the State of Arkansas and sent their money into that State. Under the circumstances it is regretted that we cannot furnish you an opinion on this question, leaving it to be determined by attorneys in the private practice of law in attending to the private matters of their clients.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

Roy McKittrick
Attorney-General

WOJ:CP

REPRESENTATIVE
QUALIFYING FOR
OFFICE

Deputy sheriff must resign his office upon qualifying as State Representative.

March 2, 1942

3-✓

FILE
62

Honorable John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 27, 1942, which is as follows:

> "As you may already know, a special election is to be held in the Second Representative District in Buchanan County, Missouri, on April 7 for the purpose of electing a successor to Dr. Emmett F. Cook, deceased, who was the incumbent prior to his death.
>
> Mr. Clarence M. Stewart, one of our deputy sheriffs, is considering the possibility of becoming a candidate for that place. However, before making up his mind about that he wants to be sure that it will be possible for him to continue in his position as deputy sheriff if he should be elected. Both political parties in Buchanan County have decided to hold conventions for the purpose of nominating party candidates. The Democratic convention will be held on next Tuesday, March 3, and Mr. Stewart and I would appreciate it if you can let us have your opinion on this question by that time.
>
> In this connection, the following questions suggest themselves:
>
> 1. Should Mr. Stewart resign from his deputyship immediately after his nomination, if he should be nominated?

2. May he continue to hold his office as deputy sheriff after his nomination and until he is elected?

3. Must he resign his deputyship before taking his oath of office as representative, in the event of his election?

4. If it is necessary for him to resign in any of the above circumstances, and if he is elected, may he at a later date be re-appointed deputy sheriff in the event he should decide to resign as representative?

5. The only remaining possibility which occurs to me at this time is whether or not Mr. Stewart might legally continue to hold his deputyship while serving as a member of the legislature, provided that he did not draw pay from the county during the time he was in attendance at the legislature but took a leave of absence from his office here for a period during which he might be required to be present in Jefferson City during a special session."

The first question to be determined here is whether or not a deputy sheriff of a county is an officer under the State of Missouri. In the case of State ex rel. v. Bus, 135 Mo., 325 L. C. 334, the court has said:

"Section 12, article 4, of the constitution provides: 'No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the

> general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress.'
>
> Under this section all officers (except those under the United States) are divided into two classes, viz.: 'officers under the state' and officers ' under a municipality thereof.' The language 'officers under the state' would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression 'officers under the state'.* * *"

The Constitution of the State of Missouri, Art. 4 section 12 provides as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

In the case of State ex rel. Owens v. Draper, 45 Mo., Rep. L.C. 356 357 the court said as follows:

> "* * *The case is submitted on the pleadings, and they show that whilst Owens was a judge of the Circuit Court he was elected a representative to the Legislature, qualified, took his seat, and performed the duties and functions of that office. There does not appear to have been any resignation of the judgeship, and the

question is whether he could legally hold the two offices and receive the pay appertaining to both at the same time. There has never been any doubt about the principle, so far as I am advised, that at common law, if a party accepts another office which is incompatible with the one he holds, the first one would become vacant.

Suppose Owens, instead of being elected to the Legislature, had been elected to a seat on this bench, and had qualified and entered on the discharge of its duties. It is perfectly clear to my mind that his seat on the circuit bench would have been thereby vacated. Or if the auditor should be elected treasurer or the attorney-general secretary of State, their acceptance of the latter offices would necessarily vacate their former ones. Besides the common-law rule, the State government is divided into separate and distinct branches or departments, the officers of each having separate and independent functions to perform. It was designed that they should be distinguished and divided by a line of demarkation, and that one should not trench upon the other. This principle was deemed of such importance that it was made the subject of an express constitutional provision. In the constitution it is declared that 'no member of Congress, orperson holding any lucrative office under the United States or this State (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly,or shall remain a member thereof, after having accepted any such office, or a seat in either house of Congress.' (Const. of Mo., art.4 pp 11)

Under this provision a judge of a court of record is clearly ineligible to a seat in either house of theLegislature whilst he holds the office of judge. The existence of the two offices in the same individual is incompatible, and is peremptorily prohibited.

> By the phrase 'shall not be eligible,' I do not think it was intended to prohibit a person who occupied the position of judge from running for or being elected to the Legislature. But if he should run and be elected, he would have to make his choice of which office he would retain, and his acceptance of one would necessarily operate as a vacation of the other. Therefore it follows that when Owens qualified and took his seat in the Legislature he elected to vacate and abandon the office of circuit judge.* * * "

In State v. Heath, 132 S. W. (2d) 1001 , the court said as follows:

> "* * * The principle of that case was applied and extended by this court en Banc in State ex inf. Major ex rel. Ryors v. Breuer, 235 Mo. 240, 138 S. W. 515, 516. The facts there were that Judge Breuer, then county collector, was elected circuit judge in November, 1910. He thereafter resigned the office of collector effective December 29, 1910, and on December 31, made final settlement with the county court transferring all books and funds to his successor. On January 2, 1911, he qualified as circuit judge. It was alleged that he was eneligible because of Section 19, Article 2, of the Constitution, which was as follows: 'That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or such receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable.' And also because of Section 11446, R. S. 1909, now Section 9897, R. S. 1929, Mo. St. Ann. Sec. 9897 pp. 7959 * *"

The court further said in the case of ex rel. Bus

"* * *The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers. secs. 30, 51.

The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4B. & Ad. 9.

'The rule has been generally stated in broad and unqualitied terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary.' 1 Dill. Mun. Corp. (4Ed.) sec. 225; People ex rel. v. Brooklyn, 77 N. Y. 503."

CONCLUSION

Therefore, it is our opinion that Mr. Stewart does not necessarily have to resign his office as deputy sheriff while he is a candidate for the office of State Representative but that he must resign his office as deputy sheriff in the event that he is elected State Representative. It follows that he cannot retain both

offices because in order to qualify as State Representative he must first resign his office as deputy sheriff.

Respectfully yours,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS

STATE FAIR GROUNDS: The State will not lose its title to State Fair Grounds by reason of Federal Government condemning the use thereof for military camp.

COMMISSIONER OF AGRICULTURE:

March 17, 1942

3-18

Commanding General Army Air Forces
Director for Base Services Buildings and
Grounds Division
1818 H Street N. W.
Washington, D. C.

FILE
62

Attention: Lieutenant J. R. Miller

Dear Sir:

This is in response to your request for a written opinion advising that the State Fair Grounds are available and can be obtained by condemnation suit for military purposes.

In our examination of the titles to some of the lands which are possessed by the State of Missouri for the Missouri State Fair Grounds, we find that a portion of these lands were taken subject to the provisions of a statute which was in effect at that time. That statute is now Section 14155, R. S. Mo. 1939. The portion of the section which pertains to this question is as follows:

> " * * * that should the state fail for three consecutive years to hold a fair, the land thus used for state fair purposes shall revert to the parties donating it."

There are 236 acres of land in the State Fair Grounds, 136 acres of which appear to have been conveyed subject to the provisions of the foregoing statute. That being the case, the only way by which the State could be relieved from the provisions of this statute would be for such lands to be condemned by the Secretary of War.

There is no express authority for the State to lease the Fair Grounds to the United States Government, and even

if there was, we would hesitate to voluntarily do so in view of the condition subsequent attached to the State's title.

Under the terms of 50 U. S. C. A. 171, the Secretary of War is granted certain authority with respect to acquiring lands for military training camps. That section provides in part as follows:

> "The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, * * * ; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * * And provided further, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, * * * ."

It will be noted that under this section the Secretary of War is authorized to condemn any land, the "temporary use thereof or other interest therein, or right pertaining thereto." Such a grant without question vests in the Secretary of War authority to acquire by condemnation less than a fee

title in any lands, it might be necessary to acquire for military training camps. And that would be true even though the statute only authorized him to acquire "lands" by condemnation.

In Pacific Postal Telegraph-Cable Co. v. Oregon & C. R. Co., 163 Fed. 967, l. c. 969, it is said that where a "statute gives authority for taking land, it carries with it by necessary implication the authority to take any less interest or estate in the land in the same way and to like effect as the land itself may be taken."

It is settled that "the fact that the land is owned by a state is no barrier to its condemnation by the United States." Oklahoma v. Atkinson Co., 61 S. Ct. 1050, 1064.

Therefore, under the above statute, it appears that the Secretary of War could file a condemnation suit to condemn the use of the State Fair Grounds at Sedalia, Missouri, for a term of years or period terminating at some date fixed after the close of the war.

In such a suit only the State would be concerned with the compensation to be paid. Because, even assuming that such taking would constitute a breach of the condition subsequent, the conditional interest that the heirs of the original grantor might have would only arise after three years had elapsed from such breach, and thus they would have no compensable interest at the time of the taking by condemnation. Under eminent domain the general rule is that "compensation in general must be paid to the person who owned the property at the time it was taken." (29 C. J. S., p. 1099, Sec. 196.) But the word "owner," in this connection, only includes "any person having an interest in the land, and who sustained loss or damage at the time of the taking." (29 C. J. S., p. 1101, Sec. 196.) First Reformed Dutch Church v. Croswell, 206 N. Y. S. 132 (App. Div.), involved an almost identical situation. Certain land had been granted to the church conditioned that the estate of the church was limited to endure "'so long as' a church or meeting-house, devoted to the religious purposes of the plaintiff, was 'kept and used' upon the premises." The court held this to be a limitation on the estate granted causing it to terminate upon a breach of such conditions. The claimed breach was

that the City of New York condemned the property, and the heirs of the grantor were claiming, on that disuser, the compensation. The court said, l. c. 133:

> "It does not follow, however, that the plaintiff must fail in the action. The premises in question did in fact cease to be used for the maintenance of a church thereupon. The disuser, however, was a consequence, not a cause, of a loss of title by the plaintiff. The city of New York, in condemnation proceedings, seized the estate of the plaintiff. It also seized the rights of reverter belonging to the heirs at law of the grantors. The seizure was of the entire title, wherever resident, by a single act of appropriation. There was, therefore, no interval of time between the seizure of the plaintiff's estate and the seizure of the rights of the heirs at law during which there could have been a reverter of title to the heirs because of a church disuser of the premises necessarily consequent upon the seizure. At the moment of appropriation there had been no disuser. At that moment the estate then being enjoyed by the plaintiff might have continued forever. At that moment the rights of the heirs were mere possibilities. These rights possessed no value capable of estimate. All that was valuable was the estate of the plaintiff. Therefore the money paid in by the city of New York should be paid to the plaintiff as for the only thing of value taken."

Applying the principle of that case to the present facts, it appears that the heirs of the grantor would not be entitled to any compensation that might be awarded, and particularly is this so when any reverter, if such would

occur, would not happen until three years after the taking. It will be noted, however, that the heirs in the Croswell case were made parties.

Upon a suit being filed, the State, in order to expedite matters, will enter its appearance in said proceedings so that a judgment may be entered that will best protect the rights of the State on such terms and conditions that we may be able to obtain from the court and the United States Government. Upon the filing of such condemnation suit, the nation now being at war, the section above quoted authorizes the Secretary of War to take immediate possession and use the land in question for military purposes. Thus there would be no delay arise from the resort to judicial proceedings. Neither will said judicial proceedings operate to prevent expenditure of Federal funds in converting said Fair Grounds into a military camp.

Such a limitation appears to be contained in 50 U. S. C. A. 175, but due to the exception there made, it would seem the limitation on the use of money is lifted where a condemnation proceeding has been filed and has not yet reached final judgment. That exception is as follows:

> "Nothing in this section shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this section be construed to preclude any acquring agency from expending money for the erection of any preliminary and temporary structure upon any land."

As previously pointed out, the State is under considerable handicap in connection with the transposition of

the State Fair Grounds into a military camp due to the condition subsequent attached to the title of the State to 136 acres of this land. However, we feel that a condemnation suit, as you suggest, will not cause a breach of this condition subsequent so as to constitute a forfeiture of these lands. The reason for this is stated in Evangelical Church v. Schrieber, 277 Mo. 113, where the court, in speaking of what constituted a breach of a condition subsequent, said, l. c. 130:

> "The law is that where a condition subsequent becomes incapable of performance without fault of the grantee or from any legal obstacle, it cannot defeat the fee granted or cause a reversion to the grantor or his heirs."

See also, 26 C. J. S., Sec. 156b, p. 495.

We are also requested to give assurance that no subsequent change in the State administration will affect the right of possession which the Federal Government may acquire by condemning the State Fair Grounds. As we view the situation, if the Federal Government condemns this land, then its right of possession will be fixed by the judgment of the court. Of course, the State would be bound by the provisions of this judgment and could in no way interfere with the United States' right of possession. 59 C. J., p. 330, Sec. 498.

While under the proceeding as outlined above, the United States would perhaps acquire no political jurisdiction over the State Fair Grounds, yet the rule is that where the United States acquires the right to use land, such use is free from any interference and jurisdiction of the State as would impair its effective use for the purposes for which

the property was acquired. Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 29 L. Ed. 264, 269; United States v. Unzenta, 281 U. S. 138, 74 L. Ed. 761, 773.

Respectfully submitted,

ROY McKITTRICK
Attorney General of Missouri

RM:VC

TAXATION:
REVENUE: TANGIBLE
PERSONAL PROPERTY:
SITUS:

In regard to taxation of tangible personal property including deposits, nomey, notes, etc.

May 6, 1942

5-16

FILE
62

Mr. Jesse A. Mitchell, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts:

> "Is personal property, money, notes, or other intangible property subject to assessment in the State of Missouri, when owned by a resident of some other state?"

Under section 10936 R. S. Mo., 1939, taxes are levied on all property, real or personal, except certain properties which are exempt. Since the exemption section does not refer to your question, we will not make further reference to it.

Under Section 10939 R. S. Mo., 1939, all personal property, tangible or intangible, situated in a county other than the one in which the owner resides is assessed against the owner, except property belonging to estates. This section also provides that notes, bonds, and evidences of debt, which would include bank deposit slips, are made taxable in this state, provided the owner resides in Missouri, even though they are held in another state.

Under Section 10940 R. S. Mo., 1939, every person owning or holding property on the first of June is liable to pay taxes thereon for the ensuing year.

Under Section 10950 R. S. Mo., 1939, it is the duty of the assessor to call at the office, place of doing business or residence of each person required to list his property for taxation and to require such person to make a correct statement

of all taxable property owned by him or under the care, charge or management, except certain properties therein mentioned, which are not pertinent to the question here.

Under Section 10950 R. S. Mo., 1939, it will be noted that the taxpayer is required to list money which he has deposited in a bank or other safe place.

Since the question pertains to the question of taxing property on a basis of its situs rather than on the domicile of the owner, we quote the following principle, announced in 110 ALR 715, which would be applicable here.

> "The maxima 'mobilia sequuntur personam' has never been allowed to stand in the way of the power of a state to tax property having an actual permanent situs within its jurisdiction; and it has always been held, assumed, or conceded that tangible personal property having an actual situs in a state, is there taxable, regardless of the foreign domicil of its owner, the theory being that inasmuch as the property enjoys the protection of the state, it must be made to contribute to its maintenance. This principle is supported by the following authorities, some of which, however, as indicated, involved taxation of intangibles:"

The case of City of St. Louis v. Wiggins Ferry Company, 40 Mo., 581, involving tax on ships owned by a nonresident; and also the case of Curtis v. Ward, Administrator of John D. Meredith, 58 Mo. 295, involving intangibles, are cited under the above annotations. In the Curtis v. Ward case, supra, the court, at l. c. 296, said:

> "It is equally well established, that the personal property of a non-resident

> is taxable here if it be found situate within the local jurisdiciton, regardless of whose hands it may happen to be in."

And in the case of State of Missouri on petition of Taylor, Administrator of Lee, v. St. Louis Co. Court, 47 Mo. 594, 600, the court discussed and announced the principle of law involved here as follows:

> "That the situs of personal property is the domicile of its owner, is a fiction, though color is given to its truth by the law in relation to the distribution of personal estates. If a citizen and resident of St. Louis own a farm in Illinois, no one pretends that the farm has any different location than if the owner lived upon it. But how with the cattle in its fields and stables, and the corn in its granaries? On what principle can they be said to belong to Missouri, so long as they are upon the farm? There is this difference: they can be removed to Missouri, while the farm can not; but, until removed, their situs is the farm; they help to swell the wealth of the locality; they are protected by its laws, and should be subject to its burdens. The same rule should be applied to bonds and notes, though from the different nature of the property their actual situs may be more doubtful. But, if it be established, although not the residence of their owner, the same result should follow as to them. Thus, if money be left by a non-resident in the hands of an agent for investment and loan, the money itself, the instruments taken for it, and the various forms which it assumes, so long

> as they remain in the hands of such agent, are local property, and upon every principle should be subject to the public burdens imposed upon other local property of the same kind. What difference does it make in the benefits derived by the owner from the protection afforded this property by the administration of the law, whether he live near it or abroad? or what difference in the expense of such protection?"

According to this principle, if the State in which intangible personal property is situated furnishes to such property any governmental service such as police protection or the benefits of the court of that state, then such state is authorized to impose a tax thereon.

The fact that the property may also be taxed at the domicile of the owner would not alter this rule. The principle is announced in 110 A. L. R. page 718 as follows:

> "Since there is no constitutional inhibition against double taxation and the only objection against such taxation springs from the logical inconsistency inherent in the idea of attributing two different situses to the same property at the same time for purposes of taxation, it is generally agreed that tangible personal property having an actual permanent situs in a state is there taxable, irrespective of whether or not it is also subject to be taxed, or has been taxed, in another state or in its owner's domicil elsewhere. In such case the right of the actual situs to tax cannot be impaired by a tax imposed by the domicil on the strength of a fictional situs there."

In Coe v. Errol (1885) 116 U. S. 517, 29 L. ed. 715, 718, the Supreme Court in discussing the foregoing rule, said:

> "* * * If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also.* * *"

The courts of Missouri have followed the rule that if the property, tangible or intangible is used in a business in this state then it may be taxed.

In State ex rel. American Automobile Insurance Company v. Gehner, City Assessor, 8 S. W. (2d) 1057, 1064, the Supreme Court in banc announced the principle as follows:

> "So to make debts and credits taxable in a state other than that of the domicile of the owner they must be used in an established business, and the proceeds of that business must be under a management in such locality, with discretion in the manager as to its proceeds. Otherwise, the situs of such credits and debts for the purpose of taxation is the domicile of the owner."

Following the various authorities cited in the Gehner case, supra, the court announced the following general principle at l. c. 1064:

> "A simple debt is taxable in the domicile of the creditor, no matter where the debtor.
>
> "It cannot be taxed in a different domicile of the debtor; under the decisions

> cited from the United States Supreme Court, such a tax would be unconstitutional.
>
> "This applies to money deposited in bank, subject to check by the management of the home office.
>
> "It applies to debts, such as premiums due on insurance policies.
>
> "It applies to interest due from a nonresident on bonds or notes held by a citizen of this state."

The opinion was rendered by the court in banc in July 1928, however, from the later ruling of the Supreme Court of the United States, hereinafter referred to, we find that this rule has been modified to the extent that whether or not such intangible property is used in an established business, if that property receives some benefits from the state then the state may tax it at its situs.

In the case of Smith et al. v. Ajax Pipe Line Co., 87 Fed. Rep. (2d) (1937) which was before the Circuit Court of Appeals of the Eighth Circuit, the question of the authority of the Missouri Taxing officials to assess and tax a bank deposit of a company authorized to do business in Missouri, was before the court. The company had its office in Green County, Missouri; it was a Delaware corporation and the bank deposit sought to be taxed wasin a bank in New York. At, l. c. 569, the court in treating this question held: "Bank deposits are not physical--tangible--property but choses in action--indebtedness--intangible property." In this case the court also held that under the Fourteenth Amendment, it is necessary for a state to have jurisdiction over property in order to subject it to ad valorem taxation.

And at l. c. 569, the court said:

> "In determining this taxation 'jurisdiction', or situs, two opposed considerations--place of ownership and place of property location--have caused the

legal difficulties. In respect to realty, the solution has been simple. In the respect to personalty, the difficulty has been and is very real. This difficulty arises from the common-law rule of mobilia sequuntur personam which is broadly applied in many legal situations of which taxation is but one. But that legal principle is not unassailable. It is a court made rule designed to work out practical justice. (Citing cases) * * * * * * * * * * * * * * * * * Being such, it is pushed no further than the reason for its existence justifies and where justice requires a departure therefrom exceptions are made, both in other fields of law and in taxation. (Citing cases) * In the field of taxation, these exceptions are the result of changed economic and business conditions (Wheeling Steel Corp. v. Fox, 298 U. S. 193, 210, 56 S.Ct. 773, 777, 80 L. Ed. 1143) and have constituted a development running through many decisions of the Supreme Court.

"This development has followed two lines which are somewhat parallel. The divergence arises from the respective tangible and the intangible characters of the property. Since the matter of situs was the problem of location, the law has long declared the rule that physical location of tangibles within a state gave tax jurisdiction if such location be of such permanence that theproperty could properly be regarded as a part of the property in the state. The questions in that connection have to do with physical location and permanency of such location. (Citing cases)* * * * * * * * * * * * * * * * * * *

"However 'when we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception.' Wheeling Steel Corp. v. Fox, 298 U. S. 193, 209, 56 S. Ct. 773, 776, 80 L. Ed. 1143. This 'legal conception' has been a development analogous to and later than that as to tangibles. Wheeling Steel Corp. v. Fox, supra, 298 U. S. 193, at page 210, 56 S.Ct. 773, 777, 80 L. Ed. 1143. At first, the tendency was to apply the domicile, or mobilia sequuntur personam principle on the theory of the difficulty of ascertaining separate property situs although taxation was permitted also in the state where separate situs could be determined--as in the case of mortgages. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 205, 26 S. Ct. 36, 50 L.Ed. 150, 4 Ann. Cas. 493. The moving consideration back of allowance of such double taxation was the 'practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs.' Union Refrigerator Transit Co. v. Kentucky, supra, page 205, of 199 U.S. 26 S.Ct. 36, 38, 50 L.Ed. 150, 4 Ann.Cas. 493. The next step--in analogy to tangibles (Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 93, 50 S.Ct. 59, 61, 74 L.Ed. 180, 67 A.L.R. 386)--was to accord a local tax situs 'other than at the domicile of their owner, if they have become integral parts of some local business.'"

So it seems from the principle applied in the Ajax Pipe Line case, supra, that the intangible property, in order to be taxed at its situs, must have a commercial or business situs. The court in that case held that the Missouri authorities were authorized to tax this bank deposit at the domicile of the owner. The question of the authority to tax this deposit at its situs in New York was not passed on in that case.

The most recent announcement of the principle by the Supreme Court of the United States is under date of April 27, 1942, in the case of State Tax Commission of Utah v. Malcolm P. Aldridge et al. In that case the court applied the principle that intangibles may be taxed in the domicile of the owner as well as at its situs regardless of whether or not such situs is a business situs. This principle has not been applied by the Missouri courts. In fact the principle which has been followed by our Missouri courts has been that such property may be taxed at its situs if it is a business or commercial situs. Applying the latest principle laid down by the Supreme Court of the United States, if intangible personal property has a situs in the State of Missouri and receives some of the benefits of sovereignty of the state, then they would be taxable providing the mode of assessment and taxing has been set up by the Legislature.

As we understand your question, you particularly refer to a bank deposit which is owned by a nonresident. Bank deposits receive the protection of the Missouri laws and of the courts and we think this service is sufficient to authorize the state to impose a tax on such intangibles.

As stated in the Ajax Pipe Line case, supra, the relation of debtor and creditor exists between the depositor and the bank. The law requires that every person owning or holding property shall be liable for taxes. We fail to find any authority to support the principle that the bank is the holder of the depositor's property. We do not think that it could be said that the deposit in the bank could be classed as property under the care, charge or management of the banker and that it is the duty of the banker to list such property. The bank owes the depositor an amount of money--it is not any specific property.

On the question of whether or not Missouri has provided for the taxing of such intangibles, we refer to the principle announced in State ex rel. v. Kansas City Power and Light Company 145 S. W. (2d) 116, 120, wherein the court said:

> "It is conceded that under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose.* * * * * * * *"

In that case the court held that the taxing authorities had not been provided with a lawful plan of assessment therefore the tax judgment was void.

CONCLUSION

It is therefore, the opinion of this department that intangible personal property such as bank deposits, deposited in Missouri banks could be taxed in Missouri if a plan for assessment were provided.

We are further of the opinion that no lawful plan of assessment of such intangibles is now provided under the laws of this state.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

COUNTY ASSESSORS: Expenses incurred by the various county assessors while attending "group meetings" called by State Tax Commission under Sec. 11027, Laws 1941, shall be paid by the counties from which counties the assessors have attended such meetings.

May 20, 1942.

2/16

5-29

FILE
62

Honorable Jesse A. Mitchell
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Mitchell:

Your opinion request of May 19, 1942, has been referred to me. This request is as follows:

> "An opinion of your Department written on May 6, 1942, regarding the payment of expenses of county officers by the county while such county officers are attending their respective conventions, has come to our attention.
>
> "Under Section 11027, of the Laws of Missouri, 1941, the Commission is empowered to call a group meeting of two or more assessors to discuss various matters pertaining to the assessment of property in the different counties in the State of Missouri. We would like to have an opinion of your Department on whether or not the "group meetings" prescribed in the above section, come under the term "conventions" which the former opinion dealt with and whether or not the expenses of the assessors while attending these group meetings called by the Tax Commission, shall be paid by the respective counties."

In our former opinion, referred to in your letter, it was the opinion of this Department that the various counties

of the State could not pay the expenses of the various county officials incurred while attending their respective conventions. There was one exception made to this general rule and that was in the case of the county superintendent of schools. This particular officer is required under Section 10617, R. S. Mo. 1939, to attend certain conventions called by the State Superintendent of Schools. This section provides as follows:

> "During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law. He shall spend annually, studying rural school problems and supervision of schools, five days in conventions called by the state superintendent of public schools, or twenty days in the state university or in one of the state teachers colleges, or in some other manner approved by the state superintendent. He shall not receive his salary for the third quarter of the year until he presents a certificate, signed by the state superintendent, stating that he has spent the period prescribed by law in studying rural school problems and supervision of schools, and that his report as county superintendent of public schools has been properly made to the state superintendent of public schools."

It can be seen that this statute requiring the attendance of the county superintendent of schools at these conventions is required under the laws of this State and the county wherein the officer lives is required under this section to pay his expenses unless such expenses exceed the statutory amount set up.

Section 11027 of the Laws of Missouri, page 694, subsection 14, provides that the State Tax Commission is empowered to call "group meetings" of two or more assessors from the State of Missouri. This section reads as follows:

> "The commission is empowered to call a group meeting of two or more assessors at such time and place as it may designate, due notice of which shall be given by the commission. For attending such meetings assessors who will make the assessment for that year shall be allowed a per diem of five dollars for the time actually spent, including going to and returning from such meeting, and shall be reimbursed for transportation expense actually incurred in going to and returning from said annual meeting, not to exceed five cents per mile. Provided, in counties under township organization the commission shall call a meeting of the township assessors at the county seat of said county at which meeting a representative of the commission shall be present; and provided further, the township assessors shall receive no compensation other than their necessary expenses in attending said meeting. When such claims are verified by oath and approved by the commission, or any member thereof, they shall be presented to the county court, or other taxing officers, and when duly audited a warrant in payment shall be issued and paid out of any funds belonging to the county or other municipal subdivision which such assessor officially serves."

It will be found that this section does not refer to conventions but refers to "group meetings" and prescribes that the State Tax Commission may call these meetings to be composed of two or more assessors and is not a call for the assessors from all over the State of Missouri.

A convention, as ruled on in the former opinion, we believe to be a meeting called by a voluntary organization formed by a certain group of officials, which convention is called for the purpose of promoting the welfare of such class of officials and for their mutual benefit. This type of

gathering is called by a body which is not created by law but which, as stated above, merely formed by the group of officials themselves. The group meetings specified in Section 11027, supra, are called by the State Tax Commission, which is a body created by law and such statute states that the Tax Commission may call a "group meeting" of "two or more assessors." We cannot conceive a meeting of this kind to be in any way termed a "convention." And a meeting such as this certainly was not contemplated in the former opinion of this Department.

It is, therefore, the opinion of this Department that the "group meeting" as specified in Section 11027, supra, is not a convention as contemplated in our former opinion and that the counties from which the assessors attend such meeting of the Tax Commission shall reimburse the assessors attending the aforesaid meeting in accordance with Section 11027 of the Laws of Missouri, 1941.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

TAXATION: In assessing franchises of public utilities under Section 11240 R. S. Missouri, 1939, the value of such is to be listed under heading of "all other property."

May 25, 1942

Honorable Jesse A. Mitchell,
Chairman
State Tax Commission
Jefferson City, Missouri

FILE
62

Dear Sir:

In your letter of May 4, 1942, you present the following question: In the assessment of public utilities under Sections 11240 and 11241, R. S. Missouri, 1939, must there be a separate valuation placed on the "franchises" of such corporations, or is that valuation to be reflected under the heading of "all other property?"

Section 11240, R. S. Missouri, 1939, provides:

> "The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all quasi public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other proper-

> ty of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation."

Epitomized, that section requires the "franchises" of all corporations owning, operating and managing public utilities to be assessed for taxation purposes at the same time and in the same manner as other property of such corporation is assessed; there is to be levied on the assessed value of such "franchise" the same rate of taxation levied upon other property of the corporation; and the same is made due, payable and collectible, the same as other property taxes.

Section 11241, R. S. Missouri, 1939, provides:

> "The state board of equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other quasi public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible, in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of 'all other property.'"

Epitomizing this section, it appears that the state board of equalization is required to do four things. They are: (1) ascertain, fix and determine the total value, for taxable purposes, of the entire property of such corporation, tangible and intangible, in this state; (2) assess the tangible property; (3) deduct the amount of such (the tangible property) assessment from the total valuation, and (4) enter the remainder upon the assessment list, under the head of "all other property."

In State v. St. L. & E. St. L. Elec. Ry. Co., 216 S. W. 763, (Mo. Sup.) the court in dealing with these same statutes said, l. c. 765:

> "Appellant insists that the tax assessment is illegal because the defendant owns no railroad franchises except the franchise to be a corporation, which is a nontaxable one. This is a misconception. The defendant does own railroad franchises other than that implied in that of a grant of a charter to it. It possesses, by the terms of its charter, the right to contract and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the Constitution of this state, its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highway proposed to be occupied by such street railway. Const. art. 12, sec. 20. When it obtained this permission to operate its street railway on this public highway for 50 years, the legislative grant instantly became effective, and vested in appellant a valuable franchise, wholly distinct from its franchise of artificial

> entity (State ex rel. v. Railroad, 140 Mo. loc. cit. 549, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742), and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises. State ex rel. v. Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005. Proceeding under these statutes, and in accordance with the method prescribed in a subsequent section (11559, R. S. 1909), the board of equalization assessed and adjusted the taxes laid on defendant's franchises on a mileage basis, and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant in Missouri was $173,000.16. It referred to this specific assessment as one made on 'all other property' of defendant, a method of distinguishing the various items approved in State ex rel. v. Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005. * * * * * * "
> (Underscoring ours.)

In the Wiggins Ferry Co., case, 208 Mo. 622, referred to in the preceding case as approving this statutory method of distinguishing the various items in Sections 11240 and 11241, the point involved was whether the items lumped under "all other property" consisted of the value of a franchise to operate a ferry across the Mississippi River. The Ferry Company sought to prove such was a fact, and if such were so the court said, (l. c. 643): " * * * the levy would be clearly invalid, for the reason that it would be a tax imposed by a State upon interstate commerce, which is prohibited by the Constitution and laws of the United States." The court rejected the Ferry Company's version of what was included within the assessment for "all other property", but accepted the State's version, as follows, at l. c. 645:

> "The appellant's oral evidence, while very meager, tends, however, to prove that 'all other property at $30,000,' mentioned in the assessment, was an assessment against the railroad in question for the right and privilege of constructing, maintaining and operating the road in this State, in connection with its right to conduct its business wherever the system of lines belonging to the three combined companies extend, all representing a unity of use in the entire corporate property of the three corporations, thereby making the same much more valuable than it otherwise would be for use separately and independently of each other. The evidence also tends to show that the State Board of Equalization in arriving at the value of the railroad in question, after making an investigation and hearing evidence, ascertained the kind and amount, as well as estimated the fair value, of the tangible and intangible property of the three companies as an entire system of transportation, at a certain sum, not including, however, the value of the right of each of said companies to be corporations. The board then ascertained the value of the tangible property of all of the companies and deducted that sum from the total value of the tangible and intangible property of the three companies, thereby fixing the value of the intangible property. * * * * * * * * * * "

In ruling the point the court said, at l. c. 647:

> "* * * from the record before us we are unable to concur in the views that

> the value of the franchise of the Ferry Company was included in the board's estimate of the value of the intangible property of those companies. Our understanding of the evidence is that the franchises of all three companies, that is, the rights to be a corporation and to conduct a ferry and a railroad business, were excluded from that estimate; but the value of the rights and privileges of those companies, acting in unison as one company, to construct, maintain and operate a system of railroad in this State in connection with and a part of a system in another State, was included in the valuation upon which the assessment was based."

Then, at l. c. 651, the court said of this situation:

> "If the facts of this case are as we understand them to be, then we are clearly of the opinion that the assessment is valid and that the taxes should be paid, * * * * * * * * * * ."

It thus seems apparent from these excerpts the court approved, as the Electric Ry. Co., case so holds, the method of lumping into "all other property" the franchises taxable under Section 11240.

CONCLUSION

It therefore is our opinion that in the assessment of public utilities under Sections 11240 and 11241 R. S.

Missouri, 1939, it is not necessary that there be a separate valuation placed on the "franchises" of such corporations, but that valuation is to be reflected along with other intangible items under the head of "all other property."

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

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ROY McKITTRICK
Attorney General of Missouri

LLB:RW

TAXATION: Jurisdiction of Tax Commission to entertain complaint on assessments is not dependent on County Board of Equalization having been appealed to.

October 27, 1942

11-5

FILED
62

Honorable Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

On July 26, 1939, in an opinion to the Honorable Clarence Evans, we concluded that it was not necessary for a taxpayer to appeal first to the County Board of Equalization when he felt aggrieved as to the assessment of his property, before such matter could be presented to the Tax Commission.

On June 14, 1933 in an opinion to the Honorable Jesse A. Mitchell, where the same question was presented, we concluded just the opposite, holding that unless the taxpayer first appealed to the County Board of Equalization, the State Tax Commission had no jurisdiction to entertain a proceeding to review the assessment.

You have called our attention to the conflict in these opinions and ask that we again review this question. The question, stated precisely is: May the State Tax Commission entertain the complaint of a taxpayer concerning the assessment of his property when no previous complaint on said assessment has been made to the County Board of Equalization?

In the assessment of real and personal property for taxation, the assessor must take a list of all the taxable property in his county (Section 10950 R.S. Mo., 1939) or in the event no list is made by the taxpayer, the assessor may make a list on his own view (Section 10954 R. S. Mo., 1939). After a list of the taxable property is obtained, it is the duty of the assessor to value all of said property at its true value in money (Section 10981 R.S. Mo., 1939). These valuations are to be shown on the assessment rolls or book which the assessor makes up (Section 10981 R.S. Mo., 1939) and said books are to be delivered to the County Court on or before January 20th, in each year (Section 10990 R. S. Mo., 1939).

Section 10992 R. S. Mo., 1939, provides:

> "Every person who thinks himself aggrieved by the assessment of his property may appeal, and every appeal shall be in writing, and verified by affidavit, and shall state specially the grounds of the appeal and the matter or thing complained of, and no other matter shall be considered by the board."

An appeal thus taken from the assessor's assessment, is heard by the County Board of Equalization (Sections 10992, 10993 and 11004 R. S. Mo., 1939) when it meets on the first Monday in April each year (Section 11001 R. S. Mo., 1939).

Section 11027 R. S. Mo., 1939, deals with the powers of the State Tax Commission. It provides as follows:

> "It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:
>
> "* *
>
> "(8) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, copartnership, company, association or corporation: Provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given * * * * * * * * * * as provided in section 11028."

Section 11028, R. S. Mo., 1939, provides:

> "After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided."

The county board meets on the first Monday in April in each year (Section 11001 R. S. Mo., 1939) and the State board meets on the last Wednesday in February in each year (Section 11035 R. S. Mo., 1939). After these boards have equalized and adjusted the tax rolls the county clerk must, within ninety (90) days, extend said taxes on the books (Section 11048 R. S. Mo., 1939). After the books have been adjusted and the tax extended the books are to be delivered to the collector (Section 11052 R. S. Mo., 1939).

It will be noticed that Section 11028 supra, limits the power of the Commission to being exercised after the assessment rolls are adjusted and before the tax books are delivered to the collector. Thus, in this interim (one of indefinite duration as the preceeding paragraph shows) the Tax Commission either on its own motion or on complaint may review assessments and raise or lower the valuation.

There is nothing about the language in Sections 11027 or 11028, indicating that the jurisdiction of the tax commission is dependent upon there first having been a complaint made to a county board of equalization, sitting as a board of appeals to review the assessor's valuations.

None of the cases relating to the Tax Commission's power have ever passed upon this question, but the general language in First Trust Co. v. Wells, 23 S.W. (2d), 108 (Mo. Sup.) supports our present view that the jurisdiction of the tax commission is not dependent upon there having been a previous appeal to the county board of equalization. The court stated in said case, at l. c. 111:

> "Our statutory scheme of assessing property for the purpose of levying ad valorem taxes affords the taxpayer at every stage of the proceeding an opportunity to be heard with respect to the correctness of the assessment of his property. Indeed, the right to such hearing is not foreclosed until the tax books are actually delivered to the officers intrusted with the duty of collecting the taxes. Even though the action of the state board of equalization completes the assessment, its decisions may be opened up for rehearing upon a proper showing, through the mediation of the state tax commission. Brinkerhoff-Faris Savings & Trust Co. v. Hill (Mo. Sup.) 19 S. W. (2d) 746, 751."

In Brinkerhoff-Faris Savings & Trust Co. v. Hill 19 S. W. (2d) 746 (Mo. Sup.) the court in discussing the powers of the tax commission, said at l. c. 751:

> "* * * and it has authority, on the complaint of any taxpayer and after the various assessment rolls have been passed upon by the several boards of equalization, but before the delivery of the tax rolls to the proper officers for collection, to hold hearings for the purpose of determining whether any property subject to taxation has been omitted from the assessment rolls and whether any property thereon has been improperly valued, and to make such changes with respect thereto as shall be necessary to make the assessment rolls conform to the facts as found by them."

The holding of these two cases was again expressly approved in State ex rel. Thompson v. Jones 41 S. W. (2d) 393 (Mo. Sup.)

As heretofore stated, we do not think that the jurisdiction of the tax commission is dependent upon there having been an appeal to a county board of equalization. The statutes are silent on that subject and the Supreme Court, in the cases cited, supra, has taken notice of that statutory silence on three occasions by ruling that the tax commission could review an assessment on complaint at any time between the adjustment of the assessment rolls and the delivery of the books to the collector.

However, before concluding this opinion, we think it well to note that while the tax commission may entertain a complaint about an assessment without there first having been an appeal to the county board, that if said tax commission upon hearing such complaint, approves the assessment as made, there can be no resort to court action to review the finding of the tax commission. As was said in State ex rel. Hawkins v. Edwards 286 S. W. 25 (Mo. Sup.) at l. c. 26:

> "* * * The tax bill is prima facie evidence that the assessor performed his duty in respect to it, and filed his book, as the statute requires, with the county clerk. Such filing imparts general notice of its contents. State ex rel. v. Reed & Sutton, 159 Mo. loc. cit. 85, 60 S.W. 70. Section 12812, R. S. 1919, provides that any person

> who thinks himself aggrieved by the assessment of his property may appeal. The defendant, therefore, having notice that his property was overvalued in the assessment, had his remedy plainly pointed out by the statute. The courts cannot take up the burden which the statute places upon assessors and boards of equalization. He failed to follow the method pointed out by the statute which is the one available to the taxpayer whose property is excessively valued. Meyer v. Rosenblatt, 78 Mo. 495; State ex rel. v. Western Union Telegraph Co., 165 Mo. loc. cit. 523, 524, 65 S. W. 775. * * * * * * * *"

See also State ex rel. Wyatt v. May 123 Mo. 348, 356.

CONCLUSION

It is therefore the opinion of this department, that the State Tax Commission has jurisdiction to entertain a complaint on assessments of property even though an appeal from such assessments has not been taken to a county board of equalization.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

LLB:A.

APPROVED:

ROY McKITTRICK
Attorney General

OFFICERS:
PROSECUTING ATTORNEY:
SURVEYOR:
Prosecuting Attorney's and Surveyor's office incompatible and cannot both be held by same person at the same time.

September 16, 1942

105

FILED
63

Hon. Alfred F. Moeller
Ste. Genevieve, Missouri

Dear Sir:

This will acknowledge receipt of your letter of Sept. 10, 1942, in which you request an opinion as follows:

> "I request an opinion from your office as to whether the offices of County Surveyor and Prosecuting Attorney can be held by one person at the same time."

In order to determine whether one person may hold two offices at the same time it is first necessary to examine the statutes and the Constitution. An examination of the statutes pertaining to the offices of Prosecuting Attorney and County Surveyor reveals no direct statutory prohibition against either of these offices being filled by a person who holds another office. Section 18 of Article IX of the Constitution might be considered as prohibiting such dual office holding. Said section reads as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

This section was held only to apply to counties and cities of over 200,000 inhabitants in the case of Nickelson v. City

of Hardin, 282 Mo. 198, l. c. 203. There is neither a statutory nor constitutional prohibition against the offices of Prosecuting Attorney and County Surveyor being filled in the County of Ste. Genevieve, for the county has a population of 10,905 by the 1940 Census.

In the case of State ex rel. Walker v. Bus, 135 Mo. 325, dual office holding is discussed at length. There the question was whether a person could be a deputy sheriff and a school director at the same time. From this case the following quotation is taken, at l. c. 338:

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.
>
> "It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result

> in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'
>
> "Sheriffs are given power, and it is made their duty, to preserve the peace, arrest and commit to jail all felons and traitors, execute all process and attend upon courts of record.
>
> "The board of directors of the St. Louis public schools has charge, control and management of the public schools and of all the property appropriated to the use of the public schools within said city.
>
> "We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. State ex rel. v. Goff, 15 R. I. 507."

The law remains the same today. Where there is no statutory or constitutional prohibition, one person may hold more than one office at the same time if the duties of the offices are not incompatible.

This brings us to a consideration of the powers and duties of the Prosecuting Attorney and the County Surveyor.

The duties of the Prosecuting Attorney are set out in Article 2, Chapter 85, R. S. Mo. 1939, Section 12942 and Section 12944.

Section 12942 reads as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 12944 reads as follows:

> "He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Further, Section 12829, R. S. Mo. 1939, makes it the duty of the Prosecuting Attorney to bring removal proceedings against officers who are guilty of conduct which would justify a removal proceeding.

The duties of the Surveyor are found in Chapter 90, R. S. Mo. 1939. By Section 13192 of this chapter the Surveyor is required to give bond for the performance of his duties and the turning over of the records of the office at the expiration of his term.

Section 13198 requires the Surveyor to execute all orders directed to him by courts of record for the surveying of land, the title to which is in dispute before the court making the order.

Section 13199 makes it the Surveyor's duty to survey within ten days any tract of land in the county at the expense of the person demanding the survey, if the legal fees are tendered and the Surveyor is not engaged in executing previous orders.

Also, by Section 11001 the Surveyor is made a member of the County Board of Equalization.

Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. State ex rel. Hilton v. Sword, 196 N. W. 467.

The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. Mechem, Public Officers, Sec. 422, l. c. p. 269. Throop's Public Officers contains similar definition of incompatibility.

It has been held in the case of State ex inf. McKittrick, v. Wymore, 345 Mo. 169, wherein the duties of a Prosecuting Attorney were being discussed, that it is the Prosecutor's duty to institute actions against persons whom he knows, or has reason to believe, have committed crimes. By like reasoning, it would be his duty to bring actions against persons who were failing to perform official duties.

Inasmuch as the Prosecuting Attorney has the duty of enforcing the laws in the county, it would appear that he has some supervisory control over the Surveyor and that the two offices are incompatible. Contrary to this view it may be argued that there is only a possibility of the Surveyor doing any wrongful acts or neglecting his duties to such an extent as to require action by the Prosecuting Attorney, and that, so long as the Surveyor properly discharges his duties there is no conflict between the duties of the two offices, nor supervision of one by the other. And that, the mere possibility

is so remote as to not create any incompatibility between the two offices. But the writer is unable to see how a Prosecuting Attorney can discharge the duties of his office with fidelity, propriety and sincerity and at the same time be functioning in some other official capacity.

CONCLUSION

It is, therefore, the conclusion of the writer that the offices of County Surveyor and Prosecuting Attorney cannot be held by the same person at the same time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri

WOJ:CP

TAXATION: County Courts are without jurisdiction to change
COLLECTOR: or abate a personal tax after the same has been
COUNTY COURT: assessed, levied and extended.

- -

December 11, 1942

FILED
63

Hon. George S. Montgomery
Presiding Judge, County Court
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you submit a question, the substance of which is:

> "Does the County Court have authority to change the number of a school district in which a taxpayer is listed on his tax bill."

From the facts which you have submitted it seems that guardian of a minor whose estate is under the jurisdiction of the Probate Court of Jackson County, Missouri, has been assessed in that county. The facts also show that the minor resides in Clayton, Missouri.

Section 10957, R. S. Mo. 1939, in so far as it pertains to the taxes of minors under guardianship, is as follows:

> "* * * The personalty of an estate of a deceased person shall be taxable by and for the school district in such county in which the decedent resided at the date of his death; and the personalty of an estate in charge of a guardian or other person aforesaid shall be taxable by and for the school district in such county, in which the ward or

> owner resides, on the first day of June of the year in which the assessment is made, if such ward or owner resides in such county, and if not, then by and for the district in such county in which the property was located at the date of the appointment of such guardian or other person."

Under this section it seems to be conceded that the school taxes in question should not be assessed and collected in Jackson County. These taxes, however, have been assessed in Jackson County and the County Court is now attempting to abate the school taxes and require the collector to collect from the guardian the State and County taxes only.

At the outset, we are faced with the rule that county courts have no common law or equitable jurisdiction and their powers are defined and limited by statute. State ex rel. Chadwick Consolidated School District v. Jackson, 84 S. W. (2d) 988, 229 Mo. App. 842. With this rule in mind, we look to the statutes to ascertain the powers and duties of the county court with reference to the taxes here under consideration.

When an assessment is made by the assessor it is the duty of that officer to list the school district in which the taxpayer resides.

Section 10395, R. S. Mo. 1939, provides in part as follows:

> "* * * and it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

In the case of State ex rel. Davis v. Walden, et al., 60 S. W. (2d) 24, the court had before it the question of the authority of the board of equalization to change the

assessment list of a taxpayer to a district other than the school district where the assessor had placed the taxpayer when making the assessment. The court, after discussing the powers and duties of the assessor and the county board of equalization, said at l. c. 27:

> "* * * It seems clear that the board cannot acquire jurisdiction to make the assessment as of omitted property by striking from the assessor's books property appearing thereon and at the same time and by the same order restoring to the book the self-same property, the only purpose and effect of the order being to change the situs of the property for taxation purposes from one school district of the county to another."

The court, in the Davis case, supra, also referred to State ex rel. Hamilton v. Brown, 172 Mo. 374, and said, at l. c. 27:

> "* * * That was an action by mandamus against the county collector to compel him to accept school taxes in a less amount and for a different school district than as shown on the school tax books certified to him by the county clerk. It was held that he was not responsible for the tax books, but was responsible for the taxes as they appeared upon such tax books. * * * * *"

By this statement, taken from the Hamilton case, the court held that the tax collector was responsible for the taxes as they appeared on the tax books which were certified to him.

The court, in the Davis v. Walden case, supra, also held that the board of equalization did not have authority and jurisdiction to change the assessment list by transferring a taxpayer from the school district shown in the assessment list to some other district.

In speaking of the duties of the assessor relating to assessments, the court, at l. c. 26, said:

> "The county assessor is the officer upon whom the statute places the duty of assessing for taxation property such as that here involved. Section 12766, R. S. 1919, amended Laws 1923, p. 375, section 9756, R. S. 1929 (Mo. St. Ann. Sec. 9756). By statute it is made his duty in listing property to take the number of the school district in which the taxpayer resides at the time of making his list, to be by him marked on the list and on his personal assessment book. We find no statute devolving this duty upon any other local officer or board. This the assessor did in the instant case. He listed relator as a resident of district No. 33 and so marked him upon the assessment list and the personal assessment book. The assessment book showed a regular and valid assessment. In performing such duties the assessor may be said to have acted in a judicial or quasi judicial capacity."

Under Section 11118, R. S. Mo. 1939, county courts, under certain circumstances, are authorized to correct certain errors which may appear in connection with the assessment and levy of taxes on <u>real estate</u>.

Under Section 11114, R. S. Mo. 1939, county courts are authorized to make certain corrections on delinquent <u>land lists</u>.

We find no statute which authorizes the county court to abate personal taxes or any part thereof after the same have been assessed, levied and extended on the tax books.

In State ex rel. v. Dungan, 265 Mo. 353, 370, the court held that a county clerk was without authority to

change an assessment list and any change so made was a nullity.

In speaking of an assessment of a minor in the wrong district, the court in the Brown case, supra, 172 Mo. 374, l. c. 381, said:

> "* * * If the county clerk had no right or authority to assign the curator to district No. 4, and assess a tax against him according to the rate fixed by said district, then such taxation is simply illegal and void, and his property is not subject to levy to pay the same, and if seized and sold by the officer may be recovered by the plaintiff in an action of replevin against the purchaser. (Railroad v. Lowder, 138 Mo. 538.) If he is sued for the tax, he may set up the illegality and defeat the action. * * * * * * *"

One of the most recent cases on this question is School District No. 46, et al. v. Stewartsville School District, et al., 110 S. W. (2d) 399. In this case the real estate of a taxpayer had been assessed in the wrong district. The purpose of the suit was to compel the county court to place the lands assessed in the proper school district. The court, in this opinion, in referring to the powers and duties of county courts with reference to erroneous assessments, said, l. c. 402:

> "Article 6, Sec. 1, of the Constitution of Missouri, confers judicial power upon the county court. Section 36 of article 6 of the Constitution limits and defines the jurisdiction of county courts 'to transact all county and such other business as may be prescribed by law.'

"As to erroneous assessments of taxes, section 9808, R. S. 1929 (Mo. St. Ann. Sec. 9808, p. 7908), provides that county courts shall determine allegations of erroneous assessments or mistakes of defects in descriptions when petitioned by one, who shall show good cause for not having attended meeting of board of equalization.

"The above section has no bearing upon the controversy herein involved.

"Section 9980, R. S. 1929 (Mo. St. Ann. Sec. 9980, p. 8019), provides as follows: 'The several county courts are hereby authorized and empowered to hear and determine all allegations of erroneous assessments of lands for taxes, and in all cases where it shall appear that lands have been erroneously taxed, either by having them taxed to more persons than one, or more than once for the same year to the same person, or if the land was not subject to taxation, the said court shall order the same to be corrected on the books of the proper assessor, and shall cause the clerk to make the corrections on the books in his office.'

"Section 9946, R. S. 1929, as amended by Laws of 1933, p. 424 (Mo. St. Ann. Sec. 9946, p. 7989), provides: 'In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith,

> whether of valuation, subject to the provisions of the Constitution of this State, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation.'
>
> "The provisions of the above two sections are invoked by the appellants herein."

The court, in discussing the Brown case, supra, held that an assessment of a taxpayer in the wrong district is not an erroneous assessment, but, in fact, an erroneous taxation. And, at l. c. 403, the court said:

> "Under the authority of State ex rel. v. Brown, supra, we hold that the complaint filed by appellants in the county court of De Kalb County, Mo., presents an issue of erroneous taxation and not an issue of erroneous assessment, and that the county court of said county did not have jurisdiction to determine the issues as presented in appellant's complaint filed in said court in this cause. There is no constitutional or statutory authority giving jurisdiction to county courts in matters of erroneous taxation."

Since the error referred to in your inquiry is one of erroneous taxation, and since the county court has no jurisdiction to determine issues of erroneous taxation, then it would be without authority to make an order abating an assessment or any part of an assessment in which a taxpayer had been assessed in the wrong district.

CONCLUSION

From the foregoing it is the opinion of this department that the county court is not authorized to change or abate a personal tax which has been erroneously assessed in the wrong taxing district.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

ROY McKITTRICK
Attorney-General

SHERIFFS: Responsible for enforcing law in county.

December 19, 1942

2 1 6

12-19

FILED
63

Honorable George S. Montgomery
Presiding Judge
Jackson County
Kansas City, Missouri

Dear Judge Montgomery:

This will acknowledge receipt of your letter of December 18, 1942, in which you request an opinion as follows:

> "Our Sheriff writes me under date of December 11th, quote; 'Under the decision in the case of State ex inf. McKittrick vs. Williams, I am charged with the duty of policing the county, including Kansas City'.
>
> "As I recall it I talked with you about this matter after the rendering of this decision by the Supreme Court and you said that such was not the case.
>
> "I shall be very glad to have your opinion on this at an early date."

As you are well aware, the case of State ex inf. McKittrick vs. Williams, referred to in the excerpt from a letter of the Sheriff of Jackson County, was a case brought by Roy McKittrick, Attorney-General, against James L. Williams, Sheriff of Jackson County, to oust the sheriff for lawfully and knowingly neglecting and refusing to enforce laws. The case is reported in Volume 346 Mo. Rep.

at page 1003.

In his defense against allegations of the information and the evidence offered in support of them, Mr. Williams contended that the responsibility for enforcing the law in Kansas City was upon the municipal police department. The Supreme Court ruled against this contention and discussed the duties of the sheriff at length on page 1014 and 1015. This discussion of the sheriff's duties and responsibilities is the latest one from our appellate courts, and we are quoting at length:

> "A further argument of respondent is to the effect that he should not be charged with the failure of law enforcement in Kansas City as charged because the duty to enforce the law there was upon the metropolitan police department. We find from the evidence that while the violations charged were prevalent throughout Jackson County the greater number did take place in Kansas City. But it cannot be successfully asserted that a local police force has supplanted the sheriff in his duties as a peace officer. His is an important office and one of the oldest known to law. Under the common law he was the conservator of the peace within the county, had the safe keeping of the county jail and commanded the posse comitatus. One author says that 'for a thousand years the sheriff has been the principal conservator of the peace in his county, with full power to command, whenever necessary, the power of the county.' (Murfree on Sheriffs.) He has also been referred to as the chief executive officer of his

county. By statute (Secs. 11516, 11518, R. S. 1929, Ann. Stat., p. 7435) as well, he is made the conservator of the peace within his county. His duties are described in Farmers' Mut. Fire Assn. v. Hunolt (Mo. App.), 81 S. W. (2d) 977:

"'Sheriffs are given power, and it is made their duty, to preserve the peace, arrest and commit to jail all felons, traitors, and other misdoers, to execute all process, and to attend upon courts of record. The powers and duties of the conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace, and it has been held that the duty of a sheriff in the enforcement of the law implies initiative on his part, and that he must be reasonably alert with respect to possible violations of the law, and is not entitled to wait until they come to his personal knowledge, but must follow up information received from any source.'

"His authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the State has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his res-

ponsibility under the law. Usage cannot alter the law. (United States v. McDaniel, 8 L. Ed. 587.) It is self-evident that a custom or usage repugnant to the express provision of a statute is void. A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize. (See Vickers on Police Officers.) In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony. In the larger communities where dense population has increased the hardship of proper law enforcement police departments have developed scientific methods of crime detection and prevention. Larger means and a greater number of men are available to a local police department than to the county sheriff. Methods of rapid communication and transit are provided. Under these circumstances the sheriff may leave local enforcement in local hands, but only so long as reasonable efforts in good faith are made to enforce the law.

"The courts have taken cognizance of the development of local enforcement agencies. It has been held, and correctly so, that a sheriff may assume that a city police department will do its duty in enforcing the law and hence will not be guilty of any serious neglect of duty if he gives little attention to police matters in such city.

But this rule has a proper qualification. If the sheriff has reason to believe that the police force is neglecting its duty it is his duty to inform himself. And if he knows that the police are ignoring or permitting offenses his duty to prevent and suppress such offenses is the same as it would be if there was no municipality and no police force. The dereliction of other officials cannot excuse his failure to perform his statutory duties. (State ex rel. Thompson v. Reichman, 135 Tenn. 353, 188 S. W. 225.)"

CONCLUSION

The sheriff is the chief law enforcement officer of the county and has the duty and responsibility of seeing that the laws are properly enforced. However, he may assume that the police forces of the municipalities will properly and conscientiously perform their duties, and the sheriff is therefore not required to devote a great deal of time to routine police work in the municipalities. Should the police forces of the municipalities fail to properly enforce the law, responsibility still rests upon the sheriff and for any willful failure or refusal to perform his duties to the fullest extent of his ability he would be subject to be ousted from office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

TAXATION:
GOVERMENT OWNED LANDS:
LEVY AND ASSESSMENT:

Lands which come into possession of the United States Government after assessment but before levy of taxes are not subject to taxes for the year for which such assessment is made.

January 16, 1942

FILE
64

Mark Morris
Prosecuting Attorney
Bowling Green, Missouri

Dear Mr. Morris:

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts:

> "Would like an opinion on the following question:
>
> "Can the State and County levy taxes for the year 1941 against the private owners of land which has been taken over by the Federal Government in 1941?
>
> "Naturally this land has been assessed against these owners for the year 1942 but in this particular case they will not receive any interest on the principal due them."

Section 10970, R. S. Mo. 1939, provides as follows:

> "Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

In the case of DeGiverville v. Legg, 48 Mo. App. 573, the court held that the foregoing section establishes the taxable year as beginning on the first day of June of each year.

Section 10940 provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

This section might be understood to mean that all property owned by a person on June 1st is taxable to such person for taxes for the ensuing year. However, the lien for the taxes is not created until the levy is made under Section 11044, which is as follows:

> "As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

In speaking of when the lien for taxes is established, the court in the case of McAnally v. Little River Drainage District, 28 S. W. 2d 650, 651 said: (1-3)

> "The lien of the state for taxes is established by an assessment of all land for that purpose. Section 12757. However, said lien does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax. * * * * * * *"

By this, it is held that the tax is not a fixed encumbrance until the assessment and levy, both have been made.

In your letter you refer to the assessment as of June 1, 1941. The levy for the taxes under this assessment will not be made until May of 1942. Under the rule announced in the Little River Drainage District case, supra, the encumbrance for the taxes assessed as of June 1, 1941, does

not become a fixed lien until after the levy in May, 1942.

In treating a similar question, where lands were taken by the Government, Judge Collett in the case of United States v. Certain Lands in the City of St. Louis, Mo., 29 Fed. Supp. 92, 96 said:

> "(4) Since the lien of the taxes attaches at the time of the levy it is necessary to determine when the levy occurs. The City authorities assess and levy all taxes on real estate within the City, including State taxes -- Sec. 14706 et seq., R. S. Mo. 1929, Mo. St. Ann. Sec. 14706 et seq., p. 6091 et seq. The St. Louis Charter provides that the Board of Estimate and Apportionment shall submit and recommend to the Board of Aldermen a bill establishing the city tax rate for the fiscal year and further provides that if the Board of Aldermen should not establish the tax rate by ordinance on or before the fourth Monday in May, the rate last previously established shall be the rate for the current year. (St. Louis Charter, Art. 16, Sec. 3). It thus appears that the levy by the city authorities must occur prior to or on the fourth Monday of May. The Government took the title to the property involved on June 16, 1939. The levy of the 1939 taxes, had, therefore, theretofore been made and a fortiori the lien of those taxes had attached.
>
> "Since by Sec. 14706, supra, the assessment is begun on June 1st and the report thereof made not later than January 1st following, and thereafter the levy is made, it is obvious that the levy of the taxes for 1940 has not been made. It follows from what has been heretofore said that the lien of the 1940 taxes had not attached on June 16, 1939, and the city is, therefore, not entitled to have distribution to it of any part of the funds in the registry of this Court on account of those taxes."

CONCLUSION

From the foregoing, it is the opinion of this department that the State and county may not levy and collect taxes for the year 1941 against the private owners of land which has been taken over by the Federal Government prior to the levy in 1942 on the 1941 assessment for taxes payable in 1942.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

TAXATION: Illinois taxing authorities may tax that portion
BRIDGES: of Mississippi River Bridge which lies east of main channel of said river.

January 19, 1942

1-7

FILE

Hon. Mark Morris
Prosecuting Attorney
Bowling Green, Missouri

Dear Mr. Morris:

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts:

> "We have a toll highway bridge here in Pike County which spans the Mississippi River, thus the bridge joins the State of Missouri and the State of Illinois. The bridge has been taken over by Pike County, Missouri and the question has now arisen, since the bridge is now the property of Pike County, Missouri, as to whether the Illinois state authorities can legally levy a tax on the half of the bridge that joins the Illinois County. That is, can the Illinois County hold our county for taxes on that part of the bridge which joins Illinois?"

As we view it, the only question here is -- Does the State of Illinois have authority to tax the portion of the bridge across the Mississippi River which lies east of the center of the main channel of the Mississippi River? If it does have that authority, has it by any exemption provisions of its constitution or s tatutes relieved the bridge from the tax?

We have examined the Acts of Congress creating the authority to construct this bridge and do not find any prohibition therein which would prevent the imposition of the tax.

We think the case of People ex rel Murray v. City of St. Louis, 126 N. E. 529, is very pertinent here because the same question which you have propounded was before the Supreme Court of Illinois, in relation to the taxing of the Municipal Bridge in St. Louis which terminates on the east bank of the river in Illinois. In discussing this question, the Court said: (l. c. 531)

> "Section 3 of article 9 of the Constitution of 1870 provides:
>
> 'The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.'
>
> "(4-7) Under this constitutional provision it cannot very well be argued that this bridge is exempt as a municipal corporation's property, as the municipality owning it is not a municipality of this state. Moreover, there is a provision in this state for taxing bridges across navigable streams forming the boundary line between Illinois and other states. Hurd's Stat. 1917, sec. 354, p. 2497. All property is subject to taxation unless exempted by the Constitution or statutes passed in accordance therewith. * * * * * * * * *"

And, at l. c. 532, the Court further said:

> "(8) It is also argued by counsel for appellant that as this bridge was constructed under the authority of an act of Congress it cannot be taxed by the state authorities. It is clear that by this

> act of Congress the federal government did not retain exclusive power of legislation on all matters pertaining to this bridge; therefore, under the reasoning of Moline Water Power Co. v. Cox, 252 Ill. 348, 96 N. E. 1044, the state authorities retained the power to tax the bridge. The federal government has authorized the construction of several railroad bridges over the Mississippi river near St. Louis, and one of them -- the Eads bridge, as we understand it -- is not only used by railroads, but it is used for street cars, vehicles, and pedestrians, and yet it has been taxed by the state authorities. People v. St. Louis Merchants' Bridge Co. (No. 12580) 291 Ill. 95, 125 N. E. 752."

Pursuant to the provisions of Sec. 3, Art. 9, of the Constitution of Illinois, to exempt property from taxation, that state passed an act which provided as follows (Smith -Hurd, Chapter 121, Section 199):

> "That when any bridge used exclusively for persons and vehicles, across any stream forming the boundary line between this and an adjoining state, shall be made into a public highway free to all persons and vehicles, such bridge shall not be subject to taxation in this state."

This act was repealed in the Revenue Act of Illinois of 1939, page 886. This Revenue Act also repealed an act entitled "An Act to Provide for the Assessment and Taxation of Bridges Across Navigable Waters on the Boundaries of this State," approved May 1, 1873. The last appealed act referred to, supra, provided a manner of assessment of bridges such as the one here in question. In lieu of these repealed acts, the said Revenue Act of Illinois, 1939, by Section 18 thereof, l. c. 900, provided for the taxing of all real and personal property in that state, By Section 19, thereof, it exempted certain properties. However, we do not think this exemption provisions of the Act would include this bridge which belongs to a county in the State of Missouri. The only county property exempted

in the Illinois Act, Sub-section 6 of Section 19, thereof, is property owned by the county, used exclusively for the maintenance of the poor, swamp or overflowed lands belonging to the county, and public buildings belonging to the county.

From an examination of this Revenue Act, the exemption of bridges such as the one here in question may not have been provided for unless it is in Section 64 of the Act. This section is as follows:

> "The personal property of street railroad or bridge companies shall be listed and assessed in the taxing district where the principal place of business is located. The track, road or bridge shall be held to be personal property and listed and assessed as such, in the taxing district where the same is located or laid."

We are not going into that question in this opinion, but are calling it to your attention.

The Circuit Court of Appeals for the Seventh Circuit, United States, in 1935, in the case of City of Louisville et al. v. Babb, 75 Fed. (2d) 162, had before it the question of the authority of the taxing authorities of Indiana to tax the bridge across the Ohio River between Jeffersonville, Indiana and Louisville, Kentucky. The facts as to the obtaining of funds to build that bridge, the charging of tolls to maintain it and to retire the bonds issued for its payment, are similar to the laws of this state which authorize counties to purchase and operate toll bridges. The State of Indiananhad an exemption clause which exempted bridges free from toll. (Laws of Indiana, 1929, page 296. c. 94). In the Louisville case the bridge owners contended that the bridge was exempt even though it collected tolls, because it was for "municipal purposes". The Court sustained that view, however, in distinguishing between the provisions of the constitutions of the State of Indiana and the State of Illinois, the court said, (l. c. 168):

> "In People et al. v. St. Louis, 291 Ill. 600, 126 N. E. 529, 531, the Illinois Supreme Court was construing article 9, sec. 3, of the Illinois Constitution. There the exemption is made by these words 'the property of the state, counties, and other municipal corporations.' So it will be seen that the basis of the exemption of the property above described under the Illinois Constitution is limited to the ownership, though other property may be exempted if used exclusively for certain specific purposes. The language used in the Illinois Constitution shows that the Constitutional Convention realized that the term 'municipal corporations' included the state and counties."

So, with this construction, the basis of exemption from taxes under the Illinois Constitution is in ownership *and not* in use of the property.

The courts seem to hold that a state surrenders its sovereign rights of exemption when it goes beyond its boundaries for the purpose of owning property. This rule is stated in 99 A. L. R., page 1144, as follows:

> "As a general rule, property of a municipality located in another state has been held taxable therein; and the courts are fairly in agreement that exemption in the state of the situs of municipal and/or other public property has no application to such property, on the theory that by entering another state the political unit has forfeited all claim to sovereignty."

And, at 81 A. L. R. 1518, the rule is announced and annotated as follows:

> "Where a public service plant belonging to a municipality is situated in another state, it is taxable therein, and a

statute of the state where the plant is located exempting the property of municipalities is not applicable.

"Thus, in Augusta v. Timmerman (1916; C. C. A. 4th) 147 C. C. A. 222, 233 Fed. 216 (affirming decree of (1915; D. C.) 227 Fed. 171), it appeared that a city in Georgia owned land in South Carolina, the use of which was essential to its water supply. Holding that a South Carolina statute exempting municipal waterworks from taxation was not applicable to that land, the court said: 'unless otherwise expressed, all legislation of a state relating to cites and towns of that state, and not of another state or country. This is for the reason that the state has no control of cities and towns in other states, and from a governmental standpoint no interest in them. For a state to attempt to promote the development of cities and towns outside of its borders by exempting property owned by them from taxation exacted of its own citizens would be so anomalous and contrary to legislative history and governmental policy that nothing but the clearest affirmative expression would warrant such an inference. The general assembly of South Carolina, legislating concerning taxation and exemptions of cities and towns, had no thought of cities and towns not subject to its legislation. The plain purpose was to exempt certain governmental agencies of its own municipal coprorations.'

"The provision of the Constitution of Illinois exempting municipal property from taxation has reference only to municipal corporations in Illinois. Hence, a portion of a bridge and approaches thereto in Illinois territory the property of a Missouri city, may secure no exemption under such provision. People ex rel. Murray v. St. Louis (1920) 291 Ill. 600, 126 N. E. 529."

CONCLUSION

With these rules in mind, it is the opinion of this department that since the State of Illinois has not exempted from taxation, this bridge property, and since the State of Missouri and its political sub-divisions forfeit their rights of sovereignty by entering another state, the State of Illinois may therefore tax that portion of the Louisiana Bridge which is located in Illinois, provided the revenue act of that state has set up the proper machinery for assessing and taxing the same.

Yours very truly,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:NS

COUNTY BUDGET LAW:

The county court shall, in its discretion, pay for the supplies of the public administrator when they are listed by the public administrator in the estimated supply budget as provided by law.

April 1, 1942

#-9

FILE 64

Honorable Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Morris:

We have your request for an opinion of February 16, 1942, which is as follows:

> "It would be appreciated if you would send me an opinion on the following question:
>
> Is the County supposed to pay for the office supplies of the Public Administrator?"

Also our telephone conversation as of March 28, 1942, in which you further advised that the supplies in question were set out by the Public Administrator in the proper time as provided for in Section 10912 R. S. Mo., 1939.

Section 10912 R. S. Mo. 1939, sets out the matter in which a county officer shall obtain the necessary funds to maintain his office and is as follows:

> "It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and

> the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

The State and County Budget Law of 1941 sets out the different classes of expenditures and the county court's duty thereto. In class four (4) the statute provides as follows in Laws of Missouri, 1941, l.c.651:

> "The county court shall next set aside the amount required to pay the salaries of all county officers

> where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Article 13, Section 295 R. S. Mo., 1939, provides for the election of a Public Administrator, and Section 296 of the same article is as follows:

> "Each public administrator elected, as now or as hereafter provided for in this article, is hereby declared to be an officer for the county in which he is elected and for the city of St. Louis, if elected therein. The county courts of each county in this state now or hereafter having a population of 100,000 inhabitants or more according to the last federal census shall make suitable provision for an office for the public administrator in the courthouse of the county if suitable space may be had for same, and shall be provided as soon as the county court shall be of the opinion that the business in charge of the public administrator is such as to reasonably require a separate office for the convenience of the public: The public administrator of the city of St. Louis shall have suitable and convenient offices provided for him in the civil courts building by said city."

Article 5, Section 36 of our Constitution reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * * * *"

In the case of Rinehart v. Howell County, 153 S. W. (2d) 381, l.c. 383 the court ruled that where the Statutes specifically set out an emolument for a county officer in a county of a certain population but did not set out an emolument for a county officer of the same kind in a smaller county, the county court in its discretion could expend money in accordance with the Statute relating to the same officers in the larger counties. In this relation we quote:

> " * * * *Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected-an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and

not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. See the reasoning in Ewing v. Vernon County, 216 Mo. loc. cit. 693, 116 S. W. loc. cit. 522. Consult Harkreader v. Vernon County, 216 Mo. 696, 116 S. W. 523, involving reimbursement to a sheriff of expenditures for water, gas, janitor service and stamps. Buchanan v. Ralls County, 283 Mo. 10, 222 S. W. 1002. Additional reasons sustaining the judgment nisi may be found in the cases cited. * * * "

CONCLUSION

It is, therefore, the opinion of this office that if the public administrator of a county with the population of under one hundred thousand (100,000) has listed his estimated expenditures as provided for in Section 10912.R.S. Mo.,1939, the county court may, in its discretion, pay for the office supplies of the public administrator.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

POWER OF GRAIN WAREHOUSE COMMISSIONER TO EMPLOY INSTRUCTOR:

Grain Warehouse Commissioner may employ an outside State instructor for purpose of training men to measure grain in warehouses.

June 25, 1942

1-26

FILED
64

Mr. Turner D. Morton, Commissioner
Grain Inspection and Weighing Dept.
Jefferson City, Missouri

Dear Mr. Morton:

We have for request of June 24, 1942, which is as follows:

"In an effort to more fully cooperate with the Federal Government in its defense Program, this Department has been called upon to perform a service never before given by this State; that of measuring, instead of weighing, the contents of public warehouses.

"This necessitates the instructing of men in a line work of which comparatively little is known. The services, in an advisorary capacity, of an outstanding warehouse examiner who is a resident of another state as well as an employee of that State's Grain Department can be obtained at a nominal monthly fee. Are there any legal objections to this Department temporarily retaining the services of such a man during the period of formation of this division of our Department?

"I will greatly appreciate your opinion in this matter at your earliest convenience."

The duties of the Grain Warehouse Commissioner are set out in the new act, Laws of Missouri, 1941, page 376, Section 7, and are as follows:

"It shall be the duty of the Grain Warehouse Commissioner to have a general supervision of the sampling, inspection, weighing, and public warehousing of grain as required by this act, to supervise the handling, sampling, inspection, weighing, and storage of grain in public warehouses; to supervise protein or other chemical analysis of grain where laboratories are now or may hereafter be established; to establish necessary rules and regulations for all the aforesaid functions, and for the management of the public warehouses of the state, as such rules may be necessary to enforce the provisions of this act; to keep proper records of all sampling, inspection, weighing, protein or other chemical analysis performed under the provisions of this act, for which purpose he shall have provided books, blanks and other material needed in order to keep perfect and proper records; to fix the fees in accordance with provisions of this act; to represent the grain department in all matters requiring his attendance within and without the state of Missouri; to employ and pay the necessary personnel in accordance with provisions of this act. It shall be the duty of the Commissioner to appoint all necessary personnel required to perform the functions of the department under his supervision, such personnel including chief inspectors and inspectors,

> chief weighmasters, weighers, warehouse examiners, samplers and helpers, chief clerks and clerks, chief chemists and assistant chemists, chief scale inspectors and assistant scale inspectors, chief registrars and assistant registrars, stenographers, and such additional personnel as seasonable demands may require from time to time." (Underscoring ours.)

We wish to point out specifically that the Commissioner of the Gr in Warehouse Department is the general supervisor of the sampling, inspection, weighing and public warehousing of grain. We also wish to point out the act specifically makes it the duty of the Commissioner to appoint all necessary personnell required to perform the functions of the department.

Webster defines "inspect" to mean "to look; to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of the thing; * * "

In the case of Silfies v. Austin, 158 A. 661, 662, 104 Pa. Super. 344, the court said:

> " * * *There is no substantial difference between services of 'superintendence' and of 'inspection,' inspection being defined as act or process of inspecting or looking at carefully; a strict or prying examination; close or careful scrutiny, or investigation; act of overseeing; official examination or superintendence, and 'inspector' being one who inspects, views, or oversees. Mechanic's lien can be filed for architect's services coupled with services

> for 'inspection' and issuing certificates during construction. * * * *

The law is well settled in this State that where a statute is plain and unambiguous it is not necessary to place a construction upon it. It is only necessary to take the obvious intent of the Legislature and act in accordance therewith. State v. Keller, 137 S.W. (2d) 989; Fichtner v. Mohr, 13 S. W. (2d) 739; Cummins v. Kansas City Public Service Co. 66 S. W. (2d) 921; 36 Cyc. 1106.

From the foregoing it is seen that the Grain Warehouse Commissioner has the right under the statute to employ an instructor as part of his personnel to properly carry out the duties of his office. The only question remaining then, does the Commissioner have the right to hire a man from outside the State, as was stated in the request. We here call attention to Section 10, Article 8, Constitution of Missouri, which is as follows:

> "No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment."

In the case of State v. Truman, 64 S. W. (2d) 105, l.c. 106, the court sets out just what public office is meant to be in the following words:

> " * * * In Mechem on Public Officers, pp.1 and 2, sec. 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power,

> an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332,36 S. W. 636, 33 L. R. A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S. W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S. W. 700, 701; and it appears to be in harmony with the great weight of authority. State ex rel. Key v. Bond, 94 W. Va. 255, 118 S. E. 276, 278, 279; State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N. E. 919, 920; Bunn et al. v. People ex rel., 45 Ill. 397, 409. * * "

Judge Ellison, in the case of State v. Bode, 113 S. W. (2d) 805, l.c. 809, said as follows:

> " * * * It is our view that the Director of Conservation is not a public officer. The constitutional amendment does not fix any term of office, prescribe any duties, fix any salary, require any oath or bond, or directly vest the director with any of the indicia of office. He has no independent public duties or authority, State ex rel. Pickett v. Truman, 337 Mo. 1018, 1022, 64 S. W. 2d 105, 106 (2). Whatever he does is subject to the approval of, and as manager or director for, the commission. It is evident that the amendment contemplates the Director of Conservation shall be an expert learned in the control, management

> restoration, conservation, and regulation of the bird, fish, game, forestry, and all wild life resources of the state. Under the amendment the commission could appoint as director an expert in forestry for a brief time, discharge him, and appoint another learned in some other field. The position of director is analogous to that of the president of our State University appointed by the Board of Curators or the president of one of our State Teachers Colleges appointed by the Board of Regents. * * * * "

This statement, we believe, properly sets out the relation of the instructor who is sought to be appointed to the State Grain Warehouse Department, i.e. the instructor hired by the Grain Warehouse Commissioner is not an officer provided for by Statute with a fixed salary, official oath, bond, etc., but an employee of the Commissioner and subject to dismissal at any time. Therefore, we believe that such an instructor would not be a public officer or hold a public office as set out in Section 10, Article 6, Constitution of Missouri.

CONCLUSION

It is, therefore, the opinion of this office that the Grain Warehouse Commissioner may employ a warehouse examiner, who

is a resident of another state, in an advisory capacity to instruct men in the work of measuring the contents of public warehouses.

Respectfully submitted,

[illegible] B. [illegible]
Assistant Attorney-General

APPROVED:

[illegible]
Attorney-General

GH:FS

ROADS AND BRIDGES: Petition is not adequate to confer jurisdiction on County Court for establishment of County Road.
PUBLIC ROADS:

July 24, 1942

FILED
64

Honorable Mark Morris
Prosecuting Attorney
Bowling Green, Missouri

Dear Mr. Morris:

We are in receipt of your request for an official opinion from this office, which request reads as follows:

> "I have the following question on which we would appreciate an opinion:
>
> "Enclosed you will find copy of a petition for the location of a public road which has been presented to the county court. As you will notice this road is about one mile in length and ends at a farm house belonging to A. M. Young. Now, does the county court have to grant this petition, without discretion to do otherwise?"

We wish to supplement the request, for the purpose of this opinion, by stating that there is attached to the above request a petition for location of a public road, based on Section 8473, R. S. Mo. 1939, which petition is on a printed form and describes the road as follows:

> "* * 33 feet in width, and situated in the municipal Township of Cuivre, in the County of Pike and State of Missouri, and is of sufficiently great utility to the general public, and that the beginning courses and termination thereof, are as follows, to-wit:
>
> "Commencing in the municipal Township of Cuivre at City limits of Bowling Green running thence in a Southerly direction a distance of 80 rods thence in a westerly direction a distance of 40 rods

> thence in a southernly direction a distance of 147 rods to and terminating at the A. M. Young farm in the municipal township of Cuivre."

It is our view it will not be necessary to deal further with the contents of the petition aside from the above quoted description of the roadway.

Section 8473, R. S. Mo. 1939, provides as follows:

> "Applications for the establishment of all public roads, except state roads, shall be made by petition to the county court. Such petition shall be signed by at least twelve free holders of the municipal township or townships through which said proposed road may run, three of whom shall be of the immediate neighborhood, and shall specify the proposed beginning, course and termination thereof, and shall be accompanied by the names of all persons owning land through which said road shall run, with the amount of damages, if any, claimed by them, so far as can be ascertained, and also the names of those who are willing to give the right of way for said proposed road: Provided, that if said proposed road begins or terminates on, or runs along a boundary between the county wherein such petition is filed and an adjoining county, any or all of the petitioners herein required may be freeholders of such adjoining county, and of the municipal township or townships thereof through which said proposed road may run, or in which said proposed road may begin or terminate."

It will be noted from a reading of the above section that it is provided in part "application for the establishment of all public roads, except state roads, shall be made by petition to the county court . . . . . and shall specify the proposed beginning, course and termination thereof, * * * *" In the early case of Spurgeon v. Bartlett, 56 Mo. App. 349, l. c. 355, the court had this to say:

> "Applications to open public roads are summary in their nature, and are had with a veiw to condemn the property of the citizen for the benefit of the public. They must, therefore, be conducted in strict compliance with the statutes governing the subject. Otherwise the court obtains no jurisdiction in the first instance, and all its ulterior proceedings are void. Anderson v. Pemberton, 89 Mo. 61; Quincy, etc., Railway Co. v. Kellogg, 84 Mo. 334; Jefferson County v. Cowan, 54 Mo. 234; Whitely v. Platte County., 73 Mo. 30."

Therefore, from a statutory construction of Section 8473, as applied to the description of the proposed road, we find that it is stated that the road shall commence at the city limits of Bowling Green. Limiting ourselves for the moment, to this beginning point, we must bear in mind that Bowling Green, Missouri, is a town of some two thousand inhabitants and the city limits of said town comprise a considerable area, and each boundary line of said town would be of considerable length. The above quoted description, failing to point out a definite and certain beginning point on the city limits boundary line certainly makes the description most indefinite in determining where the beginning point of said road shall be. Further, it may be pointed out that the description says that the road shall run in a southerly and westerly direction, as these terms are very indefinite and merely describe a general course. Further, the description designates that the road shall terminate at the A. M. Young farm. It may be that the A. M. Young farm is a local appellation and would be within the knowledge of a surveyor or one endeavoring to fix the terminating point, however, the description does not designate at what place the road shall terminate on this farm. The farm may contain a considerable acreage and the terminating point could be at

various points. For that reason, it must be said that the terminating point is very indefinite and uncertain. We note in the opinion request that it states "the A. M. Young farmhouse", but we do not consider that the description is definite enough to indicate this conclusion. It is our opinion that the description set forth in the petition is so indefinite and uncertain that it does not give the county court jurisdiction over the subject matter contained in the printed petition attached to the opinion request.

To sustain our position, we call attention to the case of Williams v. Kirby, 169 Mo. 622, l. c. 628, wherein the court said:

> "The notice in the first place was jurisdictional (Railroad v. Young, 96 Mo. 39) and without it all the proceedings would have been without authority and absolutely void. And anything that was thereafter done toward condemning defendant's land for levee purposes, not in pursuance of it, or with respect to lands of defendant mot embraceddwithin its provisions, rendered the entire proceedings a nullity.
>
> "It is plain from a casual reading of the petition that it does not specify the termination of the proposed right of way. 'to a point in what is known as the Highlands, in survey 1051, section 17,' is evidently too indefinite for any purpose, and clearly does not comply with the statute which requires the termination to be specified in the petition.
>
> "No surveyor could find the terminus of it under such a description, for how could he determine from the petition the exact point in what is known as the Highlands in survey 1051, section 17, was intended under a description so indefinite. It would be impossible.

> "and it has been uniformly held by this court, in proceedings to condemn private property for public use, that unless it affirmatively appear upon the face of the proceedings that every essential prerequisite of the statute conferring the aut ority has been complied with, such proceedings will be void. (Anderson v. Pemberton, 89 Mo. 61; Whitely v. Platte County, 73 Mo. 30; Jefferson County v. Cowan, 54 Mo. 234; Zimmerman v. Snowden, 38 Mo. 218.) That the petition does not specify the terminus of the proposed right of way, is too clear for argument, and, as it must appear from the face of the record in order to confer jurisdiction on the county court in the first instance, it must follow that neither the circuit nor the Supreme Court acquired jurisdiction of the property by appeal."

The views expressed in this case, so far as we can find, have not been overruled by the courts and must be taken as the law, in determining questions as presented by the opinion request.

CONCLUSION

From the foregoing, it is the view of this department that the petition containing the description of the proposed road as set forth in this opinion, is too indefinite and uncertain to specify the proposed beginning

course and termination of such proposed road, within the meaning of Section 8473, supra, thereby rendering the petition for location of the public road void, and not conferring jurisdiction upon the County Court of Pike County over the subject matter contained in said petition.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

PENITENTIARY: Minimum sentence two years in the penitentiary.

October 28, 1942 .

11-4

FILED

64

Hon. Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of October 26, 1942, which reads as follows:

> "I would appreciate an opinion on the following question: Section 4310 Mo. R. S. 1939 reads that the punishment shall upon conviction be punished by imprisonment in a penitentiary for a term 'not exceeding' two years. Does this mean that the Court or jury can sentence one convicted to a period of only one year in a penitentiary?"

Section 4310 R. S. Missouri, 1939, referred to in your request, is one of the few penalty sections that has the peculiar wording, " * * * be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months." In most penalty sections the punishment provided is "not less than two years nor more than ___ years in the penitentiary." Where the penalty reads, "not exceeding two years in the penitentiary," it has been held to be reversible error where the court does not further say in its instructions, "not less than two years." It was so held in the case of State v. Bevins, 43 S. W. (2d) 432, pars. 6,7, where the court said:

"Since the defendant's right to have the punishment assessed by the jury is statutory, not constitutional, he takes it, of course, subject to the limitations and conditions imposed by other pertinent statutory provisions; in this instance by sections 3704,3705, and 3706. But he was entitled to have the jury correctly and fully informed as to the various punishments that might be assessed. By instructing the jury that they could assess the punishment at imprisonment in the penitentiary 'not exceeding two years' and failing further to instruct them that they could not assess such imprisonment for a less term than two years, the court misled the jury and probably induced the assessment of one year in the penitentiary, a punishment 'not authorized by law.'

"The language of instruction No. 1 regarding the punishment follows the language of the statute denouncing the offense and prescribing the punishment. But it is not always sufficient merely to use the language of a particular statute in an instruction. That may sometimes be misleading. That the instruction as given, without a further instruction to the effect that two years was the least penitentiary imprisonment that could be assessed, was misleading in this case there can be no doubt. Paraphrasing the language of this court in State v. Rose, 178 Mo. 25, 32, 76 S. W. 1003, it requires very ordinary intelligence to understand from the use

> of the words 'not exceeding two years' that any length of time of imprisonment may be fixed so that it does not exceed the time expressly designated."

Section 4850 R. S. Missouri, 1939, reads as follows:

> "Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years."

Under this section no person shall in any case be sentenced to imprisonment in the penitentiary for any term not less than two years.

It has been held by the Supreme Court of this State, that where the jury finds a defendant guilty under proper instructions as to the penalty, and assesses the punishment at one year in the penitentiary, the court may assess the proper punishment which would be two years in the penitentiary. It was so held in the case of State v. Julin, 235 S. W. 818, par. 5, where the court said:

> " * * The next question earnestly urged here by appellant is the action of the court in raising the punishment

from one year to two years in the penitentiary. The jury returned a verdict finding appellant guilty and assessing his punishment at one year in the penitentiary. Section 4049, R. S. 1919, provides as follows:

"'If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence, and render judgment according to the lowest limit prescribed by law in such case.'

"The constitutional rights of appellant were no invaded or imposed upon by the action of the court in following the plain letter of the statute. Appellant had been regularly charged with crime by a grand jury, had been arraigned, was confronted by the witnesses against him, was afforded every opportunity to make his defense, and enjoyed in the trial of the case such protection and safeguards as were vouchsafed by the Constitution, both state and federal, and this statute is but a sequence of and supplementary to section 4048, R. S. 1919, Section 3698, R. S. 1919, is as follows:

"'Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for

> any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years.'
>
> "From the foregoing it is apparent that it became the duty of the trial court to change the punishment fixed by the jury to that of the minimum punishment fixed by statute, and in doing so there was no violation of the constitutional rights of appellant. The punishment, upon conviction, of a number of offenses under our law, is fixed by the court, and not by the jury; e. g., section 3248, R. S. 1919. At the common law the verdict of the jury was guilty or not guilty, and the court fixed the punishment according to the laws in force, and the sections above quoted are not therefore in contravention of the constitutional rights of appellant and are constitutional. State v. Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; State v. Mathews, 202 Mo. 143, 100 S. W. 420."

The above case was based upon what is now Section 4094 R. S. Missouri, 1939, which permitted the court to render judgment according to the lowest limit prescribed by law in such a case where the jury assessed a punishment either by fine or imprisonment below the limit prescribed by law for the offense.

CONCLUSION

It is, therefore the opinion of this department that a person convicted cannot be sentenced to one year in the penitentiary for the reason that the minimum term is two years.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PROSECUTING ATTORNEY: It is not mandatory for county court to pay stated salary of a stenographer for the prosecuting attorney, but should reimburse prosecuting attorney for reasonable sums paid for such services incurred in the discharge of his duties.

December 4, 1942

FILED
64

Hon. Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This is in reply to your letter of November 25, 1942, which contains a request for an opinion concerning the salary of a stenographer for the prosecuting attorney of a county of eighteen thousand.

This request reads as follows:

> "Would appreciate an opinion on the following question: Would a salary of $75.00 per month for a stenographer for the Prosecuting Attorney in a County of 18000 be mandatory upon the County Court to pay? This work would naturally be for official County and State duties only."

We are enclosing an opinion given by this office on April 24, 1936, to the Honorable Forrest Smith, State Auditor, which held that the prosecuting attorney should be allowed reimbursement for necessary stenographic and clerical help from the county, in reasonable and necessary amounts. This opinion partially covers

your request. The salary of prosecuting attorneys in certain counties which include Pike County is set out in Section 12939 R. S. Missouri, 1939. We find no statutory authority which allows the prosecuting attorney to employ a stenographer at a stated salary in counties coming under this section. In counties of greater population the legislature saw fit to set out that stenographers could be employed by the prosecuting attorneys at a certain salary, but in the smaller counties the courts have interpreted the law to be that the prosecuting attorney may employ a stenographer and be reimbursed for all reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties.

Since the opinion above described, and a copy of which is enclosed, was given by this department, the Supreme Court of this State has passed definitely upon this question in the case of Rinehart v. Howell County, 153 S. W. (2d) 381. The court, in holding that the prosecuting attorney may be reimbursed for reasonable sums paid for necessary stenographic services, said, at l. c. 382,383:

> "This is an action by Homer Rinehart against Howell county, Missouri, for reimbursement of reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties as prosecuting attorney of said county. Howell county appealed from an adverse judgment for $120." (Underscoring ours.)
>
> ***\

p. 7042, Sec. 11835, p. 606, Sec. 11326, and p. 613, Sec. 11353, the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State, did not provide for like services in counties of the population of Howell county, and contends for the application of the maxim expressio unius est exclusio alterius. * * * * * *

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"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected—an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's

> protection of the interests of the state, the county and the public. See the reasoning in Ewing v. Vernon County, 216 Mo. loc. cit. 693, 116 S. W. loc. cit. 522. Consult Markreader v. Vernon County, 216 Mo. 606, 116 S. W. 523, involving reimbursement to a sheriff of expenditures for water, gas, janitor service and stamps. Buchanan v. Ralls County, 283 Mo. 10,222 S. W. 1002. Additional reasons sustaining the judgment nisi may be found in the cases cited."

Under the above holding the court did not hold that the prosecuting attorney could employ a stenographer at a definite salary and that it would be mandatory upon the county court to pay the salary. It merely held, that the prosecuting attorney should be reimbursed for all reasonable sums paid for necessary stenographic services incurred in the discharge of his official duty. Where a prosecuting attorney employs a stenographer at a definite salary, and pays her, (or him) from his own funds, it would be a question of fact whether the sum paid the stenographer was reasonable and necessary.

Where a prosecuting attorney employs a stenographer and pays the stenographer from his own funds in order that he should be reimbursed it would be necessary that he follow the law as set out in the county budget act, Section 10912 R.S. Missouri, 1939, which reads as follows:

> "It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to

> the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Under the above section, it is the duty of the prosecuting attorney who claims any payment for salary, supplies, or any other expenses for personal services,

to submit such claims, for allowances in his budget, to the county clerk on or before the 15th day of January of each year, and, unless he so submits his budget he would not be entitled to allowance for salary, supplies and other expenses. The purpose of submitting the budget to the county clerk is to prevent the county expenditures from exceeding the revenue provided for that year. In passing upon this question the Supreme Court in the case of Traub v. Buchanan County, 108 S. W. 341, said:

> "The first contention, that the budget law is invalid, because by it the legislature deprived the county court of its constitutional power to transact the business of the county and vested this power in the auditor, is without merit. The effect and intent of the budget law, as we understand it, is to compel, or at least to make it more expedient for the county courts to comply with the constitutional provision, section 12, art. 10, Mo. Constitution, which provides that a county shall not contract obligations in any one year in excess of the revenue provided for that year. The budget law leaves the transaction of business to the county courts. But the law provides (section 19, p. 350, 1933 Laws (Mo. St. Ann. Sec. 12126s, p.6434)):
>
> * * *

court not having been curtailed by the enactment of the budget law, the point made by respondent is without merit and is ruled against him."

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CONCLUSION

It is, therefore, the opinion of this department that it is not mandatory upon the county court to pay the monthly salary of a stenographer for the prosecuting attorney in a county of eighteen thousand population.

It is further the opinion of this department that the prosecuting attorney should be reimbursed for all reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties as prosecuting attorney of the county.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:R

PUBLIC PRINTING
BALLOTS:

Charge for printing ballots is limited by law.

- -

December 21, 1942

12-24

FILED
64

Honorable Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This is in reply to your letter of recent date, which is as follows:

> "Would appreciate an opinion on the following question: 'Is there a legal monetary limit on the cost of printing ballots for a general election?'"

Section 11593 R. S. Mo. 1939, which pertains to preparation of ballots for a general election, reads as follows:

> "All ballots cast in elections for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of the ballots and of the cards of instruction for the electors in each county, and the delivery of the same to the election officers, as provided in section 11598, shall be a county charge, except where the officers to be voted for are exclusively city officers, in which case such printing and delivery shall be a city charge, the payment of which shall be provided for in the same manner as the payment of other county or city expenses."

Section 14966 R. S. Mo. 1939 fixes charges for publication of public notices etc., but it does not include charges for printing ballots. In the absence of a statute fixing rates, since the clerk, under Section 11594 R. S. Mo. 1939 is required to cause to have the ballots printed and since Section 11593 R. S. Mo. 1939, provides that cost of the ballot and its delivery shall

be a public charge, then the price for the printing would be fixed by contract.

CONCLUSION

It is therefore, the conclusion of this Department that there is no statutory provision fixing the cost of printing ballots for a general election.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:AW

BRIDGE BONDS: County courts may not appropriate surplus taxes to pay bonds issued for payment of
COUNTIES PAYING FOR: toll bridges or operation of such bridges.

January 2, 1942

Mr. W. L. Mulvania
Prosecuting Attorney
Atchison County
Rockport, Missouri

FILE
65

Dear Sir:

Your opinion request of December 10th has been received and contents carefully noted. Your request, after deleting the caption, is as follows:

> "The County of Atchison has constructed and now owns and operates a toll bridge across the Missouri River, said bridge being known as the Brownville Bridge. Because of traffic conditions, it now appears to the County Court of this County that there will not be sufficient revenue derived from the tolls collected to take care of the revenue bonds and the interest thereon as the same becomes due and also pay the cost of maintaining, repairing and operating said bridge.
>
> "I am herewith enclosing a letter which was written to Mr. Carl M. Hunter, the presiding judge of the County Court of this county, by Mr. Frank W. Bowen, Vice-President of Stifel, Nicolaus & Co., Inc. of Chicago, Illinois who represent the stockholders. You will note various quotations from the Court's order in the County Court of Atchison County which deal with the question involved. You will also note a quotation of the legal conclusions reached by Charles & Trauernicht, attorneys for the above named company. I wish to call your attention specifically to the following quotation from their

opinion: 'Our attention has also been directed to Section 22 of the County Court's order under which the bonds were issued. We construe the said section to mean that the tax revenue of the County, to the extent needed for the ordinary functioning of the County government, may not be drawn on to meet the obligations of the bridge, but it is our opinion that any surplus funds of the County may be applied and, in fact, are required to be so applied by the covenant contained in Section 14 of said Order.'

"In advising with the County Court on this matter, as prosecuting attorney of this county, I have respectfully taken issue with the conclusions reached by these attorneys, but at the suggestion of the County Court I am submitting the proposition to you as to whether or not any surplus funds that may be in the county treasury, which may be in the Road And Bridge Fund or in any other fund which is derived from taxation may be applied to the "Toll Bridge Revenue Bond Interest and Sinking Fund" or to the cost of maintaining, repairing and operating said bridge.

"My opinion that such funds of the County could not be so applied was based upon Section Three of the Act relating to the acquisition, construction, ownership, operation and maintainance of Toll Bridges by counties or political or civil subdivisions of a County of the State as found in the Laws of Missouri. Extra Session 1933-34, said Act having been amended by an Act of 1941 at page 525. I find the following in Section Three as found on page 116 of the Session Acts, Extra Session 1933-34: - '... and any public body

which shall issue bonds under the provisions of this act is hereby authorized and required to make all necessary provisions for the payment of principal and interest on any such bonds by the fixing, collecting, segregating and allocating of the tolls and other revenues received from the operation of said bridge or bridges. Such public agencies enumerated above may execute liens in proper form, pledging the revenue derived from the toll of such toll bridges or parts thereof which are constructed or acquired with funds borrowed as aforesaid, to the retirement of such bonds; provided however, that no revenue bonds or any liens securing such bonds shall be repaid in whole or in part from any funds arising from taxation, nor shall any such bonds or liens given under authority of this act constitute a lien on any credit of such agency, and provided further, that at such time when all the monies borrowed as aforesaid shall have been repaid, together with interest and charges thereon, no further toll shall be charged for the use of such bridges by the travelling public.'

"I failed to see how the bond agreement or the Court's order as set forth in the letter from Mr. Bowen could reasonably be construed to mean what Charles & Trauernicht says it means, but even assuming that it does say that, it seems to me that such an agreement or such an order, in the face of the statute above mentioned, would be absolutely void and therefore the Court would have no right to apply any surplus funds derived from taxation to the payment of those revenue bonds or to the maintenance and operation from money derived from taxation, even though it may not pay any part of the bonds or the interest thereon, in the light of the sections set out in the letter of Mr. Bowen and in the light of the statute above quoted.

"Thanking you for your opinion in this matter, I remain."

There seem to be but two questions of law presented in this request. One of these is, whether a county court has the right to exceed the authority given it by statute and pay principal and interest of bonds issued for the contruction of a toll bridge, with money derived from taxation of property, when the income from the bridge itself is insufficient to take care of such indebtedness.

The other question is, whether or not the county courts would be authorized to pay the cost of maintenance and operation from monies derived from taxation, even though the bonds and the interest thereon are not paid therewith.

The County Courts in the State of Missouri were created by Article Six, Section Thirty-six of the Constitution of the State of Missouri, which section reads as follows:

"Section 36. - County Courts - In each county there shall be a county court, which shall be a court of record and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three in number, of whom the probate judge may be one, as may be provided by law."

These Courts are courts of limited and inferior jurisdiction. See St. Louis County vs. Menke, 92 S. W. 2nd 818, Ex Parte McLaughlin, 105 S. W. 2nd 1020, Missouri Digest "Courts" key number 33. They are of statutory origin and have no common law or equitable jurisdiction. State ex rel. v. Johnson, 138 Mo. A. 306, 121 S. W. 780; State ex rel. v. Jackson, 299 Mo. A. 842, 84 S. W. 2nd 988. Therefore, any power which they have, of a necessity, must be conferred upon them by the legislature and they

must proceed in the manner set out by statute as stated in State ex rel. Kelley v. Trimble, 247 S. W. 187, 297 Mo. 104, 247 S. W. 1009, which says:

> "Local courts, those of limited jurisdiction, and inferior courts, not proceeding according to the court of the common law, are confined strictly to the authority given, and the records of such courts must show the existence of all facts necessary to give jurisdiction, both of the subject matter and the parties to the action."

The statute which gives county courts the right to issue the type of bonds in question is Section 8549, R. S. Mo. 1939, a part of which was set out in your letter cited above. This section is a special statute, in a way, which deals with only one power of the county courts which is that of constructing toll bridges and providing ways and means of financing such undertakings. However, this section also has the following exception:

> " --- Provided however, that no revenue bonds or any liens securing such bonds shall be repaid in whole or in part from any funds arising from taxation."

In other words, the statute not only refrains from giving the courts power to divert tax funds, but specifically restrains the various county courts from diverting such funds for the purposes aforesaid.

Attached to your letter was a letter from Stifel, Nicolaus & Co., which called attention to Section 14 of the County Court's order which was as follows: "The County of Atchison further covenants with each of the purchasers and owners of any of said bonds, at any time

outstanding, that if the revenue of the Bridge should at any time prove insufficient to pay the cost of operating, maintaining and repairing the Bridge, in addition to maintaining the said 'Toll Bridge Revenue Bond Interest and Sinking Fund,' then the county to the extent of such deficiency, will pay such operation maintainance and repairing costs from moneys received from sources other than the operation of the Bridge.' As can be seen from the authorities and statutes cited above, the County Court of Atchison County has attempted to do what the statute plainly provides that it cannot do. They have undoubtedly exceeded the authority granted them by the legislature and in view of the fact that they have no common law powers, it is the opinion of this department that any agreement whereby the County Court attempts to pay the Bridge bonds and interest on such bonds from any funds derived from taxation is void.

In the letter attached to your request, we notice an item from Charles & Trauernicht, which is as follows: "Our attention has also been directed to Section 22 of the Court Court order under which the bonds were issued. We construe the said section to mean that tax revenues of the county to the extent needed for the ordinary functioning of the County Government may not be drawn upon to meet the obligations of the Bridge, but it is our opinion that any surplus funds of the County may be so applied, and, in fact, are required to be so applied, by the covenant contained in Section 14 of said order." There were no authorities cited to sustain this view, and we have been unable to find any law to substantiate this position.

Now as to the second question, to wit, Whether the County would be authorized in paying the cost of maintaining and operating the Bridge with monies derived from taxation. It seems that the intention of the legislature, when it enacted Section 8548, R. S. Mo. 1939, was very clear. It empowered a county to construct a toll bridge and to obtain money for that purpose. However, as can be seen from a careful reading of the section of the statutes aforesaid, the General Assembly did not intend for bridges constructed

under this statute, to be a constant liability and drain on the funds obtained from taxation in the county. This department can see no reason why, if the bonds and interest cannot be paid from the taxation funds, that the maintenance and operation of the Bridge should be.

All persons dealing with a county court are presumed to have knowledge and notice of the limitation of its powers, and therefore the purchasers of the bridge bonds bought them with a knowledge of the limitation of the counties' authority to pay the bonds in any way other than that prescribed by law.

> "The County Court, in making contracts, is the agent of the county, with express, limited and defined powers, and anyone contracting with it must take notice of its authority." Bauer v. Franklin County, 51 Mo. 205; Sturgeon v. Hampton, 88 Mo. 203.

CONCLUSION

In view of the authorities cited above, it is the opinion of this department that no money derived from taxation in any county can be used for the purpose of paying toll bridge bonds or the interest on such bonds, or for the purpose of operating, repairing or maintaining a toll bridge.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

Cities of the Third Class:
Vacancies in Council:

Mode of filling vacancy in council of city of third class.

February 16, 1942

2-73

FILE
65

Hon. Fred E. Mueller
Associate Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Mueller:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the following statement of facts:

> "A question has arisen in this County relative to a situation which exists in the City of Maplewood. The City of Maplewood has a population of more than 12,000 and less than 20,000 inhabitants and is incorporated under the alternative form of government as a City of the Third Class and is governed by a council consisting of the Mayor and three councilmen. Recently one of the councilmen died and the remaining members are desirous of filling the vacancy by the appointment of some person to serve during the balance of the unexpired term.
>
> "The situation requires an interpretation of Sections 7059 and 7061 of the Revised Statutes of Missouri, 1939, as to whether it will require a vote of three members of the council to appoint the new councilman or whether a majority which consists of two members can fill the vacancy by their vote."

That part of Section 7059, which refers to your question, is as follows:

"In every such city there shall be elected at the first regular municipal election held after the taking effect of this section, and every four years thereafter, a mayor and two councilmen in cities having a population of three thousand and less than twelve thousand, and a mayor and three councilmen in cities having a population of twelve thousand and less than twenty thousand, and a mayor and four councilmen in cities having a population oftwenty thousand and less than thirty thousand. If any vacancy occurs in such office, the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term.* * * *"

That part of section 7061, which refers to your question is as follows:

Optional form 3rd Class

"Every city having a population of twenty thousand and less than thirty thousand shall be governed by a council consisting of the mayor and four councilmen, and every city having a population of twelve thousand and less than twenty thousand shall be governed by a council consisting of the mayor and three councilmen, and every city having a population of three thousand and less than twelve thousand shall be governed by a council consisting of the mayor and two councilmen, chosen as provided in this article, each of whom shall have the right to vote on all questions coming before the council. In cities having four councilmen, three members of the council shall constitute a quorum, and in cities having three councilmen three members shall constitute a quorum, and in cities having two councilmen two members of the council shall constitute a quorum, and in cities having four councilmen the affirmative vote of three members, and in cities having three councilmen the affirmative vote of three members, and in cities having two councilmen the affirmative vote of two members of the council shall be nec-

> essary to adopt any motion, resolution or ordinance, or pass any measure unless a greater number is provided for in this article.* * * *"

This Section appears to require three members of the council in cities of the class of Maplewood, which is a third class city to constitute a quorum and the affirmative vote of such three members of the council is required to adopt any motion, resolution or ordinance, unless a greater number is required by the article.

Said section 7059 provides that appointment to fill a vacancy shall be made by the remaining members of the council. This would mean that two councilmen in such city could fill a vacancy. The two sections may seem to be in conflict, because one provides that two members may fill a vacancy on a council in such cities, while the other requires three members to be present to constitute a quorum and the affirmative vote of all three of them shall be necessary to pass a motion, resolution or ordinance.

The following rule of statutory construction should be applied here. State v. Wipke 133 S. W. (2d) 354, 356:

> "It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent."

Applying this rule, here we must give both of these sections some meaning if possible.

In the case of Johnson v. Kruckemeyer et al., 29 S.W. (2d) 730, 732, the court in construing two sections of the Workmen's Compensation Act, which might appear to be somewhat in conflict said:

> "Nothing in subsection (j) militates against this view, but, if anything, it adds to the force of the conclusion which we have reached. As we read them, the two sections are not contradictory, and, in so far as they deal with different features of the same general

subject-matter, it is our duty to read them together, and to harmonize them if possible."

These rules are quite applicable here because we think both of the sections under consideration deal with the same subject matter, that is with cities of a certain class; but the sections, each, refer to different phases of this one subject.

Said Section 7059, deals with the subject of the election of the mayor and councilmen and the filling of a vacancy thereon, in such cities. This might be termed as a special statute pertaining to such cities.

Section 7061 might be termed as a general statute dealing with the governing of such cities. It will be noted that this section refers to the passage of motions, resolutions and ordinances and requires the vote of three members of the council of such cities to pass the measure.

In the case of Tevis et al. v. Foley 30 S. W. (2d) 68, the court in discussing the rule of construction of special and general statutes, said at l. c. 69 paragraph three to five:

"Appellant contends that section 10629, Rev. St. 1919, which respondents invoke as authority for dismissing the appeal in this case, did not take away the right of appeal guaranteed by the general statute governing appeals. This general statute, among other things, provides that any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution, may take his appeal to a court having appellate jurisdiction. Section 1469 R. S. 1919.

"Section 1469 is a general statute, and deals with the right of appeal in comprehensive terms, while section 10629 is a later and special statute and deals with the question of appeal in certain specified cases of which the case at bar is one. In this situation the rule of construction is that, 'where there is one statute dealing with a subject in general and comprehensive

> terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'"

Applying these rules of construction to the set of facts which you have submitted, we think the provisions of said section 7059 would be applicable to the appointment of a councilman to fill a vacancy in such cities.

CONCLUSION

It is therefore the opinion of this department that when a vacancy occurs in the office of councilman on the city council in cities of the third class, operating under a special charter and containing a population between twelve thousand and twenty thousand, then such vacancy shall be filled by appointment made by the remaining members of the council.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

TOLL BRIDGES: All expenses of toll bridges are to be paid from money received from the tolls on such bridges.

July 11, 1942.

7-13

FILED
65

Hon. W. L. Mulvania
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

The Attorney-General hereby acknowledges receipt of your letter of July 8, 1942, requesting an opinion from this Department. Such request is as follows:

> "You will recall that on January 2, 1942 you rendered an opinion to me relative to the operation and maintenance of the Brownville Bridge which involved the question of whether or not the county court would be authorized to pay the cost of maintenance and operation from monies derived from taxation, even though the bonds and interest thereon are not paid therewith. Your conclusion was that no money derived from taxation in any county can be used for the purpose of paying toll bridge bonds or the interest on such bonds or for the purpose of operating, repairing or maintaining a toll bridge.
>
> "After taking this matter up with Mr. Trauernicht, who is representing Stifel, Nicolaus & Co., the bonding company, it appears that he has finally come to the same conclusion. But it is now his contention that under the Court Order, which provides that the cost of maintenance and operation of the bridge may be paid out of funds or revenues coming to the county other than from taxation, if

the revenue from the tolls are insufficient to pay both the interest and sinking fund on the bonds as well as the operation, and maintenance, that all fees and fines deposited with the county treasurer should be so applied. This would include fees from the office of the County Recorder, Circuit Clerk, Prosecuting Attorney, Justices of the Peace, etc. Because of the present conditions the revenue from the bridge is entirely insufficient to pay the cost of operating, maintaining and repairing the bridge, in addition to maintaining the Toll Bridge Revenue Bond Interest and Sinking Fund.

"The question therefore arises whether the county has the authority to make an order pledging these sources of revenue such as fees and fines to the payment of the operation and maintenance of the bridge from the fees derived from the various county offices.

"It is my view that it certainly cannot be paid out of Class 1, 2 or 3 under the county budget law. If it could be paid from any class it would have to be from Class 4, it seems to me. This class provides: 'The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.' Laws 1941, page 650.

"If it is to be paid out of Class 4 then that amount which is derived from fees and not from taxation, or so much as is necessary to

pay for the operation of the bridge would have to be allocated and set apart for that purpose so that no tax money would be used out of that Class.

"I would appreciate it very much if you would give me your opinion as to whether or not this can be done or whether the cost of operation and maintenance must be paid solely from the revenue derived from the tolls of the bridge."

The Toll Bridge apparently was constructed under and by virtue of Article 4, Chapter 46, of the Revised Statutes of Missouri, 1939. Such being the case, the manner in which the bridge is to be paid for and the manner in which it is to be operated and maintained is set out in Section 8548, R. S. Mo. 1939, which section provides as follows:

"In order to secure funds for the purpose of acquiring, constructing, owning and operating, improving or extending, and maintaining toll bridges, and approaches thereto, all public agencies named in the preceding section may issue negotiable toll bridge revenue bonds and sell such bonds to the United States Government, or any authorized agency thereof, or other investor or investors. In the event of the issuance and sale of bonds authorized by this act by a public agency, such agency shall charge a reasonable toll for the use of any such toll bridge, the amount of which toll shall be sufficient to pay the reasonable cost of maintaining, repairing and operating such bridge and to provide a sinking fund sufficient to amortize and repay any such loan, including interest and financing cost, on such dates and within such period of time as may be agreed upon between the borrower and the original purchaser of such revenue bonds, and said tolls shall be used for no other purpose; and any public body which shall issue bonds under the provisions of this act is hereby authorized

> and required to make all necessary provisions for the payment of principal and interest on any such bonds by the fixing, collecting, segregating, and allocating of the tolls and other revenues received from the operation of said bridge or bridges. Such public agencies enumerated above may execute liens in proper form, pledging the revenue derived from the toll from such toll bridges or parts thereof which are constructed or acquired with funds borrowed as aforesaid, to the retirement of such bonds: Provided, however, that no revenue bonds or any liens securing such bonds shall be repaid in whole or in part from any funds arising from taxation, nor shall any such bonds or liens, given under authority of this act constitute a lien on any other property of any such public agency or a pledge of the credit of such agency; and provided further, that at such time when all moneys borrowed as aforesaid shall have been repaid, together with interest and charges thereon, no further toll shall be charged for the use of such bridges by the traveling public. Such bonds may be made negotiable, may bear interest not to exceed 6 per cent per annum, and may mature annually or semi-annually, and may be sold at such time and in such manner as the issuing authority may determine upon."

As can be seen from a study of this section, the county court may charge a toll for the use of this bridge in such an amount as to take care of the operation, maintenance and repair of such bridge and to provide a sinking fund for the purpose of repaying the loan, interest and financing costs. It further provides that the county court is required to make all provisions for the payment on principal and interest on any such bonds by the fixing, collecting, segregating and allocating of the tolls and other revenues received from the operation of said bridge or bridges. It is further provided that no bonds given under the authority of the act shall constitute a lien on any other property of any such public agency or a pledge of the credit of such agency.

From the wording and provisions of the above statute it is apparent what the intention of the Legislature was. They intended that the counties, and other bodies in which for the purpose of this opinion we are not interested, were to have the authority to build a bridge such as the one in question, but they were to pay for such bridge in a certain manner. This manner was to be one which was in no instance to be a burden upon the county and which was, that it was to be paid for, both in construction, maintenance, repair and operation, from the revenue derived from the tolls on such bridge.

We believe that when the Legislature set up a specific manner in which the expenses of the Brownville Bridge were to be paid as was done in Section 8548, supra, that they had in mind an old legal maxim with which many of us are familiar. This maxim is "Expressio Unius Est Exclusio Alterius," which translated means "the expression of one thing is the exclusion of another." In other words, they have set up a specific procedure in this matter, which excludes any other.

In speaking of the liability of a public body in a matter of this kind, the Supreme Court of Missouri in State v. Smith, 74 S. W. (2d) 367, l. c. 371, said:

> "We have consistently ruled that bonds or other forms of obligation issued by cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations, do not constitute debts of the particular political subdivision or public agency issuing them within the definition of 'debt' as used in the constitutional provisions of this state."

We do not feel that the county has any authority to make an order pledging the fees and fines deposited with the treasurer, for the payment of any of the indebtedness or upkeep of the Brownville Bridge.

Conclusion

Therefore, it is the opinion of this department that the County Court of Atchison County does not have the authority to make an order pledging the fees and fines to be deposited with the Treasurer of the county, to the payment of any indebtedness of the Brownville Bridge. We do not, in the light of the statute cited above, deem it necessary to discuss the proposition of the fees and fines being earmarked for other purposes, since the statute seems to be very plain and unambiguous.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

JSP:EG

CRIMINAL COSTS: Parole is not a part of the case in reference to payment of criminal costs.

PAROLES:

July 13, 1942

1-14

FILED
65

Hon. W. L. Mulvania
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 9, 1942, which reads as follows:

> "In the case of State vs. Basil C. Strong there was a conviction in this county on a charge of theft of a motor vehicle. The defendant was placed on parole after the sentence. The original fee bill was submitted to Atchison County, Missouri for payment on Jan. 22nd, 1940. When the parolee was to answer his parole at the February, 1941 term of the circuit court, information was given the court that the terms of defendant's parole had been broken. On this information the Court ordered a subpoena issued for 'Louis Stalcup, the Nightwatchman of the City of Mound City, Missouri, and for the day marshal for the city of Mound City, Missouri and for the deputy sheriff.' In response to this subpoena Mr. Hogan, Mr. Nauman and Louis Stalcup did appear in the Circuit Court as commanded. All the costs as allowed by the County Court under the original fee Bill were paid by the county to the county treasurer in February, 1940. A supplemental cost bill has been presented to the county court for payment of the fees of

the witnesses who appeared in response to the above subpoena.

"The question therefore arises as to whether the county Court has a right to pay these costs which were incurred after the conviction and sentence of the defendant and which related to evidence bearing upon the question of the revocation of his parole. I would appreciate very much having your opinion upon this question."

The costs sections applicable to your request are Sections 4222 and 4225 R. S. Missouri, 1939.

Section 4222, supra, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 4225, supra, reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

In the case of State ex rel Browning v. Kelly, 274 S. W. 731, l. c. 733, pars. 4,5, the court said:

> "* * * The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. * * * * * * * * * * * "

In the opinion in the above case it was definitely held that the parole proceeding is not incident in any way to the conviction or sentence in the case. Even if the parole proceeding was a part of the criminal case under Section 4232 R. S. Missouri, 1939, the officers mentioned in your request are not entitled to any fees if within five miles from the place of the hearing.

In the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, pars. 5-8, the court said:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Bader v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Also, in the same case, at par. 16, the court said:

> "The rule is stated in 15 C. J. 509, Sec. 176, as follows: 'Money paid to a county officer to which he is not entitled by law may be recovered back, without previous demand, in an action for money had and received instituted by the county.'"

We find no statutory authority for the payment of witness fees and mileage in the case of a parole hearing.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the parole hearing is not a part of the case proper.

It is further the opinion of this department that the statute does not allow the county or State to pay witness fees and mileage to witnesses summoned to a parole hearing.

It is, therefore, our opinion that the officers mentioned in your request should not be paid witness fees and mileage under a supplemental cost bill presented to the county court and if paid by the county through a mistake could be recovered from the witnesses by the proper action.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

WJB:RW

COUNTY TREASURER: If treasurer appoints wife deputy or clerk he forfeits his office.

November 30, 1942

11-30

FILED
65

Honorable W. L. Mulvania
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

Under date of November 20, 1942, you wrote this office requesting an opinion as follows:

"At the November election Mr. Rolla Cook was elected to the office of county Treasurer. The present incumbent is Mr. R. O. Bartholomew. At the present time Mr. Cook is engaged in the military services of the United States of America and has been so engaged since about the month of June, 1942.

"I have been requested to ask you for the opinion as to whether the office would be considered vacant in the event that he came back here long enough to qualify but was obligated to return to his camp immediately thereafter. There is the further question of whether the place might be filled by a clerk, since there is no provision in the statute for a deputy in a county of this size. It is my understanding that his wife would like to carry on the duties of the office as a clerk if she would be authorized to do so under the law. If she was paid by him out of his salary would this be in violation of the nepotism law.

"Both the incumbent and Mr. Cook, the treasurer-elect would appreciate having

your opinion on these questions."

As we informed you in our letter acknowledging receipt of your request, we are not in position to rule upon the question of whether or not a vacancy would exist in the office of county treasurer due to the drafting into the Army of the elected treasurer. However, the other question contained in your request can be answered at this time.

The county treasurer is an officer of the county elected under the provisions of Section 13791 and 13792, R. S. Mo., 1939. The county treasurer is a ministerial officer. State ex rel v. Adams, 101 M. A. L. C. 472. Being a ministerial officer the treasurer would have the authority to appoint a deputy even though there is no statute authorizing the appointment of a deputy. Small v. Field, 102 Mo. 104, State ex rel v. Reber, 226 Mo. 229.

The nepotism law referred to in your letter is Section 13, Article 14 of the Constitution; and in the case of State ex inf. Norman v. Ellis, 28 S. W. (2d) 363, this section of the constitution was held to be self-enforcing. In the same case at l.c. 367 and following a wife was held to be a relative as the term is used in Section 13, Article 14 of the Constitution. The following quotation is a portion of the Court's discussion of the status of a wife:

"The entire trend of recent legislation, the recent interpretation of the relation of husband and wife, is to make

them different persons, each having individual rights independent of the other; each responsible for his or her conduct, independent of the other. The old fiction of oneness in a legal sense has been entirely abrogated by the statutes and by judicial interpretation. The only reason for saying that a man is not related to his wife has disappeared. With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails. When the reason for a definition of a legal term ceases, the definition is obsolete. Since at common law the reason a man was not related to his wife was because his wife had no separate legal existence, and since, under modern interpretations and modern statutes, she has come into existence, and at law she is as distinct an individual as he is, then the fiction of no relationship vanishes. She is related to him by affinity by reason of the engagement before the marriage, and that relationship of affinity continues after the marriage. The absurd fiction that he could not be related to her but is related to her blood kin by marriage disappears entirely.

"It is suggested that in using common-law terms, lawmakers are presumed to use them in their common-law significance, and intend to have them applied as understood at common law. There is another rule superior to that, which is that the <u>intention</u> of the lawmakers and Constitution makers must be gathered when interpreting an act or a constitutional provision. Lawmakers and the people adopting

> a constitutional provision, have a right to put an interpretation on the words they use which meets their intention. They can define their language as they please and, if they see fit, can give a common-law phrase or word a meaning entirely contrary to its ancient usage. This the Legislature has done in section 6632, Rev. St. 1919, and the Constitutional Convention of 1924, and the people have done in adopting section 13, article 14. The debates in the Constitutional Convention show that it was intended to apply to wives of officials, and as a matter of common knowledge the voters in 1924 so understood it.
>
> "These respondents, having the opinion of the Attorney General upon which to proceed, are not to be blamed morally for appointing their wives as their deputies. Nevertheless they have forfeited their offices, and therefore ouster is ordered in each case."

Counties are political subdivisions of the State. Barton County v. Walser, 47 Mo. 189. A county treasurer is a public officer of a political subdivision elected by the people and having power to appoint a deputy or an assistant. Any person appointed by the treasurer to assist him in the performance of his duties, he would appoint by virtue of his office or employment.

CONCLUSION

It is the conclusion of this office that a county treasurer who would appoint his wife a deputy and leave to the wife as deputy the operation and management of the office of county treasurer would be violating provisions of Section 13, Article 14 of the Constitution and would thereby forfeit his office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

SCHOOLS: District of child's residence is liable for tuition, under Sec. 10458, R. S. Mo. 1939, but "residence" is a question of fact.

November 19, 1942

11-30

FILED
66

Mr. N. L. Newton, Secretary
Board of Education
California, Missouri

Dear Sir:

We have your letter of recent date, in which you submit the following for an opinion:

> "Recently we had before our Board of Education, a question involving the responsibility for payment of tuition. We would like your opinion on the matter.
>
> "Briefly, the case is this. A non-resident student attended our school one month. This student was from District No. 41 and resided with his parents who lived in that district during the month. The parents of this student then moved to St. Louis and the student transferred his place of residence to District No. 25, where he is living with friends and plans to remain the rest of the school year. District No. 41 tendered us one month's tuition, claiming their responsibility ended when the student moved from their district into District No. 25, and that henceforth District No. 25 is responsible for the payment of the student's tuition.
>
> "Who, in your opinion, is responsible for the tuition due us?"

The facts stated in your letter are not sufficient to determine definitely the answer to your question. You will see from the law hereafter quoted that the circumstances and facts surrounding the present stay of the pupil in District No. 25 largely determine the answer to your question. However, we will undertake to outline the rules by which you may make the determination when you have all of the facts in your possession.

Section 10458, R. S. Missouri, 1939, reads in part as follows:

> "The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; * * * * *"

It will be observed that the only tuition for which a district is liable is the tuition of a pupil who is a resident of that district. From the facts set out in your letter, the pupil in question was a resident of District No. 41 for one month of the school year, and that district would consequently be liable for the tuition of such pupil for that period. However, there is nothing in your letter which would indicate that said pupil has since said first month been a resident of District No. 41. Neither the pupil nor his parents reside in said district, and consequently there would be no theory upon which it could be said that the pupil in question is now a resident of District No. 41. Since the pupil is not a resident of such district, the district would not be liable for his tuition.

If either of the districts in question is liable for the tuition of the pupil, it would be District No. 25. Whether said district is liable for such tuition will depend largely upon the facts surrounding the stay of such pupil in said district.

The determination of residence is always a troublesome problem. "Residence" is a flexible term, the meaning of which is to be determined from the context of the language wherein it is found.

In the case of State ex rel. v. Clymer, 164 Mo. App. 671, the court discussed at some length what constituted sufficient residence of a child within a school district which would entitle him to attend such school. The court pointed out that the policy of the state was to furnish free education for all children of school age, and that the construction of any statute regarding the requirements as to residence of such children should be liberally construed. In that case a child was residing in one district, while its parents did not reside there. In the course of the opinion the court, in referring to a former case, said, l. c. 677:

> " * * In passing on the case, Judge Thompson held the word 'resident' used in the statute, was to be distinquished from the word 'domicile,' and without the proviso in the statute, if the child had gone to live with the grandmother without any expectation of returning to its parental residence while the grandmother lived, or while the child remained unmarried, and not merely for the purpose of acquiring the privilege of a better school than existed at the domicile of the parent, she might be a resident of the grandmother's school district, although the father resided elsewhere. * * * * "

In the case being considered by the court in the foregoing case the child resided with his grandparents in one district, while the parents of the child resided at another

place in the state and in another school district. In discussing those facts, the court said, l. c. 678:

> " * * * The boy, to all intents and purposes, was a resident of the school district, although his domicile may have been at Springfield. He was living in the district as a member of the relator's family, and under an agreement made with his father by which the relator had agreed to take, care for, and educate him. It was not a contract made for the sole purpose of permitting him to attend the Steelville school. The grandparent was aged, and the boy had lived with him a part of the time for more than five years, and undoubtedly there existed between them a degree of affection perhaps equally as strong as that between father and son. The common experience of mankind proves the truth of this statement, and therefore, it needed the testimony of no witness to establish it. But the grandfather did testify that he liked the boy and wanted him to live with him, and it was satisfactory with the father and the son also. There is no claim that the contract was not made in good faith, or that it was not being strictly performed by all parties thereto. The fact that it was not in writing was a matter that the parties alone were concerned about, and no stranger could set it aside or take advantage of the failure to observe formality in its execution."

In the course of the opinion the Missouri court referred to and discussed cases from other states, and we believe that the opinion of the Missouri court laid down the rule that if a pupil were in a school district for the bona fide purpose of remaining there indefinitely, and not for the mere purpose of obtaining the benefits which might be

his by reason of being in that district, such child would be a "resident" of such district within the meaning of the school law. Whether such child is in the district under circumstances as would entitle him to be classed as a resident of that district for school purposes will have to be determined from the facts surrounding that particular child.

CONCLUSION

It is, therefore, the opinion of this office that a school district in which a child has been residing but from which it and also its parents have removed, is not liable under Section 10458, R. S. Missouri, 1939, for the tuition of such child.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

JUSTICES OF THE PEACE: Beginning and ending of term.

- -

November 10, 1942

11-16

FILED
67

Hon. Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this Department, as follows:

> "The question is, whether justices of the peace serve four years or until their successors are duly elected and qualified, or whether they serve four years and until their successors are duly elected and qualified."

Section 5 of Article XIV of the Missouri Constitution, which relates to terms of officers, is as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Section 2525 R. S. Mo. 1939 provides for the election of justices of the peace in 1882 and that such justices shall hold the office for four years or until their successors are elected, commissioned and qualified.

Section 2530 R. S. Mo. 1939 provides that the justices of the peace are to be commissioned by the county court; that they hold the office for four years and until their

successors are elected and qualified.

Under Section 2531 when the county court has determined who has been elected as a justice of the peace it is the duty of the county court to immediately cause to be made out and delivered to the elected person the certificate of election.

Under Section 2532 if the justice of the peace does not qualify within twenty days after having received this certificate of election then the certificate is void.

Under Section 2534 it is the duty of the justice, after having received the certificate of election and within thirty days thereafter, before entering upon the discharge of his duties, to cause the certificate, with his oath endorsed thereon, to be recorded in the office of the clerk of the county court.

By Section 2537 the justice cannot begin to perform his official duties until his commission has been recorded.

By these sections it will be seen that the lawmakers have clearly provided that the justice of the peace shall begin his duties when he has received the certificate of election, taken the oath prescribed thereon, and has recorded the same.

While Section 2530 does indicate that the justice may hold his office for four years, yet, reading these other sections in connection with this section, there might be cases in which he would not hold his office for four years because his successor complied with the provisions of Sections 2525 to 2537, a few days sooner than did the incumbent. Since the law provides for certain numbers of justices of the peace in certain townships, then it would naturally follow that the qualification of the newly elected justice of the peace, would automatically end the term of the incumbent.

The provisions of Section 2525, supra, were before the Supreme Court in the case of The State ex rel. The Attorney-General v. Ranson, 73 Mo. 78. In that case the court went into the history of that section and the constitutional provisions hereinbefore referred to, were considered at l. c. 91, where the court made this statement:

> "The first question is, what constitutes, under the law, the official term of justices of the peace? The statute in force now and when respondent was elected and qualified, provides that: 'Justices of the peace are to be commissioned by the county court, and shall hold their office for four years, and until their successors are elected and qualified.' The constitution of the State--5th section, 14th article--declares that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' The stipulation of the parties shows that at the November election in 1876, the respondent was duly elected, commissioned and qualified as a justice of the peace within and for Kaw township, in Jackson county, Missouri, for the period of four years, and until his successor was duly elected or appointed and qualified. * * *"

In that case the justice of the peace received his commission and qualification on November 10th, after the general election. It appears that the construction which has been placed on the statutes applicable to justices of the peace in relation to the beginning of the term is that the term begins when the justice receives his commission and qualifies as directed by the foregoing statutes. Under the construction placed on this statute by the court in the case of Gage v. Vail, 73 Mo. 454, the term of the incumbent expires on the date that the successor is elected. At l. c. 455 the court, in speaking of judicial functions performed by the incumbent after his successor had been elected and qualified, said:

> "* * * The judicial functions of G. W. Lewis ceased when his successor was elected and qualified, and conceding that

> he made the entry of the judgment on his docket, it was more than six weeks after he had ceased to be a justice of the peace, and the judgment, therefore, has no validity whatever.
> *"

CONCLUSION

It is, therefore, the opinion of this Department that a justice of the peace serves until his successor is elected and qualified; that a justice of the peace is elected for a term of four years, but that if his successor is elected at the time prescribed by statute at the end of his term and qualifies at a time short of the full four year period to which the incumbent was elected, then the incumbent's term ends on the date that his successor qualifies.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SCHOOLS: Pupils residing on land owned by United States entitled to all school privileges.

December 11, 1942

12-15

FILED
67

Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

Under date of December 1, 1942, you wrote this office requesting an opinion as follows:

"The School District of the City of St. Charles, Missouri, and a common school district in St. Charles County have submitted to me a question with the request that I obtain an answer from your office.

"The common school district involved does not maintain a high school and pupils resident therein attend the high school maintained by the School District of the City of St. Charles and the directors of the common school district pay tuition for such students, all as provided in Section 10458 of the Revised Statutes of Missouri for 1939.

"There is in the common school district, however, certain land which is owned by the federal government by reason of having been taken through condemnation proceedings for purposes of maintaining flood control on the Mississippi River. A family lives upon some of these federal lands and the directors of the common school district do not feel that they should pay tuition for pupils of such a household on the theory that the Government's taking such

lands within the district took the lands out of the district and that therefore, Section 10458 would no longer apply. The School District of the City of St. Charles, on the other hand, feels that the federal land is within the common school district and while it may not be taxable, the directors of the district are bound by Section 10458, supra, as regards pupils living on such federal lands. I would appreciate your opinion on whether or not the directors of the common school district are required under Section 10458 to pay tuition for the pupil living on federal lands within the common school district. I have looked through the statutes and annotations but have been able to find nothing that can persuade me to the view the directors of the common school district take. If, however, you can give us information to that effect we would very much appreciate it."

Your attention is directed to Section 1, Article XI of the Constitution of Missouri:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Pursuant to the direction in the above section of the Constitution all of the school laws have been enacted. Section 10345 directs the enumeration of persons of school age and is in part as follows:

> "The board of directors of each district shall, between the thirtieth day of April and the fifteenth day of May of each year take, or cause to be taken, and forwarded to the County Superintendent of Schools an enumeration of the names of all persons over six and under twenty years of age resident within the district, designating male and female, white and colored, and age of each, together with the full name of the parent or guardian of each child enumerated;
> * * * * * "

and Section 10458 furnishes the authority for sending pupils from districts which do not maintain high schools to districts maintaining high schools at the expense of the district. In the case of State ex rel Burnett v. School District, 335 Mo. 803, the Supreme Court ruled the duty of paying the tuition was squarely upon the sending district, and the pupils could not be made to pay tuition.

There is no distinction made by these sections of the statutes and Section 1 of Article XI of the Constitution between persons of school age who reside on tax-exempt land and those who reside on tax-paying land.

The rule is announced in the case of State ex rel v. Clymer, 164 M. A. 671, that statutes relating to attendance in schools should be liberally construed in order to open the doors of the schools to pupils and not to close them. It has further been held that the word, "residence" as used in the school laws is not synonymous with domicile, that it means merely place of abode, State ex rel v. Smith, 64 M. A. 613, and this rule was approved in State ex rel Logan et al v. Shouse et al, 257 S. W. 827.

From the foregoing it would appear that any child of school age who has his place of abode within a school district which does not maintain a high school would be entitled to attend a high school in some district maintaining a high school at the expense of the district in which the child resides. This, of course, would not be true if the child was moved into the district temporarily solely for the purpose of attending school.

It remains for us to determine whether or not a child residing on land within a school district which is exempt from taxation should be considered as residing within the district. Land owned by the United States is exempt from taxation. Section 10937 R. S. Mo., 1939.

By the authority of the seventeenth clause of Section 8, Article I of the Constitution of the United States, the federal government may exercise exclusive legislative power over all lands acquired for the construction of forts, arsenals, magazines, dockyards and other needful buildings when the land is acquired with the consent of the state within which it is located and sovereignty is ceded by the state. The General Assembly of Missouri has sought to give consent of the State to the acquiring of lands by the United States for certain purposes. Section 12691 R. S. Mo., 1939:

> "The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government of-

> fices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

and by Section 12693 R. S. Mo., 1939, is reserved to the State of Missouri certain elements of sovereignty:

> "The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in section 12691 is hereby granted and ceded to the United States so long as the United States shall own said land: Provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon."

There has always been a distinction between land acquired by the United States by purchase and that acquired by condemnation. An excellent discussion of this distinction is found in James v. Dravo Contracting Co., 302 U. S. 134, 58 S. C. R. 208, 215:

> " * * * * * The right of eminent domain inheres in the federal government by virtue of its sovereignty, and thus it may, regardless of the wishes either of the owners or of the states, acquire the lands which it needs within their borders. Kohl v. United States, 91 U. S. 367, 371,372, 23 L. Ed. 449. In that event, as in cases of acquisition by purchase without consent of the state, jurisdiction is dependent upon cession by the state, and the state may qualify its cession by reservations not inconsistent with the governmental uses.

> Story on the Constitution, volume 2, section 1227; Kohl v. United States, supra, 91 U. S. 367, at page 374, 23 L. Ed. 449; Fort Leavenworth R. R. Co. v. Lowe, supra; Surplus Trading Company v. Cook, supra; United States v. Unzeuta, supra. The result to the federal government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits, but obligations, and it may be highly desirable, in the interest both of the national government and of the state, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the state jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the states are acquired. • There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the state be compelled to grant it in giving its consent to purchases."

The Congress of the United States has recognized the distinction between lands acquired for flood control purposes and those acquired for other purposes by the enactment of Section 701 C.-3, Tit. 33, U. S. C. A.:

> "25 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of the leas-

ing of lands acquired by the United States for flood control purposes shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such property is situated: Provided, That when such property is situated in more than one State or county the distributive share to each from the proceeds of such property shall be proportional to its area therein."

Following this federal act the General Assembly of Missouri has enacted Sections 12695 and 12696 R. S. Mo., 1939, which sections are respectively as follows:

"All sums of money heretofore received or that may hereafter be received from the United States under an act of Congress, approved May twenty-three, nineteen hundred eight, being an act providing for the payment to the states of twenty-five per centum of all money received from the national forest reserves in the states to be expended as the legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated, shall be expended as follows: Seventy-five per cent for the public schools and twenty-five per cent for roads in the counties in which national forests are situated. Such funds shall be used to aid in maintaining the schools and roads of those school districts that lie or may be situated partly or wholly within or adjacent to the national forest in such county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in proportion that the area

of such national forest in such county bears to the total area of such forest in the state, as of June thirtieth of the fiscal year for which the money is or was received."

"All sums of money heretofore received or that may hereafter be received from the United States, or any department thereof under an Act of Congress approved June 28, 1938, being an act providing for the payment to the several states of 25 per centum of all moneys received for leases of land situated in the various states to which the United States owns fee simple title under the Flood Control Act of May 15, 1938, as amended and supplemented, to be expended as the General Assembly may prescribe for the benefit of the public schools and public roads of the county or counties in which such government land is situated, or as provided by any Acts of Congress authorizing the distribution of income or revenue from such lands owned by the United States of America or any of its departments, bureaus or commissions or any agency of the United States of America, to states or counties or as provided by any amendments to said acts, shall be expended as the county court of the county entitled to receive such funds may direct in accordance with the provisions and regulations as have been or may be in the future provided by the Acts of Congress providing for such distribution to states and counties."

CONCLUSION

From a consideration of all the foregoing, we find nothing which would indicate that a school district which does not maintain a high school would be relieved of the duty of paying the tuition of pupils who have completed the course in the schools maintained by the district and wish to attend high school in a district maintaining a high school.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

COUNTY CLERK; COUNTY COURT;
COUNTY BUDGET ACT; - County Clerk of Jackson County is the accounting officer to certify as such on claims against the county.

December 14, 1942

12-19

FILED
67

Mr. Ben Nordberg
County Clerk Elect
County Assessor's Office
Courthouse
Kansas City, Missouri

Dear Sir:

This is in reply to your recent request for an opinion concerning the duties of the county clerk of Jackson County.

Your request consists mainly of three questions:

I

First: Who shall act as budget officer of Jackson County?

Section 10922 of Article 2, Chapter 73, R. S. Missouri, 1939, which is the County Budget Law, provides as follows:

> "In all counties of this state now or hereafter having a population of more than eighty thousand inhabitants, according to the last federal decennial census, the presiding judge of the county court shall be the budget

> officer of such county, or the county court in any such county may designate the county clerk as budget officer in any such county.
> * * * * * * * * * * *"

The above partial section is unambiguous, and plainly states that the presiding judge of the county court shall be the budget officer, unless the county court designates the county clerk as budget officer.

Since the population of Jackson County is 477,828, according to the last decennial census, the above partial section is applicable to Jackson County.

CONCLUSION

It is, therefore, our opinion that unless the county court designates the county clerk as budget officer, the presiding judge of such county court shall be the budget officer.

II

Your second question is:

> Can the county court designate an employee of its own naming, without statutory authority, who shall keep the principal records of the county when such responsibility has been specifically fixed on the county clerk by Section 13823 R. S. Missouri,1939?

We are presuming that when you refer to the county clerk's keeping of the principal records of the county, that you mean: Can the county court designate an employee who shall act as an accounting officer, as defined in Section 10934 R. S. Missouri, 1939?

Section 10932 R. S. Missouri, 1939, partially reads as follows:

> "All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer. No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating: * * * * * Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies,

> materials, equipment, or services other than personal therein described, in such quantities as may be required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer as herein provided; but all orders for such supplies, materials, equipment, or services other than personal shall bear such certification. In case of such contract, no financial obligation shall accrue against the county until such supplies, materials, equipment or services other than personal are so ordered and such certificate furnished." (Underscoring ours.)

Under the above partial section, which is very similar to the section applying to the State Budget Act, no contract shall be binding on the county, unless it be in writing, and unless there is a balance to the credit of the appropriation, to which the same is charged, and unless it bear the certification of the accounting officer.

Section 10934 R. S. Missouri, 1939, defines "accounting officer" as follows:

> "Wherever in this act the term of 'accounting officer' shall appear, it shall be deemed to mean the county clerk, county comptroller, county auditor, accountant or other officer or employee keeping the principal records of the county."

Under the above section the accounting officer can only be the county clerk, county comptroller, county auditor, accountant or other officer or employee keeping the principal records of the county.

Section 13823 R. S. Missouri, 1939, reads as follows:

> "It shall be the duty of the clerk of the county court: First, to keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods of his respective settlements with the court; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; third, to file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere; fourth, to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

Under this section it is the duty of the county clerk to keep the principal accounts of the county. That it was the duty of the county clerk to keep the principal accounts of the county was held in the case of Ward v. Christian County, 111 S. W. (2d) 182, l. c. 185, where the court said:

> " * * * Moreover, section 12161, R. S. 1929, Mo. St. Ann. Sec. 12161, p. 6445, makes it the duty of the county clerk 'to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom.' * * ."

Since Section 10934, supra, definitely states that the accounting officer can only be the clerk, county comptroller, county auditor, accountant or other officer or employee keeping the principal records of the county, and, since Section 13823, supra, specifically states that the county clerk shall keep the principal records of the county, then, without any additional authority, it is the duty of the county clerk to act as the accounting officer, and it is his duty to certify that there is sufficient money to pay any claim under any written contract entered into by the county, or the heads of any county department, before the same shall be a legal contract, as set out under Section 10932, supra. Also, in supporting this view we find that Jackson County is not authorized to have a county comptroller, county auditor or accountant. The only counties that are entitled to a county comptroller are counties having a population of more than 200,000 inhabitants and less than 400,000 inhabitants, according to the last decennial census. This does not include Jackson County, for the reason that Jackson County has a population of 477,828. In counties having a population between 200,000 and 400,000, as hereinbefore set out, a county comptroller may be elected, in accordance with Section 10919 R. S. Missouri, 1939, which is part of the County

Budget Act, which was amended merely as to the salary of the county comptroller, by the Laws of Missouri, 1941, page 649. As to the term, "county auditor", or "accountant", as mentioned in the definition of "accounting officer", in Section 10934, supra, we find that in Article 10, Chapter 100, Revised Statutes of Missouri, 1939, there is a provision for the election of a county auditor in counties in this State in which there is a city now containing, or which may hereafter contain, 50,000 inhabitants and less than 150,000 inhabitants. This section does not apply to Jackson County. We also find that in Article 11, Chapter 100, there is a provision for the election of county auditors in counties having a population of more than 80,000 and less than 150,000, in which the circuit court is held in more than one place. This does not apply to Jackson County. It is common knowledge that at the present time, and in the past, there has been a county auditor in Jackson County, but, after a careful research, we do not find any provision for a county auditor in counties of the population of 477,828.

It is true, under Section 13824 R. S. Missouri, 1939, which applies to Jackson County, there is a provision that reads as follows:

> " * * * Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

It is very obvious that the employment of such an auditor is not permanent, but is merely for the purpose of the checking up of not all of the county officers, but the temporary employment of the check-up of one or more of the county officers. This section, under no construction can be interpreted to mean that counties having a population such as Jackson County can have a permanent county auditor.

Under Section 10933 R. S. Missouri, 1939, the acting officer shall be personally liable, and liable on his bond, for the amount of any obligation incurred by his erroneous certification as to the sufficiency of an appropriation, or of a cash balance, or for any warrant drawn when there is not sufficient amount, unencumbered, in the appropriation, or a sufficient unencumbered cash balance in the fund to pay the same, or for the payment of any amount not legally owing by the county.

It also provides for the giving of a bond for the faithful performance of his duties, to be approved by the county court and any premiums on such bonds shall be paid by the county.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county clerk of Jackson County is, and shall be the accounting officer who shall certify before any contract shall be binding, upon the county, that there is sufficient balance, unencumbered, to the credit of the appropriation to which the same is to be charged, and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred.

III

Your third question is:

Who shall prepare the financial statement of the county, as set out in Section 13827 R. S. Missouri, 1939, (which section applies to each county in this State?

In answer to this question, we are enclosing a copy of an opinion rendered by this office to Hon. Alvin H. Juergensmeyer, Prosecuting Attorney, Warren County, Warrenton, Missouri, dated November 12, 1942, in which we held that the county court can appoint and designate any one to prepare the financial statement, but if it fails to designate any person to prepare the financial statement, then it is the duty of the county clerk to prepare the financial statement and he shall receive, as compensation for the preparation, a certain sum to be paid him in addition to his regular salary.

CONCLUSION

We are, therefore, of the opinion, in view of the authorities set out in the above mentioned, and enclosed opinion, that the county clerk is not authorized and compelled to prepare the financial statement, as set out in Section 13827 R. S. Missouri, 1939, if the county court should designate of record any other person to prepare the financial statement.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ASSESSORS:
TAXATION
FEES:

Assessor should list all property, real or personal on the list of each taxpayer.

February 11, 1942

FILE
68

Mr. Frank Owen
Assessor of Clark Co.
Kahoka, Missouri

Dear Mr. Owen:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the following statement of facts:

> "There is a difference in opinion of Ex-Assessors and of the present Assessor. I thought it might be well enough to have the opinion, of what a non-resident list means.
>
> "The post official made a list like if John Jones lived in Lincoln Township and had real estate in some other Township in the county with no personal list in that Township, would he be listed on 'Real Estate'. Would all the real estate he might own in the county come under one list."

Since this question involves a question of compensation to the assessor, we must look to the statute providing such compensation for the purpose of determining same.

In the case of Smith v. Pettis County, 136 S. W.(2d) 282, 285, the court said:

> "The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer.* * *"

And in Lamar Township v. City of Lamar, 261 Mo. , 171, 189, the court in speaking of the authority of officers said:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that al officers be required to perform their duties within the strict limits of their legal authority."

Section 10950 R.S. Mo., 1939, which provides for the assessment and fees, reads in part as follows:

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise

> which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose, which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain: first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the contrary notwithstanding; * * *

> that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list: * * *."

We think these statutes very plainly state that all of the property of the taxpayer in the county should be included and listed on one assessment list.

CONCLUSION

From the foregoing, it is the opinion of this department that all of the property in the county both real and personal, belonging to a taxpayer, should be included in the one assessment list which he is required to return to the assessor.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

LOTTERIES: Distribution of chances by filling stations a lottery.

- -

May 11, 1942

5-16

Hon. Michael W. O'Hern
Prosecuting Attorney
Kansas City, Missouri

FILE
68

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"A group of independent filling station operators have made a request from me with reference to giving them an opinion as to whether or not the proposed statement which they have submitted to me in writing would constitute a violation of the law. I am giving this to you as they have prepared it for me, setting out what they intend to do, which is as follows:

'A PLAN FOR A CASH AWARD

BUSINESS STIMULATOR FOR

FILLING STATIONS

(Prepared for submission to the Attorney General of the State of Missouri through Michael W. O'Hern, Prosecuting Attorney of Jackson County)

This plan, entitled "The Ghost Walks," is an adaptation of a plan for motion picture theatres which has already been approved by attorneys general, county prosecutors and the

U.S. Postoffice Department. The demand for stimulating methods by which small, independent filling station operators might be able to continue in business caused this adaptation to be made, with but a few changes in the original and approved plan for theatres. These few changes, however, require that investigation be made as to the legality of the plan.

"The Ghost Walks" is a competitive contest of skill and quick thinking, using scrambled words, hints and clues as to the correct words and awards for those most alert mentally.

The procedure of this adapted plan would be as follows: Contests will be conducted on a weekly basis, beginning and ending at midnight on Fridays. During each current week, cards bearing each a single word, together with printed contest rules, would be distributed to the customers of a filling station. Among these cards would be several that would provide the correct answer to the scrambled word to be posted on a bulletin board throughout Saturday of each week. For instance, on Saturday morning, the following scrambled word might appear, (with four easier scrambled words upon which lesser prizes are to be awarded):

K E E D T A R R U N
"He'll take you for a ride!!"

The clue indicated would appear below the word upon the card. During the week, several cards bearing the word UNDERTAKER would have been distributed. The first person to appear at the fill-

ing station, sometime during business hours on Saturday, and to present the card and identify the scrambled word would be awarded the prize. The four lesser prizes would be handled similarly.

The scrambled word would remain upon the bulletin board throughout Saturday and until closing time on Saturday night, or until midnight. Then, below it, would be posted the correct word and the name or names of prize winners.

The cards bearing words would be distributed through the preceding week and, due to the method of distribution, it would be impossible for attendants to arrange any illegitimate "fixing"---this because the attendants themselves will not see the scrambled word to be posted upon the board until late each Friday night, nor would they see the correct word until it is to be posted on Saturday night or Sunday morning.

"The Ghost Walks," as a feature for theatres, did not use the word cards and the contests were and are conducted with every person in the theatre entering the competition.

Under different conditions, such as prevail in filling stations or other businesses, the theatre plan is not feasible. Hence, the selection method is similar to that used by the quiz programs on the national radio networks, in which contestants are selected, by prearrangement or at random, from the studio audiences. Only these selected contestants may compete for the prizes.

> By our plan, no consideration is necessary to qualify the public for participation. By simply calling at the participating station and requesting one of the word cards, any person may procure such a card and have a part in the contest. It is possible, however, that customers may be given extra cards with purchases. The distribution will be handled in such a manner that the person making no purchase whatever may earn the prizes by calling at the station on Saturday with the proper card and identifying the scrambled word. The only restriction shall be that cards will not be given to children under fourteen years of age. Of course, the motive is to stimulate business by attracting new business, but we believe that the fact that there is no compulsory consideration, added to the fact that a certain feat of mental skill is necessary, will make this feature legitimate and legal. It may be well to add that prizes will be War Bonds, except in cases where financial need seems to indicate that a better purpose would be served in awarding cash."

"I would appreciate very much if you would at your earliest convenience have some one advise whether this constitutes a violation of the law."

Section 10, Article XIV of the Constitution of Missouri provides:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to

> prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704, R. S. Mo. 1939, provides:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

A lottery has been defined by our courts as "any scheme or device whereby anything of value is, for consideration, allotted by chance." State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109; State ex rel. v. Hughes, 299 Mo. 529, 253 S. W. 29.

The elements of a lottery are: (1) consideration; (2) prize; (3) chance. State ex inf. McKittrick v. Globe Democrat Publishing Co., 110 S. W. (2d) 705.

The persons submitting the scheme for consideration admit that the chance and prize elements are present. Therefore, the only question to be decided is whether the element of consideration is present.

In Featherstone v. Independent Service Station Ass'n, 10 S. W. (2d) 124, a voluntary association of retail dealers sold numbered tickets to its members. These members in turn gave the tickets to their customers on the basis of one ticket for every dollar spent. At stated periods the association held drawings against the numbered tickets outstanding. The prize was an automobile. This plan was later modified so that dealers distributed tickets to non-customers as well as to customers.

Featherstone, a competitor, attacked the scheme as a lottery and unfair competition. Judgment for defendants on the ground that plaintiff could not maintain the action.

On appeal the Court of Civil Appeals of Texas at Dallas held that the scheme even as modified was a lottery and that plaintiff was entitled to equitable relief. The opinion was in part as follows:

> "While dealers under the new plan distributed tickets to non-customers as well as to customers, it seems that the scheme was to distribute tickets in the main to customers, as the evidence discloses that only a few, negligible in number, were given to persons other than customers. That the giving of tickets, and the drawings and distribution of prizes, were inducements to patronage and unquestionably lured customers is shown from the very satisfactory business results that followed. Patronage thus induced was the consideration that passed from the ticket holder for the chance received, in that the price paid, whatever it was, the amount being immaterial, constituted the aggregate price for the merchandise or service and the ticket

> that represented a chance to win the prize; in other words, for one undivided price both were purchased, the merchandise, or service, and ticket, the ticket being as much bought as though priced separately."

Glover et al. v. Malloska, 238 Michigan 216; 213 N. W. 107; 52 A. L. R. 77, is a leading case bearing on the question of business lotteries where chances in drawings by lot are distributed indiscriminately and without charge to customers and non-customers alike. Here certain retail oil stations distributed numbered tickets without charge to purchasers and to persons asking therefor. Once a month an automobile was disposed of by chance to the ticket holder of the same number. The retail stations acquired these tickets from Malloska from whom they purchased oil.

Glover et al., brought suit in equity, alleging unfair competition and charging that the scheme complained of was a lottery. In upholding the contentions of the complainants the Supreme Court of Michigan said:

> "The scheme was clearly a lottery. People v. McPhee, 139 Mich. 678; 103 N. W. 174; 69 L. R. A. 505; 5 Ann. Cas. 835; People v. Wassmus, 214 Mich. 42; 182 N. W. 66. The often asserted essentials of a lottery, viz: consideration, prize and chance, were all present. Malloska sold the tickets to his customers for distribution by them in the course of trade to further his pecuniary interest, and this established consideration. The fact that Malloska gave some tickets away at fairs and exhibitions and the purchasers of tickets for use in the retail trade gave them away, without pay, to their customers, and sometimes to others, did not at all save the scheme from being a lottery."

The two cases quoted above are practically identical with the scheme submitted in your request. And, in view of the

holdings in those cases and the reasons advanced therein, we believe that such a scheme is a lottery and prohibited by our Constitution and statutes.

CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby chances are distributed by service stations to customers and also to non-customers who make request therefor, and a weekly prize is given upon the result of a drawing, is a lottery within the meaning of the Constitution and statutes of Missouri.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

CHIROPODY: Shoe dealers are exempt from the provisions of Article 4 of Chapter 57, R. S. Mo. 1939.

May 20, 1942

Honorable Michael W. O'Hern
Prosecuting Attorney
Jackson County
Kansas City, Missouri

FILE
68

Dear Sir:

We are in receipt of your request for an opinion under date of May 18, 1942, as follows:

> "Dr. L. A. Hansen, Vice President of the Missouri Association of Chiropodist's, has brought to us the enclosed advertisement of the Ventola Boot and Shoe Company, located at 3117 Troost Avenue, Kansas City, Missouri. He has asked for an opinion as to the legality of this advertisement under Section 9800 R. S. of Missouri, 1939, and Amendments thereto.
>
> "It is Dr. Hansen's opinion that the Ventola Shoe Company has violated this law, in that they are advertising as orthopedic shoemakers, and further advertise that their arch supports are made to individual measurements, and that corrective service is given to customers on the appliances from time to time. He would like an opinion as to whether it would be necessary for the Ventola Shoe Company to have a chiropodist in their employ or have a license to practice chiropody, if they do make individual measurements on arch supports, and if they do give individual corrective service.

"Under date of September 29th, 1939, Robert P. C. Wilson, III of your office gave Dr. W. L. Nixon, chiropodist of Jefferson City, Missouri an opinion on several similar questions and you might refer to this correspondence. Dr. Hansen is anxious to get an opinion on this as soon as possible, so that the association may take whatever action is necessary."

Attached to your letter was a newspaper advertisement, approximately 6 inches long and one column wide, over the name of "VENTOLA Boot & Shoe Rebuilder." Without quoting the advertisement in full, the pertinent parts are:

"Some Shoes Are
FOOT PROTECTORS
NOT FOOT CORRECTORS

FREE CONSULTATION
about your Shoe Problems!

When you can't stand or walk without pain come in and see JAMES VENTOLA 'Orthopedic Shoe Maker' Foot Comfort Specialist.

Foot corrections and arch supports made to your individual measurements from flexible sole leather and felt. The life of these arch supports is 2 to 10 years. They are interchangeable from one pair of shoes to another. We also give corrective service to the appliance from time to time.

We Guarantee Foot Comfort.
Our Arch Supports Must Be Fitted.
NO MAIL ORDERS"

The advertisement also depicts the human skeleton and purports to show the points of pain which may arise due to flat feet.

Section 9800, R. S. Mo. 1939, which provides the punishment for the unlawful practice of chiropody, is as follows:

> "Any person who shall unlawfully obtain registration under this article, whether by false or untrue statements contained in his or her application to the board by presenting to said board a fraudulent diploma, certificate or license, or one fraudulently obtained, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred nor more than two hundred dollars, or by imprisonment for not less than three months nor more than one year or by both such fine and imprisonment; and any person not being lawfully authorized to practice chiropody in this state and registered as aforesaid, who shall advertise as a chiropodist, in any form, or hold himself out to the public as a chiropodist, shall, upon conviction thereof, for each offense be punished by a fine of not less than one hundred nor more than two hundred dollars, or by imprisonment for not less than three months nor more than one year, or by both such fine and imprisonment. It shall also be unlawful for any person to practice or to profess to practice chiropody, as defined in section 9796 of this article, unless he or she shall first have obtained a certificate from the board, as hereinbefore provided. Any person who shall so practice or profess to practice chiropody shall, upon conviction thereof, be punished by a fine of not less than twenty-five ($25.00) dollars nor more than one hundred ($100.00) dollars for each such offense."

The word "chiropody" is defined in Section 9796, R. S. Mo. 1939, which is as follows:

> "The definition of the word 'chiropody' shall, for the purpose of this article, be held to be the local, medical, mechanical or surgical treatments of the ailments of

> the human foot, and massage in connection therewith except amputation of the foot or toes, or the use of anaesthetics other than local, or the use of drugs or medicine other than local antiseptics."

We direct your attention particularly to the fact that there must be massage in connection with the local, medical, mechanical or surgical treatment of the ailments of the human foot to constitute the practice of chiropody. There is no statement in either your opinion request or the advertisement submitted therewith which reveals any such massage in connection with the fitting or building of arch supports by this shoe builder or manufacturer.

There is a further indication in Article 4 of Chapter 57, R. S. Mo. 1939, relating to the subject of "Chiropody," which indicates the intention of the Legislature to exempt shoe builders or manufacturers from the provisions of the article. In Section 9809 we find the following:

> " * * * This article shall further not apply to manufacturers of and dealers in shoes or corrective appliances for deformed feet: * * *"

The facts in the instant case apparently bring the shoe builder in question squarely within that class to which Section 9800, R. S. Mo. 1939, and the other provisions of Article 4 of Chapter 57 do not apply.

CONCLUSION

It is, therefore, the opinion of this department that manufacturers of and dealers in shoes or arch supports are not engaged in the practice of chiropody where there is no

massage, medical or surgical treatment of the foot in connection with the fitting of such shoes or arch supports to the individual.

Respectfully submitted

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

ELECTIONS: Application of Corrupt Practice Act
CORRUPT PRACTICE ACT: to candidate on Non-partisan Judicial Ballot.

- -

November 17, 1942

11-26

FILED
68

Hon. Ernest F. Oakley
Judge of the Circuit Court
St. Louis, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this Department on the question of whether or not a person who is selected on the non-partisan judicial ballot is required to file a statement of receipts and expenditures as is provided under Section 11790 R. S. Mo. 1939.

Said Section 11790 reads as follows:

> "Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an

> officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

Amendment No. 3, adopted in 1941, established a non-partisan system for nomination, appointment and election of judges of certain courts. Section 3 of this amendment is as follows (Laws of Missouri 1941, p. 723):

> "Each judge appointed pursuant to the provisions of this amendment shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in such office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of this amendment become applicable to this office,

shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of this amendment not become applicable to his office. Not less than sixty (60) days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of this amendment may file in the office of the Secretary of State a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such a declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the geographic jurisdictional limits of his court, or circuit if his office is that of Circuit Judge, on a separate judicial ballot, without party designation, reading: 'Shall Judge .....
(Here the name of the judge shall be inserted)
of the .....
(Here the title of the Court shall be inserted)
Court be retained in office? Yes No.'
(Scratch One)
If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in Section 1 of this amendment; otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December 31st following such election as is provided

for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

"Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the Secretary of State shall not less than thirty (30) days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

Throughout this section and at other places in the amendment the judges are referred to as "candidates" and the time and place of determining whether such judges shall be retained is referred to as "an election." Since this is a new procedure in Missouri we have no case law to refer to. However, from a reading of the entire act it seems that the person who desires to succeed himself and submit his name to the voters would be considered as a candidate at an election. This election is carried on as any other election, as it applies to ballots, voting and casting up returns.

Section 11790 R. S. Mo. 1939 applies to every person who is a candidate "* * * at any election for a state, county, * * * office," and since a candidate for circuit judge would fall within that classification, it follows that such candidate is subject to the provisions of Section 11790 and should file a statement of receipts and expenditures as is required by said section.

CONCLUSION

It is, therefore, the opinion of this Department that a person who seeks election on the non-partisan judicial ballot should make out and file a statement of receipts and expenditures as is contemplated by Section 11790, R. S. Mo. 1939.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SCHOOLS: When tuition and transportation fees of pupils of a closed district may be paid out of teachers' fund.

November 16, 1942

See opinion to Mail
H Reichert April 5, 1951
holding tuition
payable out of
teachers or incidental fund.

FILED
68

Mr. Thomas P. O'Rourke
County Treasurer
Edina, Missouri

Dear Sir:

We have your letter of November 14, 1942, in which you submit the following for an opinion:

> "Will you please advise me on Closed School as to Funds. I have been holding that Tuition and Transportation can be paid out of either Teachers or Incidental Funds. On Insurance, Clerk Fees, Repairs on School Houses, or any other Incidentals, I am holding that they should be paid out of Incidental. Some Schools can't see if they get short in Incident l Fund why they can't pay a Warrant out of Teachers Fund."

Your request does not state why the school was closed. There are several sections of the statutes regarding the transporting of pupils and the payment of their tuition when the school of a local district is closed. We must, therefore, look to the different statutes with regard to such matters to determine what provision is made in each case. We are assuming that you are inquiring about common school districts, and this opinion will proceed on that assumption.

Section 10324, R. S. Mo. 1939, after providing for the maintenance of school for an eight months' term, reads as follows:

> " * * * Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

It will be seen that in case a school is closed under the conditions set forth in the foregoing section, the tuition for the pupils is to be paid from the teachers' fund, but the cost of transporting such pupils is to be paid from the incidental fund.

Section 10464, R. S. Mo. 1939, reads as follows:

> "If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the

> state, shall not exceed the amount that the state would have otherwise paid to such district."

By the foregoing section provision is made for closing a school if the average daily attendance is less than fifteen pupils, upon the request of the state superintendent. The section provides that the total expense of transporting said pupils and paying their tuition shall not exceed the amount that the state would have otherwise paid to such district. What the state would have otherwise paid to such district would have gone into the teachers' fund. (Section 10566, R. S. Mo. 1939.) We believe that said section contemplates that where the state superintendent requires the school to be closed and the pupils to be transported, both the teachers' fund and the incidental fund of the district can be used to pay for the cost of such transportation and the tuition of the pupils. The teachers' fund in that case could be used to pay either of said expenses.

In addition to the two foregoing sections, there is another case where it might be said that a school is closed and provision made for transporting its pupils. That situation is where two or more districts combine in accordance with the provisions of Section 10457, R. S. Mo. 1939. We are enclosing herewith a copy of an opinion rendered by this office on October 27, 1942, regarding the use of teachers' funds for payment of the expenses of pupils under such combination.

CONCLUSION

It is, therefore, the opinion of this office that in case any common school district is closed because it has enumerated less than twenty-five children, the board may pay the tuition of such children to another school out of the teachers' fund, and may pay the expense of transporting such children out of the incidental fund.

It is further the opinion of this office that where the state superintendent requires a board of a district, where the average daily attendance for the last previous school year was less than fifteen pupils, to transport such pupils to another district, the tuition and transportation expenses may be paid out of either the teachers' fund or the incidental fund.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

COUNTY SUPERINTENDENT OF SCHOOLS:

How paid for performing duties as Supervisor of Transportation.

February 23, 1942

Mr. Raymond H. Patterson
County Superintendent of Schools
Galena, Missouri

FILE 69

Dear Sir:

This department has been requested by Mr. Frank Huffhines, Prosecuting Attorney of Stone County, to give you an official opinion upon the following question:

> "Please give me a ruling on the way to handle the salary of the County Supt. (House Bill 231) for transportation. Should the County Court put it in with their money and pay it over to the Supt. when the regular check comes in fact make it part of the regular check, or should the county Treas. make a separate fund and write the Supt. a check direct without it going through the County Court hands?
>
> "If the County Treasurer writes the check direct is it necessary for them to have anything to authorize them to write beside the state law?"

Laws of Missouri, 1941, pp. 546-548, provide that the county superintendent of schools in each county shall act as supervisor of school transportation. The act further sets forth the salaries to be paid to the county superintendents for these duties. As to the method of payment, it is said:

> " * * * On or before the 20th day of each month the State Superintendent of Schools shall issue his warrant payable to the treasurers of the several counties of the State of Missouri for one-twelfth part of the salaries herein provided, to be paid out of funds appropriated by the General Assembly for the support and maintenance of public schools under the provisions of Article XI, Section 7 of the Constitution of Missouri. The county treasurers of the several counties shall pay over such compensation monthly and at the same time he pays the county superintendent of schools his salary for the performance of his other duties."

It is well established in this state that a county superintendent of schools is a county officer and not a state officer. Hollowell v. Schuyler County, 322 Mo. 1230, 18 S. W. (2d) 498.

This department in an opinion rendered on January 2, 1942, to Hon. Charles B. Butler, Doniphan, Missouri, held the above act constitutional in that it did not increase the compensation of the county superintendent of schools during his term of office. A copy of this opinion is herewith enclosed.

It is the settled rule in most jurisdictions that a statute conferring certain additional duties on a public officer ex officio does not have the effect of appointing him to a second office. McCullers v. Board of Commissioners, 158 N. C. 75, 73 S. E. 816; People v. Leet, 13 Ill. 270; Moore v. Nation, 80 Kan. 672, 103 Pac. 107. See, also, annotation in Annotated Cases 1913D, p. 511. It will be seen, therefore, that the imposition of new duties upon the county superintendent of schools did not create another office, but said officer is entitled to his extra compensation by virtue of the fact that he is county superintendent of schools, and, as pointed out in Tayloe v. Davis, 212 Ala.

282, 102 So. 433, "it matters not that a name * * * is given to the body created."

Section 10618, R. S. Mo. 1939, provides that the county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer. This office in an opinion rendered to Mr. Roy S. Dunsmore of Alton, Missouri, on October 2, 1935, held that the $400.00 appropriation made by the State to counties to be placed in the county revenue fund and applied on payment of the salary of the county superintendent was to be placed in a special fund. We believe the holding in that opinion is equally applicable to the state funds paid into the county for the county superintendent of schools for performing his duties as supervisor of transportation. This is also the interpretation given this section by the State Auditor of Missouri, which executive construction is entitled to great weight in interpreting any statute. Automobile Gasoline Co. v. St. Louis, 52 S. W. (2d) 281; State v. Freeland, 300 S. W. 675, 318 Mo. 560.

The ruling of the State Auditor is as follows:

> "We suggest that you open up in your fund ledger an account 'Supervisor of Transportation' and when you receive the monthly draft from the State, deposit said draft in county funds, crediting the account of the Supervisor of Transportation with the amount of the draft."

This money received from the State, although it is put in a special fund, is still a part of the countyrevenue fund and must be paid out like any other money in that fund. We believe it would be a more efficient procedure if two checks were drawn in paying the county superintendent of schools, because this breakdown would show more clearly the transaction.

CONCLUSION

It is, therefore, the opinion of this department that the funds received by the treasurer from the State in payment to the county superintendent of schools for his duties as supervisor of transportation should be placed in a special fund in the county revenue fund and paid as any other salary of a county official is paid.

Respectfully submitted

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
(Attorney General

AMO:HR

PARK BOARD: Construction of Section 84 of House Bill 581 in regard to appropriations for State park purposes.

June 13, 1942

6-17

FILE 69

Mr. Fred W. Pape
State Park Board
Jefferson City, Missouri

Dear Mr. Pape:

Your request for an opinion from this department has been referred to me. The question is as follows:

> "Does Section 84 of House Bill No. 581 of the Laws of 1941 at page 222 include the appropriation as set up in Section 74 of House Bill No. 66 of the Laws of Missouri for 1941 at page 110 pursuant to the provisions of Section 73 of House Bill 581 aforesaid or does the last provision of Section 84 of House Bill 581 exempt Section 74 of House Bill 66 from the provisions of Section 73 of House Bill 581 which tends to include it in Section 84, House Bill 581?"

The sections referred to above should be set out and examined and we therefore cite you to the following sections:

Section 74 of House Bill 66 of the Laws of 1941, at page 110, is as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Twenty Thousand ($20,000.00) Dollars, or so much thereof as may be necessary for the use of the State Park Board for the purpose of securing Federal funds for construction work in State parks, for the period beginning January 1, 1941 to June 30, 1941."

Section 84 of House Bill 581 of the Laws of Missouri for 1941, at page 222, as originally passed, and prior to the Governor's veto, provided as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund the sum of One Hundred Fifty Thousand Dollars ($150,000.00) to be expended as follows:
>
> "$100,000.00 to be set aside for the purpose of matching federal WPA funds used in state parks.
>
> "$50,000.00 to be set aside for the use of securing other federal aid services, and the purchase of additional or adjoining lands for state parks for the years 1941-1942, and that no deduction as provided in Section 73, House Bill 581, shall apply to this appropriation."

Section 84, after the veto of the Governor, is as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund the sum of One Hundred Thousand Dollars ($100,000.00) to be expended as follows:
>
> "$75,000.00 to be set aside for the purpose of matching federal WPA funds used in state parks.
>
> "$25,000.00 to be set aside for the use of securing other federal aid services, and the purchase of additional or adjoining lands for state parks for the years 1941-1942, and that no deduction as provided in Section 73, House Bill 581, shall apply to this appropriation."

Section 73 of House Bill 581 of Laws of Missouri for 1941, provides (p. 219):

> "All appropriations made under the provisions of House Bill 581, are subject to all prior appropriations made for State Departments contained in this bill made by the 61st General Assembly and in no event will the total appropriation of such departments exceed the amount set out in House Bill 581."

As can be seen, the appropration as set out in Section 74 of House Bill 66, cited above, was for the period of January 1, 1941, to June 30, 1941. It was passed for the purpose "of securing Federal funds for construction work in State parks." In order to secure some Federal aid, in many cases, it was necessary that the State do certain things before such Federal grant could be secured. This was not a question of "Matching Federal funds," but was for the purpose of laying certain groundwork which was necessary before the Federal funds could be secured.

Section 84 of House Bill 581, supra, as originally passed provided that one hundred thousand dollars ($100,000.00) was appropriated for the purpose of "Matching Federal WPA funds used in state parks," and fifty thousand dollars ($50,000.00) was appropriated to be used for securing "other federal aid services." After this Bill was passed and before it became effective, Governor Donnell vetoed certain amounts in such Bill and reduced it to read as it now is set out in the official Laws of Missouri, 1941, cited above. He deducted twenty-five thousand ($25,000.00) from the one hundred thousand ($100,000.00) item leaving an appropriation of seventy-five thousand ($75,000.00) dollars for "matching WPA funds"; further he deducted twenty-five thousand ($25,000.00) dollars from the fifty thousand ($50,000.00) item leaving an appropriation of twenty-five thousand ($25,000.00) to be used for securing "other federal aid services."

Both Section 74 of House Bill 66 and Section 84 of House Bill 581 appropriate the sums above for the benefit of the state parks under the control of the State Park Board.

Section 73 of House Bill 581, Laws of Missouri, 1941, as cited above, provided that all appropriations made under provisions of House Bill 581 are subject to all prior appropriations made for State Departments contained in Bill 581

made by the 61st General Assembly and in no event was the "total appropriation of such departments to exceed the amount as set out in House Bill 581." In other words, under the strict wording of this general section, the total amount appropriated to the State parks could not exceed the amount set out in House Bill 581, Section 84, to-wit, one hundred thousand ($100,000.00) dollars, unless there is some other section governing same.

We now call your attention to the last provision in Section 84, House Bill 581, which says "that no deductions as provided in Section 73, House Bill 581, shall apply to this appropriation." This is a specific exception, for a certain appropriation, from Section 73, House Bill 581. In other words, the question is whether or not the general provision in Section 73, House Bill 581, governs the question or whether the last provision of Section 84, House Bill 581, will exempt such section from the provisions of Section 73, aforesaid. The law seems to be that where a general statute and a special statute refer to the same subject matter that the provisions of the special statute will govern. See State ex rel. Equality Sav. & Bldg. Ass'n. v. Brown, 68 S. W. (2d) 55, 334 Mo. 781, following State ex rel. v. Webster Groves Loan & Bldg. Ass'n., 68 S. W. (2d) 60, 334 Mo. 789, State ex rel. R. Newton McDowell Inc. v. Smith, 67 S. W. (2d) 50, 334 Mo. 653.

Conclusion

Therefore, it is the opinion of this department that Section 73 of House Bill 581 of Laws of Missouri, 1941, does not refer to Section 84 of House Bill 581, Laws of Missouri, 1941, since it is a general statute and the last provision of Section 84 of House Bill 581 aforesaid, specifically exempts Section 84 from the provisions of the general provision.

Section 74 of House Bill 66, Laws of Missouri 1941, appropriates for the purpose of "securing federal funds for construction work"; the first provision of Section 84, House Bill 581, appropriates for the purpose of "matching Federal WPA funds" and the last provision of Section 84 of House Bill 581 appropriates for the purpose of "securing other federal

aid services and the purchase of additional or adjoining lands for state parks for the years of 1941-1942." It is our opinion that these three appropriations refer to three different matters although they are closely connected.

We feel that the appropriation is as follows: (1) Seventy-five Thousand Dollars ($75,000.00) for the purpose of matching Federal WPA funds; (2) Twenty-five Thousand Dollars ($25,000.00) for the purpose of securing other federal services; and (3) Twenty Thousand Dollars ($20,000.00) for the purpose of securing Federal funds for construction work in State Parks. In other words, the appropriation as made by the 61st General Assembly for the above purposes, subject to the veto of the Governor, was One Hundred Twenty Thousand Dollars ($120,000.00) to be alloted as set out above.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

CONSERVATION COMMISSION: EMERGENCY REGULATION NO. 1 is INVALID.
EMERGENCY REGULATION #1:

August 1, 1942

FILED
69

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 28, 1942, which reads as follows:

> "I would appreciate your opinion as to the validity of the Conservation Commission's emergency regulation No.1 effective December 12, 1941 as the same effects the Elk River electrical power plant near Noel, Missouri in McDonald County, inasmuch as that power plant is not now in operation and all machinery has been removed from the power house and has not generated electricity for the past three years to my own knowledge.
>
> "It is my opinion and the opinion of the owners, The Empire District Electric Co., that the cost of the reconditioning and beginning operation again would be far out of proportion to the maximum amount of electrical energy that could be generated, and the enforcement of this regulation has met with great dissatisfaction and contempt in this county for the reasons above set forth."

Section 16, Article 14, of the Constitution of Missouri vests the Conservation Commission with the authority

to control, manage, restore and regulate the bird, fish, game, forestry and wildlife in this State. Section 16, Article 14, reads in part:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, * * *

"WHEREAS, certain Federal Agencies under the direction of the President have been charged with the responsibility of protecting National Defense utilities, and have urged the protection of steam and hydro-electric generator plants and structures incident thereto, as vital points in National Defense; and

"WHEREAS, the said Agencies call attention to the fact that use of such areas by hunters or fishermen, although loyal citizens, makes it possible for a saboteur to gain access in the guise of hunter or fisherman, thus enabling him to plan or even prepare his act of sabotage without being subject to suspicion; and that they, therefore, request all cooperation possible from the Conservation Commission of Missouri in protecting these plants by closing the surrounding areas:

"NOW, THEREFORE BE IT RESOLVED that the Conservation Commission, exercising the power in it vested, does hereby ordain and establish the following emergency regulation, effective upon publication and continuing for the duration of the emergency:

"Emergency Regulation No. 1.- No hunting, trapping or fishing is permitted at any time, or in any manner, within two hundred (200) yards of the following locks, dams and electric power plants:

"U. S. Lock and Dam No. 20, near Canton, in Lewis County,
U. S. Lock and Dam No. 21, near West Quincy, in Marion County,
U. S. Lock and Dam No. 22, near Saverton, in Ralls County,
U. S. Lock and Dam No. 24, near Clarksville, in Pike County,
U. S. Lock and Dam No. 25, near Winfield, in Lincoln County,
U. S. Lock and Dam No. 26, near Alton, in St. Charles County,

Osage River Electric Power Plant, near
Bagnell, in Miller County,
Osage River Electric Power Plant, at
Osceola, in St. Clair County,
Sac River Electric Power Plant, at Capling-
er Mills, in Cedar County,
Niangua River Electric Power Plant, or
Tunnel Dam in Laclede County,
White River Electric Power Plant, at
Powersite, in Taney County,
Shoal Creek Electric Power Plant, near
Joplin, in Newton County,
Elk River Electric Power Plant, near
Noel, in McDonald County. "

It is quite evident that while such action on the part of the Conservation Commission in promulgating such emergency regulation was apparently done solely in behalf of national defense at the request of the government and with the best of intentions it clearly exceeds such authority granted to the Commission under the Constitution and laws of the State of Missouri.

Therefore, said Emergency Regulation No. 1 is not a valid regulation and cannot be enforced by the Conservation Commission of the State of Missouri.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

H. H. Kay
(Acting) Attorney General

ARH:EAW

TAXATION: Notice of assessment by Assessor.
ASSESSMENT:

- -

November 25, 1942

11-30

FILED
70

Mr. Hubert T. Perry,
Treasurer and Ex-Officio Collector
Carrollton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion as follows:

> "1. I would like to have your opinion as to whether or not a personal tax is valid and collectible, if the Assessor did not, in fact, call upon the tax payer or leave an assessment blank with such tax payer.
>
> "2. What evidence must the alleged tax payer present to show conclusively that the Assessor did not discharge his duty as to assessing the property?"

Since your questions pertain to assessors in counties under township organization we refer to Section 14005, R. S. Mo. 1939, which relates to assessment of taxes by assessors in such counties. By such section it may be seen that the assessment for taxes is made in accordance with the provisions of the general laws in relation to assessment of real and personal property taxes.

Referring to the general law in relation to assessment of such taxes we find that Sections 10950 and 10951, R. S. Mo. 1939, prescribe the procedure which the assessors should follow in making assessments.

Section 10950, in so far as it applies to your question, is as follows:

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. * * * * * * * * *"

By the provisions of this section it will be noted that it is the duty of the assessor to call at the office, place of doing business or residence of the person required to list his property.

Section 10951, R. S. Mo. 1939, also pertaining to the procedure for assessment, provides in part as follows:

> "If any person required by this chapter to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office, the usual place of residence or business of such person, a written or printed notice, requiring such person to make out and leave at the place

> named by said assessor, on or before some convenient day named therein, not less than ten days nor more than twenty days from the date of such notice, a sworn statement of the property which he is required to list, and shall leave with such notice a printed or written blank for the statement required of such person. If any such person shall have deceased prior to the time when the assessor calls for such list, the assessor shall deliver such written or printed notice to the executor or administrator of such deceased person, and such executor or administrator shall make out and deliver to the assessor such sworn statement of all the property of such decedent. The date of leaving such notice and the name of the person required to list the property shall be carefully noted by the assessor; and if any such person shall neglect or refuse to deliver the statement, properly made out, signed and sworn to as required, the assessor shall make the assessment, as required by this chapter: * * * * * * * * * * * * * * * * * * *"

Section 10954, R. S. Mo. 1939, provides as follows:

> "Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

From this section it might be concluded that the assessor could make assessments under the conditions therein

specified without complying with the provisions of Section 10951, supra. However, we think this is clarified by the court in the case of State ex rel. v. Cummings, 151 Mo. 49, l. c. 58, wherein the court, in construing these tax sections, said:

> "* * * By section 7531, Revised Statutes, 1889, the time within which all assessments must be made is fixed to be 'between the first days of June and January' succeeding. The assessor is required to call in person at the office, place of doing business or residence of each person subject to taxation, and require such person to make a correct statement of all taxable property owned by such person, or under the care, management, or charge of such person. If the owner is not at home, the statute requires that a written or printed notice be left at the place of business or residence of the taxpayer, notifying such person to make a list, and the assessor is required to specifically note the date of the service of such notice. By this personal call or written or printed notice, the taxpayer is secured the privilege of stating exactly what property he has and its value. When this call is made on the taxpayer, and request made on him for his list, or, if he be absent, the notice is left for him, within the period from June 1st to January 1st succeeding, then jurisdiction is obtained to assess his property. We use the word 'jurisdiction,' for want of a more correct expression. Strictly speaking, tax proceedings are only quasi judicial, but, as they have the effect of judgments, the word 'jurisdiction' can readily be made applicable to them. As notice of strictly judicial proceedings is essential, so likewise it is made necessary in all enlightened systems of just and equal taxation. * * *"

By this statement the court held that jurisdiction to make the assessment does not exist until the assessor has complied with the provisions of Sections 10950 and 10951, supra. Then, after having done this, if the taxpayer does not make out a list, the assessor may proceed as authorized under said Section 10954, supra.

The court, in the Cummings case, supra, in outlining the procedure for the assessor to follow under such circumstances, said at l. c. 59:

> "Tested by these rules, it must be held that when the assessor, Brokate, went in person, on June 9, 1894, to the residence of defendant, and left the printed notice and blank list requiring defendant to list his property, and defendant received that list on that day, the jurisdiction to assess attached. If, after receiving this blank list and notice, he failed to make out his own list, or refused peremptorily to do so, as is shown by his evidence, then the law authorized the assessor (section 7535) to make out the list on his own view, or 'on the best information he could obtain.' * * * * * * *"

And the court further said in the Cummings case, supra, at l. c. 60, in reference to the time when the assessor has jurisdiction to make the assessment:

> "* * * The action of the assessor is quasi judicial, and when, as in this case, his jurisdiction attached by the due service of the notice and blanks, his valuation and assessment, unless appealed from, become conclusive upon the taxpayer. *"

From this statement it will be seen that the court has held that jurisdiction to make the assessment attaches upon due

service of the notice and blanks.

In speaking of the procedure to be followed by the assessor in making an assessment the court, in the case of State ex rel. v. Hoyt, 123 Mo. 348, at l. c. 354, said:

> "It would be utterly impossible for an assessor to remember, and be able to testify to the fact, that lists had been left with each property owner, and that they had not been returned as required by law. Hence the statute requires that the fact of leaving the list should be specially noted by the assessor. The right and power of the assessor to make the assessment depends upon the due performance of his duties in respect to these requirements. The duplicate lists and notations thereon, which were retained in the office, and the subsequent assessment made by the assessor on the strength of these duplicates, all done by a public officer, in the regular discharge of his official duties, should be taken and held as having somewhat the characteristics of the return of an executive officer, and, in the absence of fraud, or actual misfeasance, should be taken, in a proceeding to enforce the collection of the taxes levied, as, at least, prima facie evidence of the existence of the facts upon which the power of the assessor to make the assessment was conditioned."

In this case the court held that the tax bill is prima facie evidence that the amount of taxes therein set out is just and correct. However, it will be noted that it also held that the right and power of the assessor to make the assessment depends upon the due performance of his duties in respect to the statutory requirements.

In speaking of the provisions which may be used by the taxing authorities to controvert an allegation that the assessor did not perform his duties under the statute, the court held that the duplicate lists and notations thereon,

which are retained in the assessor's office, and the subsequent assessment made by the assessor on the strength of such duplicates, should be taken and held as having somewhat the characteristics of the return of an executive officer.

Section 10987, R. S. Mo. 1939, provides as follows:

> "Whenever an assessment of property is made in the absence of the head of the family, a duplicate list of such assessment shall be left with some member of the family of not less than fifteen years of age, and shall deliver a copy of the assessment to the owner at the time of making said assessment, if demanded by such owner."

The assessment authorized to be made under this statute may be made in the absence of the head of the family. However, it will be noted from this section that a duplicate list of such assessment must be left with some member of the family over fifteen years of age, and a copy of the assessment delivered to the owner at the time of making the assessment if demanded by such owner. All of these taxing sections contemplate that the taxpayer must have some sort of a notice before jurisdiction can attach for the assessor to make an assessment.

In the case of State ex rel. v. Seahorn, 139 Mo. 582, at l. c. 609, the court, in speaking of the presumption which would be indulged in favor of the taxing authorities, said:

> "* * * This being an action for the recovery of taxes and it appearing that Scruggs was liable to taxation, and that the assessor had authority and jurisdiction, the presumption will be indulged that the assessor and his deputies discharged their duty, and that the notices and blank assessment lists were left at his place of residence within the time prescribed by statute."

Under Section 11112, R. S. Mo. 1939, the back tax bills when properly certified are prima facie evidence that the amount claimed in the tax suit is just and correct.

CONCLUSION

From the foregoing it is the opinion of this department that a personal tax is not valid and collectible in cases where the assessor does not comply with the provisions of Sections 10950 and 10951, R. S. Mo. 1939, by calling upon the taxpayer or by leaving an assessment blank with such taxpayer or with some member of his family over fifteen years of age, as is provided by Section 10987, R. S. Mo. 1939.

As to the sufficiency of proof to conclusively show that the assessor did not discharge his duty in regard to assessing property as stated above, it is the opinion of this department that the tax bill is prima facie evidence of a valid assessment and levy and that the amount claimed is just and correct. The evidence which must be alleged by the taxpayer to controvert such presumption will depend upon the facts in each particular case.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

PROBATE COURTS: Probate Judge may not hold preliminaries
JURISDICTION: and try misdemeanor cases.

- -

December 21, 1942

12-28

FILED
70

Honorable Val Perkins
Probate Judge Elect
Lilbourn, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the question of whether or not a probate judge may try misdemeanor cases and hold preliminary examinations.

Since the office of Probate Judge is created by statutes, and since such office has no common-law powers, we must look to the statutes only, for the answer to your question. This principle is well stated in Vol. 15 C. J. page 1011, Section 426, which is as follows:

> "Probate courts have no common-law jurisdiction, but the nature, extent, and exercise of their jurisdiction depend on the terms of the constitutional or statutory grant. They cannot exercise any powers other than those which have been expressly conferred upon them, or which are necessarily implied from those expressly conferred; and their powers are not to be extended by construction or by unnecessary implication. * * * * *"

The jurisdiction of a probate court is provided by Section 2437 R. S. Mo. 1939 which is as follows:

> "Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and

> the sale or leasing of lands by administrators, curators and guardians, and over all matters relating to apprentices; and such judges shall have the power to solemnize marriages."

Also, Section 2442 R. S. Mo. 1939, provides as follows:

> "The judge of probate shall be a conservator of the peace, and shall have power to issue all writs which may be necessary in the exercise of the jurisdiction of said court, according to the usage and principles of law, and may let to bail any party indicted for bailable offense in the county in which the indictment is pending."

This Section makes the probate judge a conservator of the peace but it makes no provision for such judge to try misdemeanor cases or hold preliminaries. Under the statutory title of Criminal Procedure and especially Article IV of Chapter 30, you will note that provision is made giving to the Justice of the Peace, concurrent original jurisdiction with the circuit court to try misdemeanor cases. Article V of Chapter 30, confers on Justices of the Peace, jurisdiction to hold preliminaries in cases where a person is charged with a felony. Neither Article IV nor Article V of said Chapter confers any jurisdiction on a probate judge to hear and try misdemeanor cases or hold preliminaries.

CONCLUSION.

Following the principles hereinbefore announced, it is the opinion of this Department that a probate judge is without jurisdiction to hear and try misdemeanors or to hold preliminary examinations.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:AW

DEPOSITORIES: National Banks may pledge their assets to secure the public funds of a city of the fourth class.

BANKS & BANKING:

April 23, 1942

5-1

Mr. R. F. Poynter
Vice President
The National Bank in North Kansas City
North Kansas City, Missouri

FILE 72

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request our opinion. Since your request relates to the law relating to the depository of public funds, namely, the public funds of the City of North Kansas City, we are herewith giving you our opinion on the question. Your letter is as follows:

> "The City Attorney for the City of North Kansas City has filed with the City Council an opinion that neither a State or National Bank may pledge any part of its assets to secure the deposit of city funds. Will you please advise at your early convenience if his opinion is correct.
>
> "It has always been our understanding that both State and National banks were empowered to pledge their assets for such security."

Your question is, as we understand from your letter, and also subsequent correspondence, as follows: May state and National banks pledge their assets to secure the funds of the City of North Kansas City, a city of the fourth class?

Section 7160 R. S. Mo., 1939, provides as follows:

> "Boards of aldermen in cities of the fourth class are hereby empowered and authorized, at their first regular meetings in the months of January, April, July and October of each year, to select a depository for the funds of their respective cities, for such length of time and under such rules and regulations as may be provided and prescribed by ordinance therefor: Provided, always, that such depository shall be a banking corporation or an individual banker or a trust company doing business within such city; and provided further, however, that if such depository cannot be selected, or such satisfactory arrangements made, such boards of aldermen are hereby empowered and authorized to loan such moneys upon the same terms and under the same conditions as provided by law for the loaning of county and school moneys."

This section provides the method by which the Board of Aldermen of the City of North Kansas City may select a depository for the funds of said city, and the depository must be duly selected in accordance with this section.

The Missouri Legislature in 1937, at page 502, Laws of Missouri, 1937, enacted what is now Section 8183, R. S. Mo., 1939, which section provides in part as follows:

> "Notwithstanding any provisions of law of this state or of any political sub-

> division thereof, the public funds of every * * * city, * * * which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 13086 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 87 of the Revised Statutes of Missouri 1939, and all amendments thereto. * * * "

This section provides that banking institutions may pledge the same securities to secure the public funds as may be used by them to secure the State funds deposited by the State Treasurer in the State's legal depositories. The kind of securities that may be pledged by the banking institutions to secure the State funds are set forth in Section 13086, R. S. Mo., 1939, where reference may be made for the character of securities that may be pledged.

The Act of June 25, 1930, passed by Congress and approved by the President, 12 U. S. C. A., Section 90, provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. * * * * * ."

And, therefore, since the effective date of said Federal Act, National banks have been permitted to pledge their assets to secure public funds of the same kind and description as is authorized by the law of the state in which said association is located. The effect of this section is that National banks located in Missouri, to secure public funds of the respective political subdivisions of the State, may pledge the same securities as are set forth in Section 13086, supra.

CONCLUSION

It is our opinion, therefore, when the Board of Aldermen of the City of North Kansas City duly selects the depository for its public funds, in the manner as set forth in Section 7160, supra, and the Statutes of Missouri, the National bank in question, if it is so duly selected, may pledge the same securities as set forth in Section 13086, supra.

Respectfully submitted

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

CRH:RW

ROADS AND BRIDGES: - Commissioner of Special Road District - while employed by District - cannot recover for loss of time and medical care.

February 16, 1942

2-25

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

FILE
73

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "The De Soto Special Road District is a special road district in this county. In the early part of 1941 one of the commissioners was doing some work upon some of the District's equipment and was injured-- received a broken leg. This commissioner was and still is the treasurer of that District.
>
> "The District paid approximately $150.00 or $175.00 for doctor bills for the injured commissioner; and on December 13, 1941, paid him $600.00 for loss of time.
>
> "The report of the commissioners showing these items was filed with the county court recently in accordance with the provisions of Section 8699 R. S. Mo. 1939, The court refused to approve the settlement because of these items.
>
> "What jurisdiction does the county court have in this matter, and is there any action that they may take

for recovery? In general what action for recovery should be taken and by whom?"

From your request I am assuming that the special road district was formed under Section 8673 R. S. Missouri, 1939, which is commonly called the "Eight-Mile Square Road District."

Section 8674 R. S. Missouri, 1939, sets out the powers of such special road district. It was held in the case of American Fire Alarm Company v. Board of Police Commissioners, 227 S. W. 120, that a special road district possesses power of suing and being sued and of having a common seal.

Commissioners of Special Road Districts, as organized under Section 8673, supra, are appointed under Section 8675 R. S. Missouri, 1939.

The powers of the Board of Commissioners are set out in Section 3682 R. S. Missouri, 1939.

Under Section 8699 R. S. Missouri, 1939, it is the duty of the Board to make an annual settlement with the county court and said settlement shall contain a full itemized statement of all moneys received, and for what purchases the same have been expended, giving each particular item. There is a penal section, which is Section 4483 R. S. Missouri, 1939, which provides for the punishment of fraudulent disbursements of moneys. This section was construed in the case of State v. Holder, 72 S. W. (2d) 489. In that case, an attempt was made to prosecute a road commissioner who had received pay for work performed in the road district. The road district involved in that case was a road district organized under Article 11, Chapter 46, which is a special road district under the benefit assessment plan. Under this road district system the road district must contain not less

than six hundred and forty acres of land, but the same reasoning of law would apply to the road district known as the "Eight-mile square road district" as organized under Section 8673 R. S. Missouri, 1939. The court, in that case, at page 490 said:

> " * * * It was not charged that respondent did not perform the labor for which the claim was allowed or that the district did not receive full value therefor. The primary purpose for which money of a special road district is to be expended is for the upkeep of the roads of the district. The money was, therefore, appropriated and expended for the specific use intended by the law. In other words, the facts alleged in the information disclose, without doubt, that the funds were not diverted from their proper channel. The diversion of funds was the evil sought to be remedied by the section in question."

We find no law for the payment for loss of time by an injured employee of a special road district. We also find no law for the payment of doctor bills of approximately One Hundred and Fifty to One Hundred Seventy-five Dollars.

Under the provisions of Section 8680 R. S. Mo., 1939, the commissioners of the special road district are to serve in that capacity without compensation. You also ask in your request whether or not the county court may take any action for the recovery of the money illegally disbursed to the commissioners. Under Section 8699 R. S. Missouri, 1939, the board of commissioners of a special road district settle with the county court by a full itemized statement of all moneys received and from what sources received, and for what purposes the same have been expended.

The money being the property of the road district, any action that is brought for the illegal disbursement of the special road fund may be brought by the special road district and cannot be brought by the county court.

A taxpayer who has any interest in the subject of any action may bring an action to recover the money illegaly disbursed, if the special road district does not bring such an action or refuses to bring such an action. If such an action is brought by a taxpayer upon the refusal of a special road district to file a suit for the recovery of the money illegally disbursed, the special road district could be made a party to the suit. It was so held in St. Paul & Kansas City Short Line R. Co. et al v. United States Fidelity & Guaranty Co., 105 S. W. (2d) 14, l. c. 20, where the court said:

> "Moreover, it must be borne in mind that this is a suit in equity and that the rule in reference to such suits is that every person having any material interest, legal or beneficial, in the subject matter is properly made a party. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119.
>
> "It is provided by section 700, Revised Statutes of 1929 (Mo. St. Ann. Sec. 700, p. 909): 'All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article.'"

Also, in the case of Smith et al v. Hendricks, 136 S. W. (2d) 449, l. c. 453, the court said:

> "It is a familiar principle of equity that if A. has a cause of action at law, which he alone can assert, but in which B. has an interest, and A. refuses to bring the suit at law, B., by alleging a proper demand and a refusal of A. to bring the suit, can successfully maintain an action in equity to recover for A., because B. is interested in the recovery and it is A.'s duty to bring the suit."

In that case the court also held that the municipal corporation, which in this request is the special road district, had a plain cause of action for moneys illegally disbursed and that also a taxpayer, upon refusal of the special road district to bring such an action, may bring the action, provided the special road district was made a party to the suit. In that case the court, at page 456 held:

> "In State ex rel. Buchanan County v. Fulks, 296 Mo. 614, loc. cit. 635, 247 S. W. 129, loc. cit. 135, it is again said: 'In 7 R. C. L. 965, it is said: "If a county has a plain cause of action for an injury done to it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, in some jurisdictions any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. And like-

wise where an unjust and illegal burden is being imposed on the taxpayers by a county, or the money or property of the county, to replace which taxation must be levied, is being wasted or squandered, a taxpayer has such a direct interest that a bill to enjoin the threatened burden will lie." Newmeyer v. Missouri & M. R. Co., 52 Mo. 81, 14 Am. Rep. 394; Carson v. Sullivan, 284 Mo. 353, 361, 223 S. W. 571; Harris v. Langford, 277 Mo. 527, 533, 211 S. W. 19."

"In Castilo v. State Highway Commission, 312 Mo. 244, loc. cit. 262, 279 S. W. 673, loc. cit. 675, en banc, it was held that the plaintiffs, as taxpayers could maintain the suit if the State Highway Commission was acting unlawfully, and, concerning this question, said: ' * * * If plaintiffs are resident taxpaying citizens, the cost of constructing highways authorized by law will be paid, not by the entire public, but by the taxpaying class of which plaintiffs are members, and which they here represent. If funds be raised by taxation, and expressly set apart by law for the construction of certain highways designated by statute, are expended upon other and different highways not authorized by law, as plaintiffs specifically plead, the necessary conclusion from the facts pleaded is that the burden of taxation on resident taxpaying citizens will be increased. The roads lawfully designated will have to be constructed and maintained out of additional funds raised to replace money unlawfully diverted. Failure to allege the ultimate fact that plaintiffs' taxes will be in-

creased when this conclusion necessarily arises from facts sufficiently pleaded, is not material. * * * '"

CONCLUSION

In view of the above authorities it is the opinion of this department that a special road district is a corporation and derives its entity solely from the statutes and under the facts in your request the county is not a proper party to suit to recover money illegally disbursed by the commissioners of the special road district, but the suit must be filed, either by the special road district, or upon their refusal, by a taxpayer.

We are further of the opinion that the road commissioner mentioned in your request is not entitled to receive reimbursement for medical attention or for loss of time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS:
JUSTICES OF THE PEACE:

Error of county clerk does not prevent placing name of candidate on the ballot when he was the only candidate for that office.

August 21, 1942

8-25

FILED
13

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of August 6, 1942, which reads as follows:

> "Prior to March 5, 1942 four men, namely Norval W. Welsh, F. P. Johnston, W. G. Donnegan and Ben Matthews filed their declarations as candidates for Justice of the Peace for Joachim Township, Jefferson County, Missouri, on the Democratic Ticket. All their names appeared on the ballot for the primary election with the instructions to vote for three. Ben Matthews received the lowest vote.
>
> "In Joachim Township there are two incorporated cities, namely Crystal City with a population of 3417 and Festus with a population of 4620. The population is shown in the Official Manual of Missouri 1941-1942 page 1041.
>
> "Welsh and Matthews are residents of Crystal City, Johnston of Festus and Donnegan of Herculaneum.

> "Matthews contends that Joachim Township is entitled to four Justices of the Peace, that he was nominated in the Primary Election and that his name should be placed on the ballot as a candidate in the general election. He bases his contention upon Section 2522 R. S. Mo. 1939.
>
> "Please give me your opinion if Joachim Township is entitled to four Justices of the Peace and if Matthews' name should be placed on the ballot for the general election as a candidate."

The first question, "Is Joachim Township entitled to four (4) Justices of the Peace?" This involves construction of Section 2522 R. S. Mo., 1939, which reads as follows:

> "Each municipal township except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; * * *." (Underscoring ours.)

The reason for the Statute, supra, is set out in the case of State ex rel Hazel et al. v. Watkins, 253 S. W. 781, l. c. 782, in which the court said as follows:

> " * * * The law providing for additional justices in a township was enacted for the purpose, no doubt, of providing for the necessities of the more populous communities, and the communities remote from a justice of the peace, and also to provide for each township a sufficient number of justices of the peace to take care of the justice of the peace litigation arising therein. This purpose, we think, should have some consideration in disposing of the question before us."

Therefore, it seems it was undoubtedly the intention of the Legislature to provide for an additional justice in an incorporated city with a population of over two thousand. We call your attention specifically to the portion of the Section, supra, which is as follows:

> " * * * who shall be a resident of such town or city; * * * * ."

Therefore, the Legislature evidently intended for <u>each</u> town as designated above to be entitled to a justice to reside in the city.

Your second question is, "Should Matthews' (who was the fourth man in a three man contest) name be placed upon the ballot for the general election as a candidate for the office of Justice of the Peace?" We again refer you to the citation on construction of Statutes as set out above.

Section 11543, R. S. Mo., 1939, reads as follows:

"The list of nominations published by the clerks of the county courts of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot, the size of type, squares and emblems used, spacing and blank lines to be as prescribed by law for the official ballot: Provided, that the names of nominees for township offices shall not be printed in the notice authorized by this section, but such notice as to township offices shall be in the following form:

"For justice of the peace___twp.,
(One or two to elect, as the case may be)

_____

_____

"For constable _____twp.,

_____

"Provided, that said notice shall be a copy of the ballot to be voted, except for the blank space in the township officers: Provided further, that at the end of each party ticket the names of the nominees for township

> offices shall be published, set solid, paragraphing only for each township."

The primary ballot, as we understand it, in this case was printed setting out four names with the instructions to vote for three as provided in the Section set out above.

We are assuming that Matthews, the candidate for one of the four offices of justice of the peace, received some votes, even though he received less than any one of the other three candidates for said offices.

Since we have held that Joachim Township is entitled to four justices of the peace, and since, according to your request there were only four candidates for the four offices, it is our opinion that the candidate Matthews should be placed upon the general election ballot.

Section 11569 R. S. Missouri, 1939, reads as follows:

> "The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election."

This section is mandatory, and, since there are four offices to be voted upon, and since only four candidates filed for the four offices, each candidate received the "greatest

number of votes" at the primary as a candidate for the office of justice of the peace.

It is true that the county clerk erred in stating upon the official ballot that only three of the candidates should be voted upon, yet, errors of election officials cannot void the voters who voted for Matthews as justice of the peace.

In the case of Bradley v. Cox, 271 Mo. 438, John H. Bradley, now Commissioner of the Supreme Court of Missouri, Division No. 1, was a contestant against Argus Cox, for the office of Judge of the Springfield Court of Appeals. The election was very close, and, upon examination, it appeared that in Maries County 1311 votes were cast for a man by the name of Arch A. Johnson, who was not the Democratic Nominee for Judge of the Springfield Court of Appeals. The court, in that case, held that even though the county clerk had placed the wrong name in the ballot, as a Democratic Nominee, for Judge of the Springfield Court of Appeals, the error of the county clerk should not void the 1311 voters who voted for Arch A. Johnson, who was not a nominee, and ruled that the votes should be cast for John H. Bradley. If the votes had not been counted for John H. Bradley, the contestee, Argus Cox would have been elected. The court, in arriving at that opinion, first said: (l. c. 451)

> " * * * This court is, however, committed, as are all courts, to the principle that the disfranchisement of voters is not favored. We will not give to any law such a construction 'as would permit the disfranchisement of large bodies of voters because of an error of a single official' in any case in which the law in question 'is fairly susceptible of any other.' * * * * * * * * ."

And, further said, at l. c. 453:

> "The statutory provision that ballots other than those the county clerk prepares and causes to be printed shall not be cast or counted means, simply, that no ballot shall be cast or counted except those officially prepared. It does not mean if any error occurs in printing such ballot the ballot shall be thrown out." (Underscoring ours.)

Also, in the case of Gass v. Evans, 244 Mo. 329, l. c. 354, the court said:

> "* * * The reasoning of VALLIANT, J., in the **Hehl** case is unanswerable. His interpretation of the statutes, following BARCLAY, J., in the Bowers case, is so broad, so wise and so close as to leave nothing more to be said. During a consideration of the question from the standpoint of statutory law, precedent and natural justice, he quoted from a Canadian case pointing the dangers lurking in any other view. 'It must also be borne in mind,' says BLAKE, V. C., in the case borrowed from (Grant v. McCallum, 12 Can. L. J. N. S. l. c. 114), 'that if the court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness today may be from a corrupt motive tomorrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and to have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him.' That excerpt aptly states the sum of the matter in a nutshell."

Also, in the case of Bowers v. Smith, 111 Mo. 45, l. c. 64, the court said:

> "We conclude that a reasonable and natural construction of the law forbids us to repudiate, for any such reasons as have been presented, the three thousand votes cast in Sedalia in 1890.
>
> "If for every error of a county clerk, or harmless irregularity in election procedure, citizens, having no control over either, are to lose their right of choosing public officers, the 'reform ballot act,' instead of being found an improvement of the machinery of popular government, will justly be denounced as a 'snare to entrap the unsuspecting voter.' Gumm v. Hubbard (1889), 97 Mo. 319. Such a result, however, was never contemplated in its enactment, and should not be brought about by a narrow and technical reading of it.
>
> "'Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act.' PECKHAM, J., in People ex rel. v. Board of Canvassers (1891), 129 N. Y. 395.
>
> "While it is well enough to insist on a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality where errors, such as

> are here charged, occur. The legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction."

Also, in the case of Nance v. Kearbey, 251 Mo. 374, l. c. 383, the court said:

> " * * The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. l. c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. l. c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official,* * * * * *."

Other states have followed the same reasoning as the Appellate Courts of this State, and ruled, that the mistake of an election officer should not void the will of the people. In the case of Raymer v. Willis, 42 S. W. (2d) 918, (Ky.), which is a Kentucky case, the court said at l. c. 921:

> "Where election officers fail to do their duty in this or any other respect, or shall willfully perform

> it in such a way as to hinder the objects of the law, they may be punished by fine and imprisonment. But it is a general rule of election law that, if the statutes do not expressly declare that noncompliance with a specified procedure shall result in throwing out the precinct or other district, a noncompliance that does not affect the fairness and equality of the election or the ascertainment of the true result will not vitiate the election. 9 R. C. L. 1091, 1092; Marilla v. Ratterman, 209 Ky. 409, 273 S. W. 69; Muncy v. Duff, 194 Ky. 303, 239 S. W. 49; Craig v. Spitzer, 140 Ky. 465, 131 S. W. 264, and cases cited. Cf. Stewart v. Wurts, 143 Ky. 50, 135 S. W. 434. To hold otherwise would be to subordinate the substance to the form, the end to the means. It is a transcendent rule that the right of suffrage will not be destroyed by irregularities or derelictions on the part of officers charged with the duty of conducting the election fairly and honestly, unless their misbehavior was such as to render impossible of judicial determination the will of the people as expressed at the polls."

CONCLUSION

It is, therefore, the opinion of this office that Joachim Township, was, and is, entitled to four justices of the peace, by reason of the fact that there are two

incorporated cities in the township with a population of over two thousand each.

It is further the opinion of this department, that since there were only four candidates for the four offices of justice of the peace, then, all four candidates should be placed upon the ballot as candidates at the general election, even though in the primary the voters were erroneously limited to vote only for three of the four candidates.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CRIMINAL PROCEDURE - Prosecuting Attorney certifying cost bill that defendant is insolvent is not liable in any manner unless wilfully and corruptly done.

December 8, 1942

FILED
73

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 2, 1942, which reads as follows:

> "Norville W. Brickey was charged in the circuit court of Jefferson County with obtaining money under false pretenses. After a change of venue he was convicted in the circuit court of Audrain County, Missouri. Two executions for the costs were issued, directed to the sheriff of Jefferson County. On both of these executions said sheriff made nulla bona returns stating that he failed to find any property of the within named Norville W. Brickey on which to levy.
>
> "The costs in this case should be paid, but when the fee bills are certified to the state auditor, the prosecuting attorney must certify that the defendant is insolvent.
>
> "Some people think that Brickey is solvent, while others do not. Personally I do not know if he is solvent

or insolvent.

"Should I sign the fee bill, certifying that the defendant is insolvent; and if I do, is there liability, of any kind, on my part?"

Section 4239 R. S. Missouri, 1939, reads, partially, as follows:

" * * * In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Under the above partial section the judge and prosecuting attorney shall certify that the defendant is insolvent and for that reason the State shall pay the costs, but the State Auditor is not bound by that certification and may refuse to pay the costs, for the reason that the defendant is solvent. I mention this becase the judge and prosecuting attorney are not the sole judges of the solvency of the defendant. That the State Auditor may refuse to audit claims certified under this section was held in the case of State ex rel Suter et al. v. Wilder, State Auditor, 196 Mo. 418, l. c. 428, where the court said:

> "We are of the opinion that the rules of law announced in the cases heretofore cited are applicable to the provisions of the statute in relation to cost bills in criminal cases as they now exist, and we are of the opinion that the certificate of the judge and prosecuting attorney as to the taxation of costs in criminal cases is not conclusive upon the State Auditor, nor do we mean to say that the conclusion or disallowance by the State Auditor of a fee bill is conclusive upon the parties claiming the fees. The auditor is subject to the supervision of the Supreme Court, and if he refuses to audit, adjust and settle costs which have been properly taxed and certified by the judge and prosecuting attorney, the court will not hesitate by its process to compel him to perform his duty in that regard." (Underscoring ours.)

Under Section 4239, supra, the judge and prosecuting attorney are acting in both a judicial and ministerial duty. The proper manner in which to determine whether or not a defendant is solvent, or is unable to pay the cost, is to have an execution issued by the circuit clerk to the sheriff, who shall make his return. Under the facts in your request the sheriff of Jefferson County has attempted to serve two separate executions, and has made a nulla bona return on both executions. That this was the proper procedure by which to determine the solvency of the convicted defendant, was held in the case of State ex rel F. G. Hopkins v. Justices of Buchanan County Court, 41 Mo. 254, l. c. 257, where the court said:

> " * * * What difference can it make to the county whether he is tried and convicted of the offense charged against him, or voluntarily confesses the charge to be true? In either case he would be

> required by the judgment of the court to suffer the penalty imposed by law. In this case the judgment of the court entered upon his own voluntary assumption to pay the costs was sufficient to bind him for that purpose. In other words, he has by his own act fixed his liability to pay the costs, and if unable to pay them, the penalty is just as much bound as if his liability had been fixed by law. We can perceive no reason why the services rendered in issuing the execution were not as necessary as any others charged for. It was perhaps the most satisfactory way in which the ability of the defendant to pay costs could be determined. * * * "
> (Underscoring ours.)

In your request you ask, that if you should sign the fee bill and it should develop that the defendant is not insolvent, would you, in any way, be liable. It has been held that where a judge is acting in a ministerial capacity, or a prosecuting attorney who, as a ministerial officer is acting in the capacity which is in itself judicial, that in order to hold either officer liable for a mistake he must have acted in a spirit of wilfullness, corruption and malice. It was so held in the case of State ex rel v. Diemer, 255 Mo. 336, l.c., 354, where the court said:

> "The question, one of public concern, in some of its phases, is by no means new. Pike v. Megoun, 44 Mo. l. c. 496

et seq., followed Reed v. Conway, 20 Mo. 22, in holding to the general doctrine announced above. In the Pike case it was ruled:

"'When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. (Wilson v. The Mayor, 1 Den. 599; Rochester White Lead Co. v. City of Rochester, 3 Comst. 463.) And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect to his duty.'

"The Reed-Conway case, supra, quoted with approval from Jenkins v. Waldron, 11 Johns. Rep. 1. c. 121. In that case inspectors of election were sued for denying a voter the right to vote. In denying recovery the eminent bench, presided over by no less an authority in the law than Kent, closed its judgment with these words:

> "'It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.'
>
> "To the same effect is Schoettgen v. Wilson, 48 Mo. 253.
>
> "These defendants were acting within the scope of their express statutory authority in allowing or disallowing claims. They were not guilty of arbitrarily, wantonly, oppressively or fraudulently conducting themselves and, under such circumstances, they are not personally liable for acting in accordance with their honest convictions of duty. (McCutcheon v. Windsor, 55 Mo. l. c. 153.) The reasoning of Washington County v. Boyd, 64 Mo. 179, sustains the judgment below; and so does that of Edwards v. Ferguson, 73 Mo. 686, and Knox County v. Hunolt, 110 Mo. l. c. 75, and Albers v. Merchants' Exchange, 138 Mo. l. c. 164, and Williams v. Elliott, 76 Mo. App. l. c. 12 (a case on its facts nearly in point), and so Schooler v. Arrington, 106 Mo. App. 607."

Also, in the case of Knox County v. Hunolt, 110 Mo. 67, l. c. 75, the court said:

> "But where the public officer is by law vested with discretionary ministerial powers, and he acts within the scope of his authority, he is not liable in damages for an error in judgment, unless guilty of corruption or a wilful violation of the law. He is not liable for an honest mistake. This principle has been asserted by this court under a variety of circumstances. Reed v. Conway, 20 Mo. 23; Pike v. Megoun, 44 Mo. 492; McCutchen v. Windsor, 55 Mo. 149; 48 Mo. 254; Edwards v. Ferguson, 73 Mo. 686; Washington Co. v. Boyd, 64 Mo. 179."

CONCLUSION

In view of the above authorities, it is the opinion of this department that where an execution was issued by the circuit clerk for criminal costs, and was returned nulla bona by the sheriff, and the prosecuting attorney certifies to the state auditor on the cost bill that the convicted defendant is insolvent, and it later develops that the convicted defendant is solvent, the prosecuting attorney is not liable in any manner, unless he acted corruptly, or wilfully violated the law.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

MISSOURI
REAL ESTATE
COMMISSION :

Restriction agreement filed after deed of trust does not apply to purchaser at trustee's sale.

July 16, 1942

7-73

FILED
74

Missouri Real Estate Commission
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your request for an opinion, under date of July 14, 1942, which reads as follows:

> "We have a licensee in Kansas City namely Kelly-Townsdin Company who are agents for the Home Owners Loan Corporation and as agent had the listing of 2411 Prospect, Kansas City, Missouri. Said property is restricted as to sale to negroes as shown in document A 477865, Book B, 3039, Page 27, signed, acknowledged and executed by the property owners the 18th day of December 1930, filed for recording August 3, 1931.
>
> "A negro buyer called at licensee office and desires to buy this property. The licensee asked the Home Owners Loan Corporation if the property could be sold to negroes. The Home Owners Loan Corporation through its Regional Counsel requested an opinion and Mr. W. M. McAdams, Vice President of the Missouri Abstract and Title Insurance Company, Kansas City, Missouri advised them as follows:

> "We have your letter of July 6th regarding our certificate on the property involved in the captioned case, and desire to advise that a restriction agreement was filed August 3, 1931, and recorded in Book B-3039 at Page 27, restricting the use of the premises in question and other property in the surrounding neighborhood against use by negroes for a period of fifteen years from and after January 1, 1931, with provision for automatic extension for successive periods of fifteen years thereafter unless released in the manner therein provided, but this restriction was cut out by the foreclosure of a prior deed of trust at trustee's foreclosure sale held on September 14, 1931, and was not recognized by the purchaser at said sale nor any subsequent grantee by any evidence of record, and we, therefore, take the position that our certificate regarding this matter is correct and that there are no restrictions involving the premises in question which you are required to recognize."

In the letter of Mr. W. M. McAdams, which you quote in your request, it is stated that the restriction agreement was filed August 3, 1931, and recorded in Book B-3039, at page 27. Also, that this agreement was to be in effect for a period of fifteen years from January 1, 1931, with provisions for automatic extensions. He also states that the purchaser at the trustee's foreclosure sale, which was held on September 14, 1931, did not, in any manner recognize or agree to the restriction agreement. Since the agreement was filed August 3, 1931, and the deed of trust was foreclosed

on September 14, 1931, for the purpose of this opinion we are assuming that the deed of trust was given on the property before the date of the restriction agreement, or the date of the filing of the restriction agreement, and that the deed of trust did not contain any of the restrictions set out in the restriction agreement.

Section 3426 R. S. Missouri, 1939, reads as follows:

> "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

It will be noticed that in the above section it is specifically stated: " * * * whereby any real estate may be affected, * * ." By the filing of the deed of trust it was notice to any subsequent actions affecting the real estate, that the property was subject to the amount of the loan described in the deed of trust, and also subject to foreclosure if the loan was not paid at a certain time.

Section 3427 R. S. Missouri, 1939, reads as follows:

> "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

It has been held in this State that the mortgagor may perform certain things incidental to the property, even though it is subject to a mortgage or deed of trust, but the mortgagor cannot perform something that would be a detriment to the mortgage of record. There is no question but that a first mortgage cannot be affected by the giving of a second mortgage.

Under the facts in your request the restriction agreement was not entered into until after the deed of trust had been given. That the rights of the mortgagee were paramount to the rights of the mortgagor, under the facts set out in your request, is upheld in the case of Eurengy et al. v. Equitable Realty Corporation, 107 S. W. (2d) 68, l. c. 71, where the court said:

> "In this State a mortgage or deed of trust conveys no estate in the land, but merely creates and evidences a lien thereon to secure the debt. Until the mortgagor defaults and the mortgagee forecloses or takes possession the mortgagor continues as the owner of the estate and has a right to lease, sell, and in every respect deal with the mortgaged premises as owner. Kennett v. Plummer, 28 Mo. 142; City of Springfield ex rel. Southern Missouri Trust Co. v. Ransdell, 305 Mo. 43, 264 S. W. 771; Hunter v. Henry (Mo. App.) 181 S. W. 597. Or, to otherwise express the rule, a mortgage or deed of trust on real estate is merely a security for the debt. As long as the mortgagor is in possession, he may sell or may lease the premises and collect the rents and proceeds and is entitled to sue for and recover all damages resulting from the injuries inflicted upon or from any interference with his possession. As to all parties save and except

> the mortgagee, these rights and remedies belong to the mortgagor to the same extent after as before the mortgage was executed. As to all the world except the mortgagee, the mortgagor continues the real owner. * * * * * "

Also, in the case of Guaranty Savings & Loan Ass'n. et al. v. City of Springfield, 113 S. W. (2d) 147, Pars. 10, 11, where the court said:

> "The mortgages of the respondent Guaranty Savings & Loan Association were duly recorded in the office of the recorder of deeds for Greene county, and therefore the appellant in making settlement with the Hivelys was charged with knowledge of their existence and contents, and the lien created upon the land in question. Sections 3039, 3040, R. S. Mo. 1929, Mo. St. Ann. secs. 3039, 3040, pp. 1879, 1880; Clay v. Walker, Mo. App., 6 S. W. 2d 961, 962.
>
> "The authorities in this state and in other states conflict to some extent as to whether the mortgagee is an 'owner' and whether his interest in the real estate is 'property,' but this question is settled by the case of Morgan v. Willman, supra. The court in this case, 318 Mo. 151, loc. cit. 168, 1 S. W. 2d 193, 200, 58 A. L. R. 1518, said: 'After a careful and thoughtful analysis and study of the authorities bearing upon the question, we are constrained to

the view, and so hold, that the interest of plaintiff in the land in controversy, by reason of being the owner and holder of the note secured by the deed of trust upon such land, is "property," and that plaintiff is the "owner" of property, within the meaning and intent of section 21, art. 2, of the Constituion, and the applicable statutes of this state.'

"Whatever has been held by the courts of this state, regarding the status of a mortgagee relative to the land secured by his deed of trust, if in conflict with this case, is not binding on this court, as this is the latest and governing decision of the Supreme Court, and puts at rest all doubt regarding the status of the mortgagee. Section 21 of article 2 of the Constitution of Missouri provides that private property shall not be 'taken' or 'damaged' without just compensation to the owner thereof. The mortgagee therefore is an 'owner' within the contemplation of this constitutional provision and his interest in the land is 'property.' His rights are twofold--if the property is taken in whole or in part he must be compensated, if it is damaged he must be compensated, and there is no distinction in so far as the mortgagee is concerned between the taking and damaging of his property. He has the right under article 2, sec. 21, of the Constitution to compensation in either event."

If the deed of trust had been given after the filing of the restriction agreement, the agreement would not be affected by the foreclosure. However, since, according to your request, it was such a short time between the foreclosure and the filing of the restriction agreement, we are assuming that the deed of trust was given before the filing of the restriction agreement.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the property at 2411 Prospect, Kansas City, Missouri, is not subject to the restriction agreement, as to the sale to negroes, as shown in document A 477865, Book B, 3039, page 27, in the office of the recorder of deeds of Jackson County, Missouri.

It is further the opinion of this department that if the deed of trust was given after the filing of the restriction agreement, the above described property would be subject to the restriction agreement, even though it had been foreclosed by a trustee's sale.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

VANE C. THURLO
Acting Attorney General

WJB:RW

PENAL INSTITUTIONS: Time in jail on stay of execution is not serving penitentiary sentence.

September 10, 1942

9-25

FILED
74

Hon. Paul V. Renz
Farms Commissioner
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 9, 1942, which reads as follows:

> "I should like to have a ruling from you covering the situation which I outline below:
>
> "In this case the inmate of this institution was sentenced by the Circuit Court of the city of St. Louis to Life Imprisonment on the 24th day of June,1936; on the 14th of July, 1936, the same Circuit Court entered up an order holding this man in the city jail in St. Louis 'until further order of the court'. About this time the judgment and sentence was appealled to the Supreme Court of Missouri pending which appeal the inmate continued to serve on the original judgment and sentence in the city jail; on the 17th of August the Supreme Court affirmed the judgment of the Circuit Court and the defendant was on the same day lodged in the Penitentiary and entry was made in our Serial Record Book that the sentence commenced on August 17, 1938, the date of the Supreme Court Mandate.

> "I should like to know whether in your opinion this sentence legally starts on June 24, 1936 and whether it should be so entered in our journal, or Serial Record Book, which is kept in accordance with the act of the Legislature."

Section 4106 R. S. Missouri, 1939, reads as follows:

> "Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Under this section it is mandatory that upon the conviction and sentence, the sheriff, without delay, should transport and deliver a convict to the State Penitentiary. In view of Section 4106, supra, the legislature, in order to protect defendants who have been convicted, in their appeal, enacted Sections 4130 and 4131 R. S. Missouri, 1939, which grant the defendant time for appeal. It also enacted Section 4132 R. S. Missouri, 1939, which reads as follows:

> "No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital

> cases, unless the supreme court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record, shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the supreme court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely."

Under this section the Supreme Court, a judge thereof, or the judge of the court in which the judgment was rendered may grant a stay of execution. It goes without saying, that upon a stay of execution the convict is not serving the term of his conviction set out in the judgment. The Legislature also, in order to retain the custody of the defendant during a stay of execution, enacted Section 4135 R. S. Missouri, 1939, which reads as follows:

> "If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error."

Under this section the sheriff is ordered to keep the defendant in custody without executing the sentence, that is delivery to the penitentiary.

In reading over your request, we notice you state that the Circuit Court of St. Louis made an order holding the defendant in the city jail in St. Louis until further order of the court. It is not for us to say whether this is a stay of execution, and it is a matter of fact as to whether the order was made as a stay of execution or whether it was an order unlawfully made. If it was not a stay of execution, he should be allowed his jail time spent in the St. Louis County jail. It was so held in Ex parte Perse, 286 S. W. 733, Par. 11, where the court said:

> "Docket entries also show that a stay of execution for 90 days was granted defendant. No commitment was issued until the expiration of 90 days, and it is contended that the justice had no authority to grant a stay of execution, and that it was his duty to have issued a commitment immediately, and, since he did not, he could not issue it 90 days thereafter. At the time of this judgment, May 26, 1925, the justice did not possess the power to grant a stay of execution, and that order of the justice was void. We do not think, however, that the delay of 90 days in issuing the commitment, in and of itself, rendered the commitment void. The time of the jail sentence was 6 months, and had the commitment been issued on the same day that the judgment was entered, the sentence would not have expired at the end of 90 days. We are of the opinion that, since it was the duty of the justice to issue the commitment immediately,

> the time of defendant's sentence to jail would begin immediately, and that he would be entitled to the benefit of the time from the date of the judgment, and upon the expiration of 6 months from that date he would be entitled to his release, no matter when the commitment was issued. * * * * * * * * * * * * * * * ."

The purpose of the enactment of Sections 4132 and 4135, supra, was to aid defendant in his appeal. The Legislature further enacted Section 4136 R. S. Missouri, 1939, which reads as follows:

> "In all cases where an appeal or writ of error is prosecuted from a judgment in a criminal cause, except where the defendant is under sentence of death or imprisonment in the penitentiary for life, any court or officer authorized to order a stay of proceedings under the preceding provisions may allow a writ of habeas corpus, to bring up the defendant, and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge."

Under this section, after a stay of execution had been granted the prisoner could make bond, subject to the final decision of the Appellate Court. Of course, under a valid stay of execution the time spent at liberty under his bond is not recognized as part of the time under his sentence.

It was so held in the case of Ex Parte Perse, 286 S. W. 733, Par. 12, where the court said:

> "After this proceeding was begun, and the writ of habeas corpus issued, the petitioner gave bond, and has been at liberty since that time. The time he has been at liberty under this bond should not be credited on the 6 months provided in the sentence."

There is no question but that under Section 4132, supra, the court may grant a stay of execution where there is probable cause for an appeal, or writ of error. It was so held in the case of Ex Parte Thornberry, 254 S. W. 1087, l. c. 1090, where the court said:

> " * * * That a court has power, in the exercise of its discretion, to suspend a sentence a reasonable time for a proper purpose there is no question. That purpose has usually been construed under our practice, in the absence of any statute on the subject, to granting time to file a motion for a new trial or in arrest of judgment, to secure bail, or to perfect or pending an appeal."

Section 4153 R. S. Missouri, 1939, reads as follows:

> "When the appeal is taken, or the writ of error is sued out by the party indicted, if the supreme court affirm the judgment of the court below it shall direct the sentence pro-

> nounced to be executed, and the same shall be executed accordingly; if the judgment be reversed, the supreme court shall direct a new trial, or that defendant be absolutely discharged, according to the circumstances of the case."

Under the above section, the Supreme Court may affirm the judgment of the court and direct that the sentence pronounced be executed.

Since the defendant in the case continued to take advantage of the stay of execution by remaining in the city jail of St. Louis, and did not obtain his release, on bond, as provided in Section 4136, supra, he was not serving the sentence under the judgment of the court and his sentence, under the judgment of the court, did not begin until he entered the penitentiary.

Section 9061 R. S. Missouri, 1939, reads as follows:

> "The commission shall keep a journal, in which it shall enter regularly the reception, discharge, death, pardon or escape of every convict, and all other occurrences of note that concern the state of the penitentiary."

Under this Section the Commission enters into the Serial Record Book the date of the commencement of the sentence, which, under the facts in your request, would be August 17, 1938.

Of course, in case of a parole or pardon by the Board of Probation and Parole, the board may take into consideration the fact that the defendant spent over a year in the city jail in the City of St. Louis. That authority is granted to it under Section 9160 R. S. Missouri, 1939.

CONCLUSION

Therefore, it is the opinion of this department, that if the order made by the judge of the Circuit Court of St. Louis was a stay of execution, then the sentence legally starts on August 17, 1938, which was the date of the Supreme Court mandate and mittimus, and reception in the penitentiary, and not June 24, 1936, which was the date of the sentence in the lower court and should be so entered in the Serial Record Book.

It is further the opinion of this department that if the order made by the Circuit Court of St. Louis was not a stay of execution, the date of the commencement of the sentence would still be August 17, 1938, but the defendant, if the sentence was for a certain number of years, instead of life, would be entitled to have the time spent in the city jail deducted from his term. This could only be determined by way of habeas corpus proceeding.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PENITENTIARY REVOLVING FUND: Revolving fund may be used to purchase livestock for the farm industries of the Department of Penal Institutions.

- -

September 17, 1942

9-17

FILED
74

Mr. Paul V. Renz
Farms Commissioner
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Renz:

This is in reply to yours of recent date wherein you submit a question on the following statement of facts:

"Because of conditions beyond our control, the Penal Board deems it necessary, if possible, to buy a quantity of live stock both Cattle and Hogs for consumption in 1943.

"The balance remaining in our 1942 budget will not permit our buying this stock at this time, and the only way that we can buy stock would be for the Industries to purchase this stock out of their Revolving Fund and the Penitentiary buy back from the Industries during 1943 out of the 1943-1944 Budget.

"We propose to buy all feeder stock and this stock would be fed with this years crops in order to be in condition to use in 1943.

> "We therefore submit this request to your office for an opinion as to whether or not we have the authority under law to make this purchase from the Revolving Fund of the Industries to be repaid by the penitentiary operations fund in 1943."

The officials of the penitentiary, by virtue of the provisions of Sections 9097 and 9098 R. S. Mo., 1939, have set up a revolving fund and provided for the disposition of this fund. Section 9097, in so far as it applies to the question here, is as follows:

> "The account or fund heretofore provided for by law, and known as the 'revolving fund,' shall continue to be maintained and known as the 'revolving fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material, machinery or other equipment or in the erection of buildings or making other improvements in plants in connection with the industries carried on or to be carried on in said penitentiary or on the farm or lands mentioned in section 9987 hereof or elsewhere; and in the manufacturing, handling and marketing of article so produced, until disposed of, according to the provisions of this article; and the money in said 'revolving fund' shall be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of said board. * * * * * "

Section 9095 referred to in the foregoing section pertains to the twine plant. Section 9096 R. S. Mo., 1939, referred to in the foregoing section pertains to the authority of the board to purchase raw materials required for the manufacture of any article in any industry carried on by the board in the penitentiary.

The appropriation for the Missouri Penitentiary "revolving fund", Laws of Missouri, 1941, page 171, provides as follows:

> "For the Missouri Penitentiary, chargeable to the Missouri Penitentiary Revolving Fund.—For the purchase of raw materials, machinery or other equipment, or in the erection of buildings or in making other improvements in plants in connection with the industries carried on or to be carried on in said penitentiary, or on the farms or land under the supervision of the State Prison Board, and in the manufacturing, handling and marketing of articles so produced, until disposed of in accordance with the provisions of Article 5, Chapter 48, of the Revised Statutes of Missouri, 1939, the sum of Three Million Two Hundred Sixty Thousand Dollars ($3,260,000.00) or so much thereof as may be necessary during the period beginning January first, 1941, and ending on the thirty-first day of December, 1942, when the same shall have been collected and deposited to the credit of such said revolving fund.
> *
> "D. Operation:

"General expense: communication, printing and binding, rewards, transportation, travel within and without the State, labor of convicts, royalty, insurance, materials, supplies, clothing, dry goods, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadway materials, household supplies, laundry, light, heating, power and water supplies, raw material for Industries, shop, stable and garage supplies (Ind,), small tools, miscellaneous supplies and repairs, stationery and office supplies, stores (for resale) and special materials and supplies 2,900,000.00

"Total Penitentiary out of Revolving Fund . . . . . $3,260,000.00"

By subsection "D" under the head of operation it seems that the lawmakers when they included within this item appropriations for "farm and garden supplies" construed the provisions of Section 9097 and Section 9098 to include these terms within the term "revolving fund".

By applying the rule that legislation of a general character cannot be included in an appropriation bill, State ex rel Davis v. Smith, 75 S. W. (2d) 828, it would necessarily follow that the Legislature by the foregoing phrase in the appropriation bill could not broaden the provisions of said Sections 9097 and 9098 pertaining to the revolving fund.

If the expenditures for farm operations could not be made from the revolving fund it would be on account of the provisions of Section 19, Article 10 of the Constitution which provides in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; * * * * * *"

Again referring to Section 9097, this Section could be construed to include farming industry. If it does include farming industry then it would naturally follow that purchases of livestock, feed and machinery to carry on the farming activities would come within the class of activities included within the revolving fund.

When it is considered that one of the prime purposes of the penitentiary is to furnish occupation and teach trades to the inmates thereof and also to sustain them while confined therein the industry of farming is just as essential in carrying out the purposes of the law as is the twine plant, the broom factory, the furniture factory or any other industry carried on by the Department of Penal Institutions.

CONCLUSION

From the foregoing it is the opinion of this department that the Department of Penal Institutions is authorized under the law to make purchases of livestock for the farm industries of the Department of Penal Institutions and to pay therefor from the revolving fund of such industries.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:FS

SCHOOLS: Directors cannot allow school building to be used as a residence.

September 21, 1942.

9-22

FILED
74

Miss Bertha H. Reed
County Superintendent
Department of Public Schools
Carthage, Missouri

Dear Miss Reed:

This will acknowledge receipt of your recent request for an opinion, which request reads as follows:

> "The inquiry has come to this office as to the legality of permitting some one to use a school house as a residence. The school district transports their children to another school.
>
> "Please advise me at your very earliest convenience."

The care and custody of school buildings is by law vested in the school board. Section 10357, Revised Statutes of Missouri, 1939, provides as follows:

> "The board of directors or board of education shall have the care and keeping of all property belonging to the district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. The board shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, and shall provide fuel, heating apparatus, and other material and appliances necessary for the proper heating, lighting, ventilation and sanitation of the schoolhouses; shall

have the floors swept and the fires made at the expense of the district, and cause an accurate account of the expense thereof to be kept and a report of the same to be made at the next annual meeting. The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting. Whenever any such application shall be granted and the use of such houses, buildings or grounds shall be permitted for the purposes aforesaid, the board of directors, or board of education, having charge of the same may provide, free of charge, heat, light and janitor service therein when necessary, and may make such other provisions, free of charge, as may be needful for the convenient and comfortable use of such houses, buildings and grounds for such purposes, or said boards of directors, or boards of education, may require all such expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, may be permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from such use, ordinary wear and

> tear excepted: Provided, however, this article shall not apply to cities which have or may hereafter have 75,000 inhabitants or more."

It will be seen from the foregoing section that the board is required to keep the school building in proper condition for school purposes. Certain exceptions are made by the foregoing section to the uses to which the building may be put. The section provides that in certain cases the building may be used for other than school purposes, but even that use is limited to certain specified meetings.

It has been uniformly held by the courts of this State that directors of school districts have only such authority as is expressly granted them by statute and such as is necessarily implied in the powers expressly granted. In the case of State v. Kessler, 136 Mo. App., l. c. 240, the court said:

> "The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred."

Likewise in the case of Wright v. Board of Education, 295 Mo., l. c. 476, the Supreme Court said:

> "The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication, regard always being had for the object to be attained.

> Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. (Watson Seminary v. County Ct. Pike Co., 149 Mo. l. c. 70, and cases, 45 L. R. A. 675; Armstrong v. School Dist., 28 Mo. App. 180; 25 R. C. L. p. 1091, sec. 306 and notes.)"

Nothing in Section 10337, supra, expressly authorizes the school directors to allow the use of the school building for residence purposes. Neither do we think that anything said in said section can be construed to fairly imply that the Legislatute intended to give such power to the directors. Certainly a doubt exists as to the authority of the directors, and under the foregoing authorities such doubt should be resolved against the directors having the power. Schoolhouses are paid for by public money and are dedicated to educational purposes only, except where the law expressly provides otherwise.

It is a familiar rule of statutory construction that the mention of one thing implies the exclusion of another thing. In the case of Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S. W. (2d) 195, 205, it is said:

> "It is a general rule of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius."

Therefore, we must conclude that where the school directors are given specific directions as to the purposes for which the schoolhouse may be used all other purposes are excluded.

Conclusion

It is therefore the opinion of this office that a school board does not have the right to permit the schoolhouse

to be used as a residence even though the schoolhouse is not being temporarily used to hold school in.

Yours very truly,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:EG

ROADS AND BRIDGES:

COUNTY HIGHWAY ENGINEER: Highway engineer has no authority to appoint maintenance men for the county roads.

December 17, 1942

12-22

FILED
74

Mr. Philip M. Reilly
County Surveyor and Highway Engineer
Jefferson County
Hillsboro, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 7, 1942, which reads as follows:

> "In this county the duly elected county surveyor is also the County Highway Engineer. Please advise if the County Court or the Highway Engineer has the authority to and should appoint the maintenance men for the county roads."

According to the last Federal census the population of Jefferson County is 32023, and for that reason the county surveyor is the ex-officio county highway engineer, since, under Section 8660 R. S. Missouri, 1939, it is provided that all counties in the State which contain not less than 20,000 inhabitants or more than 50,000 inhabitants the county surveyor shall be ex-officio county highway engineer. The duties of the county highway engineer are set out in Sections 8661 to 8667, inclusive, R. S. Missouri, 1939. We do not find any authority in Article 9, Chapter 46 R. S. Missouri, 1939, which applies to county highway engineers, for the highway engineer to employ or appoint the maintenance men for the county roads.

Under Section 8516 R. S. Missouri, 1939, the county court, in counties having a population of not more than 100,000, appoints all road overseers, at the February Term of the Court.

Under Section 8520 R. S. Missouri, 1939, it is the duty of the road overseers to keep the roads in as good repair as the funds at their command will permit.

Also, Section 8522 R. S. Missouri, 1939, which sets out the duties of road overseers, states how much money should be expended by road overseers for the maintenance of the roads. This section impliedly gives the road overseers authority to employ their own help.

CONCLUSION

It is, therefore, our opinion that the highway engineer of Jefferson County does not have authority to appoint the maintenance men for the county roads, but the county court has the authority to appoint the road overseers who employ their own help.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PENAL INSTITUTIONS:

MISSOURI TRAINING SCHOOL FOR BOYS:

Sentences to said School are concurrent, unless ordered by court to be consecutive, and absent applicable statutory provisions to contrary. Board of Probation etc. has power to issue and revoke paroles from said School.

July 9, 1942

7-73

FILED
75

Mr. George A. Riley
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is in the following terms:

> "We would like to have your opinion governing the case sighted below. I have consulted a number of lawyers on this question, and they disagree.
>
> "A boy, Benny Arnce, Jasper County, born October 15, 1925, was committed from Jasper County as a delinquent child on the twelfth day of May, 1937, in the Juvenile Division of the Circuit Court by a Circuit Judge. He was adjudged to be a delinquent child, charged with burglary and larceny, and given a minority sentence. This sentence, then, would expire October 15, 1946. He was paroled February 18, 1942, and while on parole, committed a new offense, was brought into court on June 2, 1942, plead guilty to burglary and larceny, and was committed here by the same Judge of the Juvenile Court for one year. This term would expire June 2, 1943. The first commitment was not mentioned in the second one.

> "My question is this: What shall we do with this boy on the completion of this one-year sentence, June 2, 1943? Shall we discharge him, or shall we hold him on the old sentence until October 15, 1946?"

Mr. Robert C. Edson, Director, Board of Probation and Parole, informed us on July 7, 1942, that the parole of Arnce was issued by that Board on February 18, 1942, and revoked by said Board on June 21, 1942.

Arnce was first convicted as a delinquent minor under the juvenile delinquent law, and later convicted of a felony under the general criminal law, by the same circuit court, and sentenced to imprisonment in the Missouri Training School for Boys. This may lawfully be done. Section 9700, R. S. Missouri, 1939. State ex rel. MacNish v. Landwehr, 60 S. W. (2d) 4, l. c. 8 (10), 332 Mo. 622; State ex rel. Wells v. Walker, 34 S. W. (2d) 124, l. c. 128, 129, 326 Mo. 1233; Section 8998, R. S. Missouri, 1939.

Copies of the commitments, which you have supplied, show that the second sentence contained no order as to whether it should run concurrently with or consecutively to the first one. The rule in that regard, applicable to persons convicted of felonies and sentenced to the penitentiary, was stated in the following terms, after an exhaustive review of the authorities, in State ex rel. Meininger v. Breuer, 264 S. W. 1, l. c. 2, 304 Mo. 406:

> "***** The law then, as now, was settled beyond dispute that in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. * * * * * * * * * * *."

That well-established rule of law is, of course, favorable to the prisoner, by permitting two separate sentences to the same institution to be served at the same time, unless the court orders otherwise, and absent the existence of applicable statutory provisions to the contrary. While this rule under present decisions of the courts is applicable only to sentences to the penitentiary, we believe that if the matter were presented to the courts, they would extend the same principle, by analogy, to boys who are inmates of the Training School.

One statute constituting an exception to this rule is by its express terms applicable only to sentences to the penitentiary. Section 9226, R. S. Missouri, 1939, refers to ". . . a convict sentenced to imprisonment in the penitentiary . . . any convict . . . any crime in the penitentiary, or . . . while under sentence." Another, Section 4849, R. S. Missouri, 1939, applies to ". . . any person . . . convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense * * * * *." Other such statutes, apply to persons convicted of the offense of escaping confinement. Sections 4306-4311, R. S. Missouri, 1939. None of those statutes apply to this case.

For the foregoing reasons, it is our opinion that the two sentences of Arnce run concurrently.

You ask whether you should hold Arnce under the original sentence, when the one-year sentence expires. This should be done, because it is your duty to keep inmates under custody so long as their sentences are outstanding, under the statutes applicable to the institution. Sections 8993-9008, R. S. Missouri, 1939. The original sentence now requires imprisonment, because the parole from it was revoked on June 21, 1942, by the Board of Probation and Parole.

Said Board was authorized by law to issue and to revoke the parole. While your letter does not expressly inquire as to the authority of said Board in that regard, it may be useful to trace that authority here, to clarify the confusing condition of the statutes.

In the Revised Statutes of Missouri, 1929, in Chapter 44, Article 2, applicable to the Training School for Boys, Section 8346, in part, provides:

> "The state prison board shall have full control and management of said reformatory * * * * * * * * * * *."

The reference to the "board" was a reference to the Commissioners of the Department of Penal Institutions. Section 8316, R. S. Missouri, 1939; Section 8972, R. S. Missouri, 1939.

And, Section 8353, R. S. Missouri, 1939, provided:

> "Said board shall have power to permit any person committed to said institution to return to his home and to release him temporarily from confinement in said institution, but not from its control and supervision; but such permit shall be conditioned upon his continued good conduct during the remainder of the term for which he was committed to such institution. Such person shall under rules adopted by said board report to said board from time to time during the term for which he was sent to said institution, and said board shall have power to cause the return of any person to serve the time for which he was committed whenever his conduct during his permit shall make it necessary or proper in the opinion of the board to do so. The superintendent or any other officer of the institution shall have authority to apprehend and return to said institution any person whom the board may direct to be so returned. No parole shall be granted by the court or judge thereof to any person committed by such court to such institution

> after he shall have been received into the Missouri reformatory."

Thereafter, the authority to issue and revoke paroles from the Training School was transferred to the Board of Probation and Parole, by Laws of Missouri, 1937, p. 400, Section 2 (now Section 9157, R. S. Missouri, 1939), which provided:

> "There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Act. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Board in so far as the Commissioners of that Department and the Intermediate Reformatory Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles, commutations of sentence, and pardons shall be carried on and completed by the Board created in this Act."

Section 8353, R. S. Missouri, 1929, above quoted, has never been repealed. Certain sections of the statutes, preceding and following said Section 8353, were repealed by Laws of Missouri, 1939, p.574, section 1. However, when the Revised Statutes of Missouri, 1939, were compiled, the above mentioned section 8353 was omitted. The sections preceding and following it in Revised Statutes of 1939, are Sections 9000 and 9001. This was obviously due to mere in-

advertence. It does not affect the validity and existence of said Section 8353, R. S. Missouri, 1929. It was so ruled in State ex rel. Asotsky v. Hicks, 142 S. W. (2d) 472, l. c. 473, 346 Mo. 640, where the court said:

> "The above sections are Secs. 101, 102 and 103 of Chapter 51, General Laws of Mo. 1877, supplement to the Wagner statutes of 1872. They do not appear in the revisions of 1879 and succeeding revisions. Even so, the omission from therevisions does not operate to repeal said sections. Meriweather v. Overly, 228 Mo. 218, 129 S. W. 1; Bird v. Sellers, 122 Mo. 23, 26 S. W. 668."

Accordingly, under existing statutes, the Board of Probation and Parole, is authorized to issue and to revoke paroles from the Training School for Boys.

CONCLUSION

Sentences to the Missouri Training School for Boys, run concurrently, unless the court orders them to run consecutively, and unless an exception to that rule is provided by an applicable statute. The Board of Probation and Parole is authorized to issue and to revoke paroles from imprisonment in said Training School by existing statutes. Benny Arnce should be imprisoned at the Training School, for the period of his sentences, unless he is again paroled by said Board.

Respectfully submitted,

APPROVED:

ERNEST HUBBELL
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

EH/rv

PENAL INSTITUTIONS:

MISSOURI TRAINING SCHOOL: Sentence to said School runs consecutively to sentence to county jail. Inmates of school may be produced for trial, in response to writ of habeas corpus ad prosequendum.

July 10, 1942

7-73

FILED
75

Mr. George A. Riley
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is, in part, in the following terms:

> "I would like to obtain an opinion from your office concerning the following case.
>
> "Samuel Davis 8029-I, born December 24, 1922, was sentenced June 16, 1937 in the juvenile Court of St. Louis City to a term of three years for delinquency, being admitted June 25, 1937. The boy has escaped eleven times from this Institution. Granting him credit for time spent in jail after being apprehended from his last escape, he still has some time remaining on his original sentence. On January 2, 1942, Samuel Davis 8029-I escaped from this Institution and was apprehended under the Kemper Military School Football Stadium by officers of the school. He was returned to the Institution and released to the Cooper County authorities for prosecution. He was tried in the Circuit Court and give a six-months jail sentence, charged with trespassing. His jail sentence will ter-

minate June 30, 1942.

> "The County Officials will notify me when his term in jail has been completed, and we plan to bring him back to the Institution here to complete his sentence. I would like to have the following points clarified."

Your first, second and sixth questions may be answered together. They are:

> "(1) Does the Institution here have any claims on this boy, whatsoever?
>
> "(2) If it is our duty or privilege to return him here, is it permissible to allow him credit on his sentence here for the number of days served in jail?
>
> "(6) Should the Institution here, in the case of an escaped boy who violates the law, is apprehended and taken into custody by county officials, tried in court, and given a sentence in some other institution resulting in the incarceration of such boy for a longer period of time than the remainder of his sentence here, discharge the boy from his sentence here?"

Your institution does, in a sense, have a claim on Davis, because his sentence to your institution has not been fully served. That sentence cannot run concurrently with the other sentence to imprisonment in the county jail. It is true, as ruled in State ex rel. Meininger v. Breuer, 264 S. W. 1, l. c. 2, 306 Mo. 406, that:

> "* * * The law then, as now, was settled beyond dispute that in the absence of a statute to the contrary, sentences were

> not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. * * * * * * * * * *."

This rule of decision was pointed out in our opinion addressed to you, dated July 9, 1942. It applies, absent the application of a statutory provision to the contrary. The statutes constituting exceptions to this rule, mentioned in our said opinion, do not apply to this case for the reasons there stated.

Sentences by different courts of the same State to the same place of imprisonment generally run concurrently, subject to the exceptions already stated. 15 American Jurisprudence, p. 126, Sections 470, 471.

However, the above mentioned rule of concurrent sentences has been applied by the Supreme Court of Missouri, and other courts, only to sentences to imprisonment in the same institution. In our opinion it does not apply where the sentences are to imprisonment in different places. A large number of authorities are summarized to this effect in 15 American Jurisprudence, p. 123, section 465:

> " In those states where cumulative sentences are permissible and the subject is not controlled by statute, if the accused is convicted of more than one offense under more than one count, sentences of imprisonment imposed under the different counts or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise or unless for other reasons (as that the imprisonment is in different places) it clearly appears that the court intended that the sentences should run con-

> secutively, and not concurrently.
> * * * * * (Underscoring ours)

Imprisonment in the Cooper County jail could not satisfy the sentence to imprisonment in the Training Schools for Boys. In Ex parte Lamar, 24 A. L. R. 864, l. c. 880, 274 Fed. 160, the question was whether a sentence by one federal court to imprisonment in a federal penitentiary, ran concurrently with a sentence by a federal court to imprisonment in the Mercer County, New Jersey, jail. At l. c. 880 of 24 A.L.R. the court said:

> "Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer County jail in New Jersey. The petitioner could not serve the term fixed for Mercer county jail until after he finished his term at Atlanta, Georgia. * * * * * * * * * * *."

Similarly, in United States v. Remus, (CCA, 6th) 12 Fed. (2d) 239, l. c. 240, the court said:

> "In this case the same judge imposed the two sentences. The second made no reference to the first. It is not to be supposed, however, from that circumstance, that he intended it to be served concurrently with the first, but rather, knowing that it could not be served in the penitentiary, that he intended that each should be served at the place designated and did not consider it necessary to say that the jail sentence should be served separately from the penitentiary sentence. * * * * * * * * * * In this case the difference in the sentences necessitated separate service- one was for a felony, the other, a misdemeanor.

> Neither was ordered to be served at the place designated in the judgment for the service of the other; the appellee could not have been sentenced to the penitentiary for the misdemeanor. From this hypothesis alone there is a clear intent of separate service."

Other decisions to the same general effect as those cited above are: Ex parte Sichofsky (Cal.), 257 Pac. 439, 53 A. L. R. 615; Zerbst v. McPike, CCA, 97 Fed. (2d) 253; Ex parte Aubert, D. C., 51 Fed. (2d) 136.

Inasmuch as these two sentences could not be served at the same time, the Superintendent of the Training School has no legal authority to allow Davis credit on the sentence to that institution for time served in the Cooper county jail.

Your sixth question is answered by the foregoing. The fact that an inmate of the Training School escapes, is convicted of an offense and imprisoned in some other institution, is no ground for discharging him from his sentence to the Training School. That sentence is still in effect.

Your third and fourth questions are:

> "(3) Does the Institution here hold the authority to release this boy from his sentence here? If so, what steps should be taken in granting this release?
>
> "(4) Does the Institution here have an option of returning the boy for the completion of his sentence or of releasing him outright?"

The Superintendent of the Training School has no authority to release Davis, and has no option with reference to requiring him to serve his sentence. Said Superintendent has the duty to maintain custody over inmates for the lawful duration of their sentences, and has no power to issue paroles.

Such power is vested in the Board of Probation and Parole, as stated in our opinion to you, dated July 9, 1942. Of course, the Governor has constitutional authority to issue pardons and paroles. Constitution of Missouri, Article V, Section 8; 46 C. J. p. 1182, section 3; State v. Asher (Mo. Sup.), 246 S. W. 911, 913.

Your fifth question is:

> "In such cases as the one sighted above, is it proper for the Institution to turn over to county authorities, boys who have committed an offense while on escape and who have been returned to our Institution? If so, what type of order or writ, if any, is required?"

Where inmates of the Training School are sought by public authorities for prosecution, it is proper to surrender custody only for the purpose of trial, but this should be done only in response to a writ of habeas corpus ad prosequendum, issued by either a circuit court, a court of common pleas, one of the Courts of Appeal, or by the Supreme Court of Missouri. In State ex rel. Billings v. Rudolph (Mo. Sup.), 17 S. W. (2d) 932, l. c. 933, 934, the court said of an analogous situation:

> "On that question those cases were, in effect, overruled in State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1. In that case we held that a circuit court had jurisdiction to try a defendant for felony after he had been sentenced to the penitentiary. Such is the universal rule. * * * * * * * * * * * * * * * * *
>
> "The writ at common law includes several forms. Among the number: (a) Habeas Corpus ad subjiciendum (you have the body to submit), (b) habeas corpus ad prosequendum (you have the body to prosecute). 21 Cyc.

353; Burril, L. Dict.; 3 Blackstone, Comm. 129, 130.

* *

"It follows the warden of the penitentiary is ordered to deliver Henry Stocks to the sheriff of Dunklin County, to be taken there for trial on said indictments. It is further ordered that said sheriff return Henry Stocks to the penitentiary on the termination of said trials."

CONCLUSION

In view of the above authorities, it is our opinion that a sentence to imprisonment in the Missouri Training School for Boys runs consecutively to, and not concurrently with, a sentence to imprisonment in the county jail. Inmates of said School may lawfully be produced for trial only, in response to a writ of habeas corpus ad prosequendum.

Paroles from said Training School may be issued by the Board of Probation and Parole, and not by the Superintendent of the School.

Respectfully submitted,

APPROVED:

ERNEST HUBBELL
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

EH/rv

PENAL INSTITUTIONS: Cannot detail inmates to pick apples outside of penal institutions.

August 27, 1942

FILED
75

Hon. George A. Riley
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, as to the authority of the Missouri Training School for Boys to allow the inmates of the Training School to gather apples from the orchard of private individuals.

Section 8972 R. S. Missouri, 1939, creates the Department of Penal Institutions, which includes the Missouri Training School for Boys. This section is a re-enactment of the Laws of 1939, Page 564.

Section 8988 R. S. Missouri, 1939 sets out the authority of the Department of Penal Institutions, as to the purchase and lease of machinery and equipment, and the employment of all the able-bodied persons in your institution. This section, which is applicable to your request, partially reads as follows:

> "Said board shall, as soon as practicable, proceed to purchase, lease or otherwise provide suitable plants, machinery and equipment, and to purchase material, for the employment of all able-bodied persons in the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro

> girls, or any other penal or reformatory institutions hereafter created, for such industries as in the opinion of the board will best occupy such persons, with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board as are needed in any of the institutions hereinabove in this section mentioned or referred to, also such as are required by the state or political subdivisions thereof, in the buildings and offices of the institutions owned, managed or controlled by the state or political subdivision thereof, also including articles and material to be used in the erection of buildings or other improvements upon, in, or in connection with, any state institutions or state properties, or in the construction, improvement or repairs of any state highways or county highways, including bridges and culverts; including lime to be used for agricultural and other purposes in this state; also including binding twine for use of farmers and others in this state: * * * * * * * * * ."

In reading the entire section it can be said that it was the intention of the legislature that any employment other than the employment of the manufacture of materials used for state departments, must be employment in the certain penal institutions, and not on the outside of the institutions. There is only one exception, and that is certain agreements with the State Highway Board for the employment of the inmates on road work. The legislature

went so far as to define "State Highway Board."

Section 8988, supra, is in plain and unambiguous language, and needs no construction.

Section 8991, R. S. Missouri, 1939, reads as follows:

> "Except as in section 8988, hereinabove provided, the leasing or contracting of convict labor in any form or manner, directly or indirectly, is hereby prohibited."

By reason of this section, and a careful search of Section 8988, supra, we find no provision for the contracting of convict labor under the facts set out in the request.

That the legislature controls the actions of the penal board, was held in the case of State v. Becker, 47 S. W. (2d) 781, l. c. 781, where the court said:

> "The principles of law governing penal institutions and the right of such institutions to manufacture and sell commodities are well settled. The power to control such institutions is vested in the legislative branch of the government and is provided for by statutes. 50 C. J. 332; 22 Amer. & Eng. Ency. L. (2d Ed.) p. 1299, Sec. 3. * * * * * * * * * "

CONCLUSION

It is, therefore, the opinion of this department, that the Superintendent of the Missouri Training School for Boys cannot send a detail of boys from the training school to help gather apples from an orchard of a neighboring farmer.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY FUNDS: Disposition of balances in County funds.

March 30, 1942

3-31

FILE 76

Hon. Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the following statement of facts:

> "The County Court of Saline County has requested me to write you with reference to the disposition of a fund remaining from the Glasgow Bridge bonded indebtedness.
>
> "At the time that bridge was built, the County issued bonds for the payment of it. Later, the State Highway Commission took over the bridge and reimbursed the County in full for the amount of the bonded indebtedness. However, before the Highway Commission took over the bridge, the County had retired some of their bonds, but the remaining bonds were not due until 1942. Now, all the bonds are paid off and the entire project is closed as far as the County is concerned. Inasmuch as they have on hand a surplus of $3,467.47, it is the desire of the Court of this county, to turn over this money to the road fund, and they would like to know if they can do this."

In searching through the statutes for some law pertaining to this subject, we find that section 13829 R. S. Mo., 1939, covers the subject of your inquiry. This section is as follows:

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

You will note from this section that it seems to be discretionary for the county court to determine which fund is to transfer a balance which is no longer needed in the fund for the purpose for which it was raised.

CONCLUSION.

Therefore, it is the opinion of this Department that the county court may turn over any balance it may have in the bridge fund to the road fund or to any other fund to which it may deem it necessary to transfer such moneys.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

Sheriffs:

CRIMINAL COSTS: - Sheriff cannot receive mileage or transportation costs of a paroled convict in transporting him to Army Induction Station.

May 25, 1942

Hon. George L. Robertson
Prosecuting Attorney
Chariton County
Keytesville, Missouri

FILE 76

Dear Sir:

We are in receipt of your request for an opinion, under date of May 22, 1942, which reads as follows:

> "This inquiry is made in reference to payment of fees for mileage and transportation of a prisoner confined and being held in the County Jail, after sentence for a felony, and under an order of parole by the Circuit Judge, contingent upon his being accepted for Army Service at the Induction Station at Jefferson Barracks.
>
> "The direct question is, should the State or County or either, pay the mileage or transportation costs of the Sheriff in taking the prisoner to the Induction Station and if neither should pay is there a proper way for the Sheriff to receive such fees?
>
> "This request is made at this time in view of the War Emergency and the

> desirability of obtaining able-bodied men, not in necessary occupations, for the Army. The prisoners should not be turned at large without some protection to the public and the Sheriff can not afford this transportation at his own expense."

The statute which allows sheriffs fees and mileage for taking convicts to the penitentiary is Section 13413, R. S. Missouri, which partially reads as follows:

> "Fees of sheriffs, marshals and other officers. - Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows: * * * * * * * * For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary; the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each

> convict while being taken to the penitentiary; and all persons, convicted and sentenced to imprisonment in the penitentiary at any term or setting of the court, shall be taken to the penitentiary at the same time, unless prevented by sickness or unavoidable accident. * * * * "

Section 13415 R. S. Missouri, 1939, which refers to Section 13413, supra, reads as follows:

> "No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

The rule as to rendition of services by public officers, and the payment therefor, is fully discussed in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Pars. 5-8, where the court said:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

In view of the above authorities, it is the opinion of this department, that neither the state, nor the county is authorized, by statute, to pay the mileage or transportation costs of a sheriff in taking the prisoner, who has been convicted and paroled, to the Army Induction Station at Jefferson Barracks, St. Louis, Missouri.

It is further the opinion of this department that the statute does not provide any proper way for the sheriff to receive such expenditures, fees or transportation costs.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION: Any person owning an interest in
PART PAYMENT OF TAXES: lands may pay taxes on his proportionate interest.

- -

December 11, 1942

12-15

FILED
76

Hon. Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you submit the following question:

> "The question of part payment of taxes has arisen in this county. Suppose that a piece of property is owned jointly and one of the parties wishes to and does pay part of the tax, and the other party does not pay his part of the tax, but allows the remainder to become delinquent. Does the interest and penalty begin to run on the total amount of tax or should the Collector only charge interest and penalty on the balance unpaid?
>
> I will appreciate hearing from you as soon as possible."

Under Section 11084, R. S. Mo. 1939, provisions are made for part payment of taxes. The portion of this section which is pertinent to your question reads as follows:

> "* * * If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

Under Section 11085, R. S. Mo. 1939, no penalty or interest may be charged against any taxpayer who pays his taxes to the collector at any time before the first day of January of the year following which the taxes fall due. That being the case, if a person is authorized to pay taxes on his interest or share in a tract of land, then no penalty or interest could accrue against such share.

Under Section 11141, R. S. Mo. 1939, which seems to carry out the provisions of Section 11084, supra, permitting payment on an undivided share in real estate, reads as follows:

> "Any person claiming an undivided share in any land out of which an undivided part shall have been sold for taxes, may redeem his undivided share by paying such portion of the purchase-money, interest, penalty and subsequent taxes as he claims of the land sold."

Section 11142, R. S. Mo. 1939, permits a person who claims a specific part of lands sold for taxes to redeem such part by paying his proportionate part of the purchase money, interest, penalty and subsequent taxes as his quantity of ground shall bear to the whole quantity sold.

It will also be noted by Section 11144, R. S. Mo. 1939, that persons who own a share in lands which have been sold for delinquent taxes may make a partial redemption. By this section the collector is authorized to make a certain charge for determining the proportion of taxes to be paid by such redemptioner.

Section 11143, R. S. Mo. 1939, also carries out the provision that a person claiming a specific part in lands may redeem such share when sold for delinquent taxes.

All of these provisions clearly indicate that the lawmakers have intended that any party who owns an interest in real estate may relieve such interest from tax liability, by paying to the collector the proportionate part or share of the taxes which are due on such interest.

CONCLUSION

From the foregoing it is the opinion of this department that any person who owns an undivided share in real estate may tender to the collector the taxes on his proportionate share of such real estate and such tender and payment will stop the interest, and penalty, on the taxes which have been so paid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

FEED: Missouri State Feed Law does not apply to feed for game birds or fur bearing animals.

- -

November 27, 1942

11-30

FILED
77

Mr. S. Y. Roth
Feed Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to yours wherein you submit the following questions:

> "When game bird feeds are sold for commercial production, either for meat or breeding purposes, will such feeds come under our Missouri State Feed Law and are they subject to registration and tonnage tax?
>
> "Do feeds used for the commercial production of fur-bearing animals either for their pelts or for breeding purposes come under the Missouri State Feed Law?"

Section 14319, R. S. Mo. 1939, which pertains to the subject of your inquiry, reads as follows:

> "The term 'commercial feeding-stuffs' shall be held to include all feeding-stuffs used for feeding livestock and poultry, except whole seeds or grains, the unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whole hays, straws,

> cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same are not mixed with other materials, but the term shall not apply to other materials containing sixty (60) per cent or more of water."

Since a penalty is provided for the violation of the commercial feed stuffs act, it is a criminal statute and, therefore, it must receive a strict construction. The general rule is that provisions of such statutes cannot be extended by judicial interpretation so as to include subjects not clearly within their provisions. This principle is announced in State v. Lloyd, 7 S. W. (2d) 344, l. c. 346, wherein the court said:

> "* * * Such statutes may not be extended or enlarged by judicial interpretation so as to embrace persons not specifically brought within their terms. No one may be made subject to its provisions by implication."

Said Section 14319, supra, applies to feed used for feeding "livestock and poultry."

The term "livestock" as it is ordinarily used, means those kind of domestic animals and fowls which are normally susceptible of confinement within boundaries without seriously impairing their utility and the intrusion of which upon the land of others normally causes harm to the land or to crops thereon. (Words and Phrases, Permanent Edition, Vol. 25, at page 415.)

The term "poultry" is used to denote domestic fowls generally or collectively reared for the table or for their eggs and feathers, such as chickens, ducks, geese and turkeys.

We think that the lawmakers in enacting Section 14319 only had in mind the livestock and poultry as is included in such terms as are referred to above.

CONCLUSION

It is, therefore, the opinion of this department that, in cases where game bird feeds are sold as commercial products, either for meat or breeding purposes, such feeds will not come under the Missouri State Feed Law and are not subject to registration and tonnage tax.

We are further of the opinion that feeds used for commercial production for fur bearing animals, either for their pelts or for breeding purposes, do not come under the Missouri Feed Law Act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

INSURANCE: Sec. 49, page 204, Laws of Missouri, 1941, does not cover costs and expenses of distributing impounded funds to policyholders.

February 3, 1942

2-6

FILE 79

Honorable Edward L. Scheufler
Superintendent of Insurance Department
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion from this office, which is as follows:

> "Your official opinion and interpretation is requested of the said Section 49, Laws of Missouri 1941, page 204, reading as follows:
>
> > 'Fire Rate Litigation. There is hereby appropriated out of the State Treasury, chargeable to the Insurance Department Fund, the sum of Fifteen Thousand Dollars ($15,000.00) for the payment of bills of exceptions, printing of briefs, court deposits and all necessary court and other costs and expenses, except attorneys' fees, in connection with the fire rate litigation, during the 1941 and 1942 biennium.'
>
> "This official courtesy is requested of you because of my desire to endeavor to distribute what I reasonably can of the 10% Rate Case impounded funds. My administrative problem is otherwise somewhat presented at length in my letter of January 7, 1942, addressed to the members of the Permanent Seat of Government of which you are a member, and in which letter I pointed out that I have inherited several problems in rela-

> tion to this sizeable amount of money, which is resting in the banks awaiting an attempted distribution before the then balance can be escheated to the Treasury of the State under the recently enacted Escheat Law, inasmuch as no request was made upon the legislature for the enactment of another appropriation bill to assist the Superintendent for payroll and other necessary expenses incident thereto.
>
> * * * * * * *
>
> "Your attention is called to the particular wording of the above section which is not earmarked by limitation, and reasonable construction of same might permit me to use an otherwise unexpended portion of the same in my projected endeavors to put some of this money out to numerous policyholders. * * *"

The question submitted by you resolves itself to a question of whether the words "and other costs and expenses * * * in connection with the fire rate litigation," as used in Section 49 of the Appropriation Act found at page 204, Laws of Missouri, 1941, are broad enough to include costs and expenses of distributing to the policyholders the 10% impounded fund which was accumulated several years ago in the fire rate litigation.

An examination of said Section 49 shows that the sum of $15,000 was appropriated for the payment, first, of certain specific items in connection with the fire rate litigation, and then "other costs and expenses * * * in connection with the fire rate litigation." In other words, the enumeration of specific things is followed by words of general meaning. This situation calls into play the familiar rule of statutory construction known as ejusdem generis, which is that where a law enumerates specific matters or things to which its provisions apply, and then by general language undertakes to include other matters or things not specifically named, the general words will be limited in meaning to matters or things of the same nature or kind as those specifically named. The rule has been stated by the courts of this State as follows:

> "There is a well-recognized rule that where a law specifically designates several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things not specifically named, such law must be so construed as to apply only to things or acts of the same general nature as those definitely set out. (City of St. Louis v. Kaime, 180 Mo. 309, and State ex rel. v. Berryman, 142 Mo. App. 373.)" (State ex rel. Spriggs v. Robinson, 253 Mo. l. c. 287.)

> "It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind. (19 C. J. p. 1255.)" (State ex rel. Goodloe v. Wurdeman, 286 Mo. l. c. 161.)

Applying the above rule to the statute in question, it will be seen that the words "and other costs and expenses", as used therein, must be limited in meaning to costs and expenses of the same general nature or kind as those specifically enumerated, which are payment of bills of exceptions, printing of briefs, court deposits and all necessary court costs. These specific items are clearly costs and expenses which are incident to litigation. Litigation is defined as a proceeding in court to enforce rights and secure compliance with the law. (Words and Phrases, Perm. Ed.) It must follow, therefore, that the words "other costs and expenses" are limited in application to costs and expenses of the same nature or kind as payment of bills of exceptions, printing of briefs, court deposits and court costs in connection with the fire rate litigation. Expenses of the distribution to policyholders of the 10% impounded fund are not of the same nature as the foregoing specified costs of litigation and court costs, and hence the costs of the distribution of the 10% impounded funds are not provided for by said Section 49 of the Appropriation Act above referred to.

It seems to us that the foregoing reasoning is peculiarly applicable to the construction of appropriation acts because the Constitution of Missouri (Section 19, Article X) provides that an appropriation act "shall distinctly specify the sum appropriated, and the object to which it is to be applied." It must be presumed that the General Assembly intended to comply with this constitutional provision when it passed the appropriation act in question, and by so doing it distinctly specified the object to which the appropriation could be applied.

There are exceptions to the rule of ejusdem generis, but we do not believe the statute in question comes within the exceptions. In speaking of this rule of construction, the Supreme Court of Missouri in the case of State v. Eckhardt, 232 Mo. l. c. 53, said:

> "' * * * Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another; nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.' (36 Cyc. 1119-1122.)"

The items of payment for bills of exceptions, printing of briefs, court deposits and necessary court costs are not greatly different from one another. They belong to the general class of costs of litigation. It might be argued that the specified items exhaust all the objects of their class in that they include all court costs and expenses, and that therefore the words "other costs and expenses" must bear a different meaning or be discarded as meaningless. However, even if that view were taken, "the other costs and expenses" would have to be "in connection with the fire rate litigation." The distribution of the impounded money in the 10% fire rate litigation is no part of the litigation and no part of the court procedure. The Supreme Court has definitely held (Aetna Ins. Co. v. O'Malley, 118 S. W. (2d) 3, and many cases since) that the courts have no jurisdiction to administer or distribute to policyholders funds impounded in fire rate litigation, but that such distribution is an administrative duty of the Superintendent of Insurance. Therefore, under no construction can

the words "other costs and expenses * * * in connection with the fire rate litigation" be held to include the costs and expenses of distributing impounded funds to the policyholders.

CONCLUSION

It is, therefore, the opinion of this department that the money appropriated by Section 49, page 204, Laws of Missouri, 1941, cannot be used to defray the expenses of distributing to the policyholders the 10% impounded fund accumulated in the fire rate litigation.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:HR

INSURANCE: Medical payment plan included in liability policy does not make policy subject to approval of Superintendent and Attorney General.

- -

March 30, 1942

3-31

FILE
79

Honorable Edward L. Scheufler
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request of recent date for an official opinion, which reads as follows:

> "Several casualty insurance carriers have offered for filing and use in this State, Automobile Liability and Property Damage policies, including, in addition to the liability and property damage and for an additional premium, an agreement to pay medical fees, hospital expenses, etc., but not including any indemnity for loss of time or a principal sum, in event of injury to the occupants of the insured car. Typical of the language of such provisions is the following:
>
> "'Medical Payments--To pay to or for each person who sustains bodily injury, caused by accident and arising out of the use of the automobile classified as "pleasure and business", while in or upon, entering or alighting from the automobile while the automobile is used by or with the permission of the named insured, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the

reasonable funeral expense, all incurred within one year from the date of accident.'

"A medical payment provision has been used in Missouri for several years, applying only to persons other than the named insured. The suggested coverage is intended to include the named insured as well as other passengers. It is our understanding that such coverage is now being offered generally throughout the United States.

"Question: Will you please advise whether or not, in your opinion, this additional coverage, described as 'Medical Payments', constitutes accident and health insurance as contemplated by Section 6077 R. S. Mo. 1939 and is subject to the requirements of that section?"

What is now Section 6077, R. S. Mo. 1939, was passed by the General Assembly in 1937 (Laws of Missouri, 1937, page 359) and provides as follows:

"No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the insurance laws of the state of Missouri until a copy of the form thereof has been filed with the superintendent of the insurance department for at least a period of thirty (30) days unless before the expiration of said thirty (30) days the superintendent of the insurance department and the attorney general of the state of

Missouri shall have approved of the same in writing. If during such period of thirty (30) days or at any time thereafter, as provided in this section, the superintendent of the insurance department or attorney general, in writing, disapprove of the form of such policy, it shall be unlawful for such policy to be issued or delivered in this state by the company filing same. If the superintendent of the insurance department or the attorney general are unable, by virtue of their other duties, to determine whether or not they shall approve or disapprove the form of such policies within the thirty-day period herein provided, the superintendent of the insurance department may extend the time within which they may approve or disapprove to a period not to exceed ninety (90) days from the date of filing such forms, and the company filing such form or forms shall be notified by the superintendent, in writing, of such extension of time. The superintendent of the insurance department and the attorney general shall not approve such forms of policies unless every part is plainly printed in type not smaller than long primer or ten point type nor unless there is printed on the first page thereof and on its filing back in type not smaller than eighteen point or great primer a brief description of the policy; nor unless the exceptions be printed with the same prominence as the benefits to which such exceptions apply. If the superintendent fails, within the thirty-day period of time or within the extended period, as herein provided, to notify the company in writing of his disapproval, then the company may issue such form of policy, but nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the in-

> surance laws of this state, and nothing herein shall bar the superintendent and attorney general from, at any time thereafter, disapproving such form after giving the company notice thereof and a hearing thereon. Whenever the superintendent or attorney general disapprove a policy form, as herein provided, the superintendent shall notify the company filing same, in writing, giving the reasons therefor. The superintendent and attorney general are hereby directed to approve for use in this state only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet needed requirements for the protection of lives and property of assureds. Any policy filed with the superintendent pursuant to this section, not conforming to the requirements herein, shall be, by the superintendent and attorney general, disapproved. Nothing in this section contained shall be held to apply to life insurance, endowment or annuity contracts, or contracts supplementary thereto."

The title to said Act reads as follows:

> "AN ACT to amend Article 10, Chapter 37, Revised Statutes of Missouri, 1929, relating to insurance, by adding thereto a new section to be numbered 5965a relating to the same subject, providing for the right of approval or disapproval of the Superintendent of the Insurance Department and the

> Attorney-General of all accident and health policies of any insurance company writing accident and health policies, doing business in this state under the provisions of the insurance laws of the State of Missouri."

Since we are concerned here with accident insurance policies only, and not with health insurance policies, we will confine ourselves to matters connected with accident insurance contracts. Accident insurance is thus defined in 1 C. J. p. 404:

> "Accident insurance is a contract whereby the insurer agrees to pay, in case the insured receives any personal injury through accident, a weekly amount for the period of disability resulting from such accident, or a fixed amount in case of certain specified injuries, or of injuries resulting in the death of the insured."

Another definition of accident insurance is given in 1 C. J., page 404, as follows:

> "A system which indemnifies the insured person for loss of business time resulting from disabling bodily injuries inflicted by external and accidental violence, or in case of death therefrom within a certain time pays the legal heirs a sum stated in the contract."

Still another definition is given in 1 C. J., page 404, as follows:

> "A contract to pay a fixed sum on death resulting from accident, either generally

> or limited to accidents of a particular kind. Some policies also provide for payments of a fixed weekly sum during incapacity caused by an accidental injury."

The above legal definitions are likewise the popular conception of the term "Accident Insurance Policy." In such a policy the insurer agrees to pay, in case of an injury, a stipulated weekly fixed amount or a fixed amount in case of certain specific injuries such as $5,000.00 for the loss of two legs, a lesser amount for the loss of one leg, a certain fixed amount for the loss of an arm, finger etc. Accident insurance policies also provide for a fixed sum in the event of death and this amount is to be paid to the named beneficiary of the insured. Frequently provisions are also contained in such policies for the payment of certain medical fees and hospital costs but these additional features are incidental to the main purposes and objects of accident insurance policies. It is apparent that the main purpose and the reason why accident and health insurance policies are purchased, is to secure the fixed periodical payments to compensate for the loss of earning power, together with the life insurance feature which provides for the payment of a specific sum in the event of death by accidental means. Policies of this description are known as "Accident Insurance Policies" within the insurance circles and are undoubtedly so considered by the insurance buying public.

With these definitions and observations on "Accident Insurance Policies" in mind, we refer again to the title used by the Legislature in enacting Section 6077. It is a familiar rule of law that if the title to an act is restrictive or descends into particulars, the statute cannot include anything beyond the restrictive wording of the title. In the case of City of Columbia v. State Public Service Corp., 43 S. W. (2d) 813, it appeared that the title to the act establishing the Missouri Public Service Commission provided that it might regulate and control public service corporations, persons and utilities. The act itself provided further for the control of light plants owned and operated by municipalities. In holding that the title was too narrow to permit the regulation of rates on light plants owned by municipalities by the Public Service

Commission since the title descended into particulars and did not mention municipalities, the court said (l. c. 816):

> "If the legislative intent was to provide for the 'regulation and control' of all four of the subjects thus separately defined and distinguished in the act itself, it is fair to assume that the title would have expressly named all four subjects. Certainly, in the light of these definitions, a title that omitted one subject would not be a 'fair forecast of the contents of the bill,' if any of such contents undertook to regulate and control the omitted subject, and such is the status of the act now under consideration. Such a title is obviously misleading and violative of the constitutional provision herein invoked. * * *
>
> "For the reasons above stated, we are constrained to hold that the power to fix such rates has not been validly conferred upon the Public Service Commission, and the judgment if affirmed."

In Williams Lumber and Mfg. Co., v. Ginsburg, 146 S. W. (2d) 604, the Supreme Court of Missouri, said (l. c. 605):

> "However, if the title is restrictive, the Act must also be restrictive and cannot include anything beyond the restrictive wording of the title. Hunt v. Armour & Co., 345 Mo. 677, 136 S. W.(2d) 312; Sherill v. Brantley, 334 Mo. 497, 66 S. W. (2d) 529.
>
> "The purpose of the constitutional provision above quoted is to prevent surprise or fraud upon the legislators by barring from the body of a bill everything not indicated

by the title. Williams v. Atchison, T. & S. F. Railroad, 233 Mo. 666, 136 S. W. 304."

The title to Section 6077 appears to be restrictive in that it applies only to "Accident and Health Insurance Policies" as such. If the title had applied to accident and health insurance or to the accident insurance business generally, it might be said that all coverages which touch upon that general character of insurance in any way, however remote, would be included. However, the said title does descend into particulars and expressly mentions only the "Accident and Health Policies" of any insurance company writing "Accident and Health Policies." It appears, therefore, that Section 6077 would be applicable if the Medical Payments Plan changes an automobile liability insurance contract into an accident insurance contract and the said section would not apply if the character of any such liability contract were not thereby changed. In the case of Logan v. Fidelity & Casualty Company, 146 Mo. 114, 47 S. W. 948, the court held that a life insurance contract was not divested of its character as insurance on life because it also provided for amounts to be paid in the event of the disability of the insured. The court said (l. c. 950);

"The mere addition of one or more features or elements in a contract of insurance on life, that may serve to give the contract or policy a particular designation in the business or insurance world, will not in the least divest the contract or policy of its chief character of insurance on life, or make the contract other than life insurance. The promise to pay a weekly indemnity by an insurance company in the event the insured receives an injury from an accident not resulting in death does not change the character of the agreement. * * * * * * *

"The calling of a contract of insurance an 'accident', 'tontine', or 'regular' life policy, or, for that matter, by any other appellation that may be adopted for business or conventional uses or classification, can-

> not make a policy containing an agreement to pay to another a sum of money designated upon the happening of an unknown or contingent event, depending upon the existence of life, less a policy of insurance on life."

In Provident Life & Accident Ins. Co. v. Rimmer, 12 S. W. (2d) 365, the Supreme Court of Tennessee cited the Logan case, supra, as authority for the following statement (l. c. 367):

> "The policy in the Equitable Life Assurance Society covered loss of life from natural as well as external and accidental causes, and was life insurance. The mere addition of the double indemnity clause providing for increased insurance upon proof of death by accident did not divest the policy of its character of insurance on life, or make the contract other than life insurance, for insurance on life includes all policies of insurance in which the payment of the insurance money is contingent upon the loss of life."

It appears, therefore, that a "Liability Policy" containing Medical Payments Plan still remains a "Liability Policy of Insurance" and is not transformed into an accident policy of insurance by the "mere addition of one or more features or elements" such as is provided by the Medical Payments Plan you outline. An Automobile Liability Policy principally covers the liability of the insured within specified limits such as the limit of $10,000.00 for any one accident in which the insured might be liable to other parties for personal injuries or property damage. Such a policy is principally and primarily an automobile liability policy and the inclusion of the relatively small benefits, such as the agreement to pay certain doctor bills and hospital expenses to all persons, including the insured, who might be injured

in and about the insured's automobile, does not appear to change the character of the insurance policy. It is still a liability insurance policy and cannot be classed as an "Accident Insurance Policy." Therefore, since the title to Section 6077 refers only to "Accident Insurance Policies" as such, it would follow that the said section was not intended by the Legislature to be applicable to such incidental benefits, when included in a liability policy which remains a liability policy. Section 6077 does not apply to Liability Insurance Policies. It applies only to "Accident and Health Policies" of companies writing "Accident and Health Policies."

We do not intend to say that it would be impossible for a company writing automobile liability insurance to transform the same into an accident and health policy within the meaning of Section 6077. This might easily occur if any such company would actually write into a contract of that type all of the features involved in an accident insurance policy such as indemnity for loss of time and a principal sum payable upon the death of the insured, together with certain specific amounts for certain types of injuries. It would be possible for a company to change the "character" of any policy, and undoubtedly any company could change any type of policy, whether it be life or fire insurance, into a matter altogether different. However, such matters must be determined as the occasion arises. In this opinion we are only attempting to say that the Medical Payments Plan which you have outlined, does not, in our opinion, have the effect of transforming the policy into an accident insurance policy and consequently Section 6077 has no application.

CONCLUSION

Section 6077 R. S. Mo. 1939, dealing with the filing and approval of accident insurance policies is not applicable to an automobile liability insurance contract which includes, as an incidental feature, the Medical Payments Plan designed to pay certain medical and hospital bills to all persons, including the insured, who might be injured in and about the insured automobile. Liability insurance policies are not covered by said section and since the addition of the Medical Payments

Plan does not transform liability insurance policies into accident insurance policies by the mere addition of this one additional feature, Section 6077 has no application since the Legislature intended it to apply only to accident and health insurance policies as such.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

INSURANCE: Plan for mutualization of St. Louis Mutual Life Insurance Company approved.

October 23, 1942

10-26

FILED
79

Honorable Edward L. Scheufler
Superintendent of the Insurance Department
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of October 13, 1942, with which you submitted the declaration and proposal of the St. Louis Mutual Life Insurance Company to amend its charter so as to make the company a mutual company.

We have examined said declaration and proposal to amend the charter and it is our opinion that the same complies with the provisions of Article 2 of Chapter 37, R. S. Missouri, 1939, and that the same is not inconsistent with the Constitution and laws of this State and of the United States.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

BOARD OF HEALTH: Two questions involving names of naturalized citizens.

September 1, 1942

9-5

FILED
80

Mr. V. M. Scott
Supervising Clerk
State Board of Health
Jefferson City, Missouri

Dear Mr. Scott:

The Attorney-General wishes to acknowledge receipt of your letter of August 31, in which you request an opinion of this department. This letter, omitting caption and signature, is as follows:

> "Is the American spelling of a German name, although inconsistent with the German method of spelling, accepted in Courts of Law? For example: An applicant desires a birth record under the name of Kehl (American Method of spelling surname) and the name was originally spelled Kuehl, which is the German spelling of the name. Would it be advisable for the applicant to have his name changed to the American version by court order?
>
> "Question II: An applicant for naturalization being naturalized in the year of 1896 in Jackson County, Mo. has a son born in Bavaria, Germany in 1883. There is no reference to the fact of naturalization of any other member of this man's family on the naturalization certificate, and the certificate in question gives the name of Jack Holt and the name of the applicant for birth record is Max Hoedl. At the time of issuance of these papers, was the fact of naturalization of the parent sufficient to naturalize a minor child if the child arrived

> in this country prior to the age of twenty-one and lived here continuously for five years? In event the name of Hoedl were changed at the time of naturalization to Holt, should there not have been some reference to the fact of change in name at time of naturalization?"

Your request contains two questions, the first of which is whether or not an applicant for a birth record and whose name at present is Kehl, the American spelling, should have the spelling of his name changed to Kuehl which was the original German spelling.

We believe that the two versions of the applicant's name will be governed by the doctrine of "Idem Sonans", which rule is recognized in this state. As authority therefor, we wish to cite you to Davison v. Bankers Life Assn., 150 S. W. 713, l. c. 715, 166 Mo. App. 625, In that case the court said:

> "'The rule of idem sonans is that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error.' (4 Words & Phrases, 3380).* * * * * *."

We also wish to cite you to Ruhin v. Bussakin, 130 S. W. (2d) 224, wherein the court discussed this matter at length.

Thus it appears to us and is the opinion of this Department, that in view of the fact that this name is pronounced the same and sounds the same, that it will be unnecessary for the applicant to have his name changed by a cort order, for the purposes set out in your request.

The second question in your request has to do with the status of a child born in Germany, of alien parents, whose father subsequently was naturalized in this country. In answering this question we will cite you to Title 8, Chapter 11, Section 714, U.S.C.A., at page 679, which provides as follows:

> "A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
>
> "(a) The naturalization of both parents; or
>
> "(b) The naturalization of the surviving parent if one of the parents is deceased; or
>
> "(c) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents; and if --
>
> "(d) Such naturalization takes place while such child is under the age of eighteen years; and
>
> "(e) Such child is residing in the United States at the time of the naturalization of the parent last naturalized under subsection (a) of this section, or the parent

naturalized under subsection (b) or (c) of this section, or thereafter begins to reside permanently in the United States while under the age of eighteen years."

As can be seen, after reading the statute cited above, your second question is going to be governed by the facts. This statute appears to be very clear and unambiguous. If both parents of the applicant or the surviving parent, if one is deceased, or the parent having legal custody of such applicant where the parents are separated, have been naturalized and if such parents' naturalization took place before the child was eighteen, and while living in the United States while such naturalization took place, he is a citizen of the United States. If the facts of this case are applied with the law, which seems to be plain, your second question will be answered.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
(Attorney-General)

JSP/rv

SCHOOLS: Lincoln University's School of Journalism may edit newspaper.

October 23, 1942

11-9

FILED
80

Mr. Sherman D. Scruggs
President
Lincoln University
Jefferson City, Missouri

Dear Sir:

Your letter of October 13, 1942, in reference to the issuance of a newspaper in connection with the journalistic course at Lincoln University, has been received.

I

Your first question reads as follows:

> "Is it not legal for this School, a state-supported institution, to operate its own laboratory and produce a weekly newspaper under the typical conditions of the typical weekly newspaper when this is the only means at the School's disposal for providing practical training and experience for students pursuing courses in journalism of a quality at the level of accredited schools in this profession?"

The section applicable to this question is Section 10774 R. S. Missouri, 1939, which reads as follows:

> "The Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to open and establish any new school, department or course of instruction, to provide necessary additional equipment, and to locate the respective units of the university wherever in the State of Missouri in their opinion the various schools will most effectively promote the purposes of this article."

Another section applicable to this question, is Section 10778, R. S. Missouri, 1939, which reads as follows:

> "It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state university of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed

> by statute for the board of curators of the state university of Missouri, except as stated in this article."

Under the above section, the powers, authorities, responsibilities, and other matters shall be the same as those prescribed by statute for the board of curators of the state university of Missouri, and, in rendering this opinion, we are confined almost solely to the powers and duties of the curators of the state university of Missouri.

Under Article 22, Chapter 72, of the Revised Statutes of Missouri, 1939, which applies to the state university of Missouri, the legislature saw fit to enact Section 10807, which reads as follows:

> "The curators shall have power to make such by-laws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them, and for the government of their officers and employees, and to secure their accountability, and to delegate so much of their authority as they may deem necessary to such officers and employees or to committees appointed by the board."

This section gives the curators of Lincoln University complete authority as to the course of study and the regulation of the same, except as to other enactments by the legislature. It was so held in the case of State ex rel Heinberger v. Board of Curators of the University of Missouri, 188 S. W. 128.

Under Section 10807, supra, the curators are authorized to make such rules and regulations as they may judge most expedient for the accomplishment of the trust imposed in them.

In the case of Marsh v. Bartlett, 121 S. W. (2d) 737, pars. 15,16, the court, in ruling upon the power to make rules and regulations said:

> "It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. There was much discussion by counsel in their oral arguments, and much appears in their brief, with reference to the meaning of the words definitive of that authority. In the aspect of the Amendment now under consideration there is no need to go into definition of the various terms. They take color and significance from the context.
>
> "The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A., N. S., 186. Regulation and legislation are not synonymous terms. In re Northwestern Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65, 70. Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. Southern R. Co. v. Russell, 133 Va. 292, 112 S. E. 700, 703."

Under the Constitution of Missouri, 1875 the legislature did enact laws creating certain courses of study, but it saw fit to empower the curators to perform that duty, by enacting Section 10807, supra, which gave the board of curators authority to pass all rules and regulations for any matters that may come up in the governing of the courses, and other matters in the state university and which also applies to Lincoln University. The curators of Missouri University are not limited either by the Constitution, or Section 10807, supra, in providing for the education of the students who enroll either in the state university of Lincoln University. In the case of State v. Board of Regents, 264 S. W. 698, par. 4, the court, in holding that the curators are empowered to make any rules and regulations which may arise on new occasions to teach new studies, said:

> "While the board, in a sense, represents the state in the performance of its duties, it is but one of the many necessary instrumentalities through which the former is enabled to act within the scope of the powers conferred by law. These powers embody no attributes of sovereignty which would entitled them to be designated as the state's alter ego. While in a sense the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first, because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the

> future; and second, because a restriction of the board's powers to the letter of the law would destroy its efficiency, and to that extent cripple the purpose for which the institution was created. Legislatures, therefore, moved by that wisdom which is born of experience, whether conscious or not of that aphorism that 'new occasions teach new duties; time makes ancient acts uncouth,' have contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined, and which may, under changed conditions, arise in the future, to the discretion of the board."

Also, in the case of Silverman v. City of Chattanooga, 57 S. W. (2d) 552, (Tenn.), par. 2, the court said:

> " * * * We have italicized the word 'regulating' as the pertinent determinative expression found in the charter. The word regulate is defined by Webster as meaning, 'to adjust or control by rule, method, or governing principles or laws.' One of the well-recognized synonyms of regulate is rule, and another is govern. So in Bouv. Law Dict., vol. 3, page 2860, a definition of regulate is 'to subject to governing principles or laws.' We are of the opinion that when its charter expressly conferred upon the city the power by ordinance of 'regulating all public grounds

> belonging to the city, in or out of the corporate limits,' that this embraced the power to enforce these regulations."

CONCLUSION

It is therefore the opinion of this department that it is legal for Lincoln University to operate its own laboratory and produce a weekly newspaper under the typical conditions of the typical weekly newspaper which would provide practical training and experience for students pursuing courses in journalism, of a quality at the level of the same course in the state university.

II

Your second question reads as follows:

> "Is it not a prerogative of the School to solicit advertising, charge and collect fees from the advertisers in its columns as a part of the training in the business aspects of newspaper management?"

III

> "Should the advertising fees charged be at a rate comparable to those charged by the commercial newspaper

of the locality, based, of course, upon the circulation?"

CONCLUSION

In view of the authorities set out under your first question, it is the opinion of this department, that Lincoln University may solicit advertising, and charge and collect fees from the advertisers in its columns, as part of the training in the school of journalism.

It is further the opinion of this department that Lincoln University may charge such fees at a rate comparable to those charged by the commercial newspapers of this locality, based, of course, upon the circulation.

We base this opinion upon the fact that the soliciting of advertising is a part of the actual training of students who have enrolled in the school of journalism at Lincoln University.

IV

Your fourth question reads as follows:

"Is a city or state license fee or occupational tax levied upon a school when it produces a laboratory newspaper for which a fee is charged its advertisers for advertising merely to

provide managerial experience in the business operations of the paper?"

Since the State has delegated to Lincoln University the business of teaching journalism, a part of which would be the practice of running a newspaper, a municipality would not have the right to charge the University for doing the thing which the State has empowered it to do and commanded it to do. This case is discussed in the case of City of Fulton v. Simms, 120 Mo. App. 677, and the case of Kansas City v. Fee, 174 Mo. 501. The above cases discuss the extent to which a city may regulate institutions established by the State.

CONCLUSION

It is, therefore, the opinion of this department that no city or state license fee, or occupational tax is required of the school of journalism or the newspaper which is a part of the school of journalism, where the fee charged to advertisers is merely to provide managerial experience in the business operation of the school newspaper.

V

Your fifth question reads as follows:

"May the revenue accruing from fees charged to advertisers be properly accounted for to the State, and then used to supplement funds for the production of the newspaper, to provide for the upkeep of equipment or to purchase additional and needed equipment in the School?"

In answer to the above question, we find no special statute which requires the fees charged to advertisers to be paid into the state treasury, as is provided in most fee statutes.

Section 10801 R. S. Missouri, 1939, requires the board of curators to furnish the state legislature a classified statement of all receipts and disbursements of the institution, but does not provide that such incidental fees shall be paid into the state treasury. That such incidental fees should not be paid into the state treasury was held in the case of State v. Board of Regents, 264 S. W. 698, par. 8, where the court said:

> " * * * Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication, does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the state treasury and appropriated therefrom by the Legislature. In the absence of a mandatory requirement to that effect, no duty is devolved upon such boards to thus dispose of these funds. Their duty in the premises, in the presence of that discretion with which the law has clothed them, is to expend such funds for the college, and account for same in the manner required by the plain provisions of the governing statutes."

As to the powers of the board of curators in opening new departments, the Supreme Court, in the case of State v. Canada, 153 S. W. 2d 12, par. 5, said:

> "The statute, as now worded, does not in terms vest any discretion in the Board of Lincoln University to determine the necessity or practicability of opening new departments. Yet we think, of necessity, a measure of discretion remains in the Board to allocate the funds at its disposal to departments for which great demand exists, if such funds are insufficient to supply all departments of learning furnished at the University of Missouri."

CONCLUSION

It is, therefore, the opinion of this department that under Section 10801 R. S. Missouri, 1939, the board of curators should furnish the state legislature with a classified statement of all receipts and disbursements of the institution, but is not compelled to pay the supplement funds into the state treasury, but may use the funds received by way of payment of advertisements for the upkeep of equipment, or to purchase additional and needed equipment in the school.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ADMINISTRATION: PUBLIC ADMINISTRATORS: Public Administrators must turn over all money, property and papers belonging to all estates in which final settlement cannot be made during first regular term of probate court after the expiration of one year after successor takes office.

February 25, 1942

3-23

FILE
81

Hon. Robert F. Sevier
Judge of the Probate Court
Liberty, Missouri

Dear Judge Sevier:

We are in receipt of your opinion request of February 11, which request reads as follows:

"This letter forwarded you direct rather than sending the same to the Prosecuting Attorney and in return asking him to forward it to you.

"Two questions have arisen in respect to Section 301 of the Revised Statutes of Missouri, 1939, as amended, found at Page 286 of the Laws of Missouri, 1941. Those two questions are as follows:

"1. Is this section, as enacted, void as respects an administrator whose term expired December 31, 1940, as being, as far as he is concerned, an ex post facto law and, therefore, not affecting him as having to meet the requirements of this section?

"2. Does the wording of that section indicate that the public administrator is to perform, as there indicated, upon only those estates of which he is administrator, or does this section affect him in all the capacities under which he may be acting as public administrator? In other words, he has some estates in which he is guardian and curator of minors and incompetent persons. Under this section would he be ordered to act in those estates in which he was guardian of minors or incompetents as well as

well as those of which he is administrator of a deceased person's estate?

"I shall appreciate a reply upon this as quickly as possible."

In answer to your first question, we are herewith enclosing a copy of an opinion which was rendered by this department on November 29, 1941, to Hon. S. F. Wier, Judge of the Probate Court, Atchison County, Rockport, Missouri, and which we think answers your question.

Now turning to your second question, which is as follows:

"Does the wording of that section indicate that the public administrator is to perform, as there indicated, upon only those estates of which he is administrator or does this section affect him in all the capacities under which he may be acting as public administrator?"

Section 301, page 286, Laws of Missouri, 1941, provides as follows:

"The public administrator shall before the first day of the regular term of the probate court after the expiration of one year after his successor in office shall have qualified publish notice of final settlement as is provided in Section 229, of the Revised Statutes of Missouri, 1939, for all estates in his charge as public administrator in which final settlement can be made during that term of court. Upon the first day of said term, the Probate Judge shall upon his own motion, order the public administrator to account for and deliver all money, property or papers belonging to all estates in his hands in which final settlement can not be made during that term of court, to his successor in office, or to the heirs of said estate, or to any executor or administrator regularly appointed, as provided by law, and such accounting and delivery shall be accomplished during the term

> of court. Provided, that when the Public Administrator shall turn over the assets of an estate to his successor in office, or to any other executor or administrator regularly appointed as is provided by law, and before any final distribution has been made of the assets of the estate, the Probate Judge shall allow him compensation based on the proportionate part of the services and trouble rendered for the period of time such Public Administrator actually served as such administrator, and provided that such compensation for services rendered by both the original and succeeding administrator who shall complete the work of such administration shall not exceed a commission of five per cent on personal property and all money arising from the sale of real estate."

It will be noted from a reading of Section 301, supra, that said section provides that the probate judge shall upon his own motion order the public administrator to account for and deliver all money, property or papers belonging to all estates in his hands in which final settlement cannot be made during that term of court. It is our opinion that the wording of this section is unambiguous and when the motion is made by the probate judge, the duty is immediately cast upon the public administrator to make final settlement of all estates in his hands in which final settlement cannot be made during that term of court.

In the case of Columbia Weighing Mach. Co. v. Rockwell, 38 S. W. (2d) 508, l. c. 510, the court said:

> "* * * We are not permitted to construe plain and unambiguous language in a statute.* * "

Therefore, in answer to the first portion of Question 2 of the opinion request, it is our opinion that the public administrator must turn over all moneys and all papers and property in all estates in his hands in which final settlement cannot be made during that term of court. By the statutory wording "during that term of office" is meant the first regular term of the probate court after the expiration of one year after his successor in office shall have qualified.

CONCLUSION

From the foregoing, it is the opinion of this department that under Section 301, Laws of Missouri, 1941, page 286, a public administrator whose statutory term of office has expired, shall at the first regular term of the probate court, after the expiration of one year after his successor in office shall have qualified, make final settlement of all estates in his hands which he can settle at that term of court, and all remaining estates in his hands, regardless of the nature of the estates, must be turned over to his successor during that term of court,

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:NS

TAXATION and REVENUE:

1. Certificate holder failing to exercise his rights, under such certificate, within four years from the date of its issuance, loses all his rights thereunder, and the taxes, from which sale was made, must be eliminated from the tax indebtedness against the land.

2. Collector cannot change description of land which has been assessed and equalized for taxation.

OPINION NO. 81

July 6, 1942

FILED 81

Mr. Geo. H. Seifert
County Collector
Poplar Bluff, Missouri

Dear Mr. Seifert:

This department desires to acknowledge your request for an opinion relating to the Jones-Munger law, which is as follows:

> "Would like to get some more information on the Jones-Munger Law. Where a tract of land sold for taxes in the year of 1937, the party got a Certificate and it only brought a part of the taxes and waited over 4 years and never taken a deed how much taxes should I collect, go back and pick up all of the taxes except what was paid or just commence collecting when the Certificate was made?
>
> "There is a few parties here have Certificates where the land was sold in 1937 only pay about 1/4 of the taxes, would like to know as soon as possible.
>
> "One party told me that that certificate paid all them back taxes, and I told him that it was all due for he did not ask to get a deed in the 4 years time.
>
> "And another thing that I would like to know can a Collector change the description on the books where he knows it is not correct or is that the Assessors place?"

The state has a lien for delinquent taxes on real estate and the Jones-Munger Law is a procedural act for the enforcement of such lien.

When the lien is foreclosed for particular years, under such procedure, the right of the state is foreclosed for those years. There is an exception, and that is in case

of defect in procedure which is fatal in effecting conveyance of the interest of the state or foreclosure of such interest.

The Supreme Court, in regard to this question, in the case of State v. Baumann, 160 S.W.2d, 697, 699 said:

> "* * *Strictly speaking, the only taxes 'foreclosed' by the sale are the taxes for which the sale is made, but in a broader sense the liens of all taxes which are inferior to that of the taxes for which the sale is made are also foreclosed or destroyed by the sale."

The duty of the certificate holder, with respect to the payments of prior and subsequent taxes, is discussed by the Court in the above case at l.c. 700, in the following language:

> "* * *The new section provides that upon the third successive sale there is no period of redemption and the purchaser is entitled to a deed upon the payment of subsequent taxes only. Sections 11149 and 11152, which were applicable to all sales, whether on the first, second or third offering, at the time the sales were made in the instant cases, and are still applicable to sales on the first and second offering, were left unchanged by the 1939 revision. The 1939 revision made several changes in the original act, one important change being the provision in Section 11130 that upon the third successive sale no redemption period should be allowed. Also by Section 11131 it was provided, for the first time, that the county or city can protect itself by bidding in the property, on the third sale. Taking all the changes together, we think the legislature understood and intended in original act that the purchaser should pay prior taxes upon any tax sale, and by the 1939 revision intended to change the law only as to the sale on the third offering. * * *"

Section 11137 R.S.Mo., 1939 is as follows:

> "In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

Therefore, the certificate holder, his heirs and assigns lose their rights obtained under the certificate unless they conform to the provisions of the above statute.

C O N C L U S I O N

It is therefore, the opinion of this department that after foreclosure under the Jones-Munger Law, by the issuance of a certificate of sale by the collector and after forfeiture of right thereunder by the owner, his heirs and assigns, under the provision of Section 11137 supra, such collector must eliminate from the tax indebtedness against the land, taxes for the years for which the sale was made.

II.

Assessment of land for taxes must be made by statutory officers and is a quasi judicial act.

> State ex rel vs. Dungan, 265 Mo., 353; Boonville National Bank vs. Schlotzhauer, 317 Mo., 1298; 298 S.W., 732; Jefferson City Bridge and Transit Company vs. Blaser, 318 Mo., 373; 300 S.W., 778; State vs. F. W. Woolworth, 159 S. W. 2, l. c. 299.

The duty of a collector, in event of insufficient or invalid description, with reference to a sale of real estate for delinquent taxes is defined by the Court in the case of State vs. Childress, 134 S.W. 2d. 136, 139 in the following manner:

> "* * *The Jones-Munger act, Sec. 9958a, Laws 1933, p.441, provides that 'whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands: but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, * * *.' (Italics ours). And Sec. 9958c, Laws 1933, p. 441, provides that 'if any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the first two enumerated (not applicable here) in the preceding section (9958b) the lien which the state has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to a lien on such land for the amount of taxes, interest and penalty, legally due thereon at the time of such sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof." (Italics ours)

Therefore it is the opinion of this department that a collector may not change the description of lands assessed and equalized for taxation.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRIMINAL LAW - Bond of person in military service is subject to forfeiture.

September 17, 1942

107 FILED 81

Hon. J. Ben Searcy
Attorney at Law
Eminence, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 12th, 1942, which reads as follows:

> "My office desires an opinion relative to a criminal bond.
>
> "Chilton Culbertson was inducted into the United States Army on or about August 1st and was granted a ten day leave. While on said leave he was arrested under a charge of grand larceny and incarcerated in jail. A Preliminary hearing was held and the defendant bound over to Circuit Court. He was arrested after he had been inducted into the Army.
>
> "The question is: If a bond is made for the defendant and he reports to the proper officials of the United States Army and is accepted, would his bond be subject to be fortified in so long as he is in the Army?"

I am presuming that in your request, where you state "fortified", you mean "forfeited."

Section 3962 R. S. Missouri, 1939, reads as follows:

> "When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Section 3973 R. S. Missouri, 1939, reads as follows:

> "If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be after-

> ward arrested on the original charge, unless remitted by the court for cause shown."

The above two sections are part of the criminal procedure of the State of Missouri, and is a part of a criminal case, and not a civil case. It will be noticed in Section 3973, supra, that the legislature directed the court as follows:

> " * * * must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, * * * * * * * * * * * * ."

This section is mandatory and it is the duty of the court to forfeit the bond when the defendant fails to appear for trial or judgment.

The section further directs the court that after the recognizance is forfeited, it shall be proceeded upon by scire facias to final judgment and execution thereon.

The scire facias is not a part of the criminal case, and has been held to be largely of a civil nature in this State. It was so held in the case of State v. Stevens, 134 Mo. App. 115, l. c. 118, where the court said:

> " * * * It was said by the Supreme Court in a case cited infra, that though a proceeding on a <u>scire facias</u>

> taken in a criminal cause is a mere continuance of an existing proceeding to enforce the collection of a confessed debt, it partakes of the nature of a civil action under the code and will be governed by the same rules. (State v. Morgan, 124 Mo. loc. cit. 475.)
> * * * * * * * * * * * * * * * * * *"

It was also held in the case of The State v. Morgan, 124 Mo. 467, l. c. 474, where the court said:

> "Nor do we think the validity or invalidity of the indictment in the principal case, can be inquired into in this proceeding. The purpose of the recognizance was to secure the appearance of the principal therein named according to its terms and conditions which in no way depended upon the validity of the indictment under which he had been convicted, conceding as contended for by the counsel for defendants that the demurrer filed by them to the scire facias went to the whole record. An examination of the authorities cited by him in his brief (State v. Randolph, 22 Mo. 474; State v. Potts, 60 Mo. 368; State v. Poston, 63 Mo. 521; State v. Rogers, 36 Mo. 138; State v. Furguson, 50 Mo. 470; State v. Reed, 62 Mo. 559) will show that not one of them goes so far as to hold that the sufficiency of an indictment can be inquired into in a proceeding on a scire facias,

> after it has been passed upon and held to be sufficient by a court of last resort.
>
> "Moreover, after the demurrer to the scire facias was overruled defendants answered over and while the proceeding on a scire facias in a case of this kind is a mere continuance of an existing proceeding to enforce the collection of a debt confessed, it partakes largely of the nature of a civil proceeding under our code, and should be governed by the same rules of proceeding, and as defendants answered to the scire facias after their demurrer was overruled they should be held to have waived the demurrer." (Underscoring, except that of the words"scire facias", and cases cited, ours.)

Under Section 3873, supra, there is no question but that under the facts in your request the bond of the defendant, if he does not appear according to the terms of the recognizance, must be forfeited. This seems to be the only question upon which you request our opinion, but we are also setting out authorities to the effect that a judgment cannot be had against the defendant or his sureties while he is a member of the United States Army.

Section 520, Article II, Par. (1), Page 115, of the Soldiers' and Sailors' Civil Relief Act of 1940 (New) Act of 1940, Title 50, U. S. C. A., App., reads as follows:

> "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the

> defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act."

Section 523, of the same Act, Page 117, reads as follows:

> "In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service —
>
> "(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and
>
> "(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this Act. Oct. 17, 1940, c. 888, Sec. 203, 54 Stat. 1181."

Section 513 of said Act reads as follows: (Page 115).

> "(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such

> stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.
>
> "(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered."

Section 525, of the same Act, Page 118, reads as follows:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

All of the above sections of the U. S. C. A. pertain to the procedure on the Scire Facias but does not have any bearing on the forfeiture of the criminal bond.

CONCLUSION

It is, therefore, the opinion of this department, that if a criminal bond is made by a defendant, and he reports to the proper officials of the United States Army, and is accepted, his bond would be subject to forfeiture, if he does not appear in court under the terms of the recognizance.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS:
NOMINATIONS BY PETITION: Statute providing for nominations by certificates is not repealed by act of 1941.

October 7, 1942

10-8

FILED
82

Hon. William E. Shirley
Prosecuting Attorney
Kirksville, Missouri

Dear Mr. Shirley:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of whether or not Section 11534, R. S. 1939 is in effect.

Said Section 11534, pertaining to nominations by certificate, provides as follows:

> "The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made: Provided, that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

Nominations by conventions or primary and by certificates was provided for by Sec. 2, Laws of 1889, p. 105. Under that article there were three sources of nominations; (1) a convention of delegates; (2) a primary election, and (3) a petition by electors.

In 1907 (Laws of 1907, p. 263) an act was passed which did away with nominations by conventions, but it did not disturb the law of 1889 providing for nomination by certificates.

In State ex rel. v. Kortjohn, 246 Mo. 34, l. c. 39, the court, in construing the primary act of 1907, said:

> "A careful reading of the act of 1907 shows that the legislative mind was bent upon the method of nominations by political parties and had no thought of disturbing the Act of 1889 so far as it related to nominations by electors, which portion of the Act of 1889 we had, in Atkeson v. Lay, so construed as to make it the avenue for the formation of new political organizations, as well as the avenue for independent, non-partisan nominations. Indeed, the very title of the Act of 1907 would indicate that there was no legislative intent to disturb that portion of the Act of 1889 relating to nominations by electors. * * * * * * *
>
> "In other words, this Act of 1909 does not attempt to deal with the subject of nominations made by electors, and is therefore not inconsistent with that portion of the Act of 1889, and of course, does not repeal that portion of such act. To my mind both the Act of 1907 and the Act of 1909 were only intended to eliminate from the Act of 1889 that portion which authorized a party nomination by a convention of delegates. * * * * * * * * * *"

The Act of 1941 referred to in your letter contains the following title:

> "An Act repealing Sections 11538 and 11539 of Article 4, of Chapter 76, of the Revised Statutes of Missouri for the year 1939 relative to the filing of certificates

of nomination, filling of vacancies and correction of tickets where vacancies are filled and enacting two new sections in lieu thereof to be known as Sections 11538 and 11539 relative to the same subject matter."

It will be noted that this title and act refers to only two sections to be repealed, viz. 11538 and 11539.

These sections as reenacted by the 1941 Act refer to filing certificates of nomination and to the filling of vacancies on the nominated ticket. They do not apply to the nomination of independent candidates by the certificates of nomination mentioned in Section 11534, R. S. 1939. If said Section 11534 were effected or repealed by the 1941 Act, supra, it would be by implication. Repeals by implication are not favored. Manrizi v. Western Coal and Mining Co., 11 S. W. (2d) 268. The Act of 1941 must be so plainly inconsistent with Section 11534 that they cannot stand together, before the latter Act can repeal said Section 11534. State ex rel Boyd v. Rutledge, 13 S. W. (2d) 1061.

CONCLUSION

From the foregoing, it is the opinion of this department that the Act of July 31, 1941, Laws of Missouri 1941, p. 354, does not affect the provisions of Section 11534 and that a person may still be placed on the ballot by the certificate, provided for by said Section 11534.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:NS

PROSECUTING ATTORNEY : Special Prosecuting Attorney appointed under Sections 12948 and 12949 R. S. Mo. 1939 is not entitled to salaries or fees.

January 14, 1942.

F20

FILE 83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We are in receipt of a request for an opinion, dated January 7, 1942, which reads as follows:

> "We are in receipt of a letter from Mr. Earnest A. Long, Circuit Clerk of Pemiscot County, wherein certain questions are asked in regard to the fee of a special prosecutor in a criminal case. We hand you herewith a copy of the letter written by Mr. Long and request your official opinion in regard to the questions raised.
>
> "We presume that the sections particularly applicable are 12948, 12949, 12950, 12939 and 13505 R. S. Mo. 1939. Section 12948 provides for the appointment of some other attorney to prosecute in a criminal case where the prosecutor has been employed as Council or is related to the defendant. Section 12949 provides for the appointment of some person to discharge the duties of office when the proper official is sick or absent. Section 12950 relates to the 'power of the appointee'. Section 12939 provides for the salary of prosecuting attorney in counties up to 200,000 population.
>
> "In addition to the questions asked by Mr. Long, we desire to know if a person appointed under the provisions of either section 12948 or 12949 R. S. Mo. 1939 is entitled to remuneration for services rendered either by the collection of fees or salary. If the person so appointed is entitled to compensation, is such compensation in addition to the salary provided for the prosecuting attorney in section 12939, or is the salary provided by said section the maximum amount allowable? What procedure should be followed in the payment of this compensation?"

According to the last decennial census of 1940 the population of Pemiscot County was 46,857 and by reason of that population the prosecuting attorney of Pemiscot County is on a salary which is set out in Section 12939 R. S. Mo. 1939, which partially reads as follows:

> "The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury, in all counties now or hereafter having a population of * * * 30,000 and less than 50,000 inhabitants, the sum of $3,000.00; * * *"

Section 12941 R. S. Mo. 1939 partially reads as follows:

> "It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, * * *"

Under the above two sections the prosecuting attorney is on a salary basis and not a fee basis.

Section 12948 R. S. Mo. 1939 reads as follows:

> "If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Section 12950 R. S. Mo. 1939 reads as follows:

> "The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present." ..

The word "fees" as used in Section 12950, supra, should not be considered as a salary and it was so held in the case of State ex rel. v. Patterson et al., 152 Mo. App. 264, l. c. 268, where the court said:

> "The prosecuting attorney receives no fees as compensation for his services and it is clear a special prosecutor can receive none since there is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant they cannot be diverted to any other use or purpose.
>
> "But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the article of the statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor. The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed. (Shed v. Railway, 67 Mo. 687; Gammon v. LaFayette Co., 76 Mo. 675; State v. Wofford, 116 Mo. 220; State ex rel. v. Walbridge, 153 Mo. 194; Sanderson v. Pike Co., 195 Mo. 598.)"

Under Section 12948, supra, the court was authorized to appoint a special prosecutor under the facts set out in your letter

from Mr. Earnest A. Long, referred to in your request, and it was so held in the case of State v. Jones, 268 S. W. 83, para. 1-2, where the court said:

> "The information charged the defendant with operating a motor vehicle while in a state of intoxication. Mr. Massengill, the prosecuting attorney of New Madrid county, filed the information and was the principal witness for the state. The evidence discloses that he is an interested party; his car and the car of the defendant were in collision. On account of his personal interest in the matter, he was disqualified to act as prosecuting attorney, or to prefer a charge based on the alleged criminal conduct of the defendant. Section 742 R. S. 1919. The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the state when the prosecuting attorney, for any reason, was disqualified. 32 Cyc. 719."
> "

It was also affirmed in the case of State v. Wilson, 200 Mo. 23, l. c. 28, where the court said:

> "* * *That the special prosecuting attorney was duly appointed appears from the record of the court on the twenty-first of February, 1905, wherein it is recited that Mr. Moss, the regular prosecuting attorney of the county, had been employed as counsel by the defendant and for that reason the court appointed Mr. Scott as special prosecuting attorney for this case. Section 4955, Revised Statutes 1899, provides: 'If the prosecuting attorney . . . be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant . . . either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to

> prosecute or defend the cause.' And section 4957, Revised Statutes 1899, provides: 'The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present.' That a special prosecutor appointed by virtue of these sections has all the power for the purposes of the case in which he is appointed as the regular prosecuting attorney, there can be no doubt. (State v. Griffin, 87 Mo. l. c. 615, 616; State v. Moxley, 102 Mo. l. c. 383, 384.) * * *"

Under the holding in the case of State ex rel. v. Patterson et al, 152 Mo. App. l. c. 268, the court specifically held that where the prosecuting attorney receives no fees as compensation for his services but is on a salary basis as set out in Section 12939, supra, it is very clear a special prosecutor can receive none, and that there is a positive mandate of the statute that all fees must be paid into the county treasury, and in the absence of an express statutory warrant they cannot be diverted to any other use or purpose. The court also, in that case, held that a public officer, even though he is specially appointed cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation as salaries and fees must be strictly construed. Evidently Section 12950, supra, was enacted when the prosecuting attorneys were on a fee basis and not on a salary basis which was re-enacted by the Laws of 1933, page 178.

We find no statutory authority allowing the county court to pay a special prosecuting attorney who has been appointed temporarily for the trial of one or more specific cases. The courts have placed the appointment of a special prosecuting attorney in the same bracket as that of an attorney appointed by the court to defend in a criminal action. In neither position, either that of special prosecutor or an attorney appointed to defend in a criminal case, does the statute set out any payment of a salary, either by statute or by a written agreement of the county court. This was so held in the case of State ex rel. v. Patterson, supra.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a special prosecuting attorney cannot be allowed a fee or salary for the reason that the statutes do not provide for such a salary or fee and that the county court cannot by written contract allow such a salary or fee. In view of this holding, it is further the opinion of this department that since the special prosecuting attorney cannot be allowed a fee or salary, it would be impossible to deduct any amount from the salaries of the regular elected, qualified and acting prosecutor to pay the special prosecuting attorney appointed under Section 12948 or Section 12949 R. S. Mo. 1939.

It is further the opinion of this department that the fee bill which included a fee due the regular prosecuting attorney should not be corrected to allow the fee to be paid the special prosecuting attorney, and a fee allowed the regular prosecuting attorney should be paid into the county treasury.

Respectfully submitted.

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:LB

COUNTY COURTS: May expend funds for National Defense.

January 16, 1942

1-17

FILE
83

Honorable Forrest Smith
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 14, 1942, as follows:

> "I respectfully request the official opinion of your office on the following questions:
>
> "(1) Do the various county courts in the State have authority to include in their budgets, for 1942, prospective expenditures for National Defense activities to be carried out within the county under the direction of the State Council of Defense, organized under Laws of Missouri, 1941, page 669?
>
> "(2) If the above question is answered in the affirmative, how should the items be set up in the budget, and to whom and in what manner should these funds be disbursed by the county court?"

Both Federal and State Governments have recognized the existence of the national emergency which has arisen within the past few months. The first recognition by the Federal Government is found in the proclamation by our President, under date of May 27, 1941, which is as follows:

"Proc. No. 2487. Unlimited National Emergency.

"Proc. No. 2487, May 27, 1941, 6 Fed. Reg. 2617, 55 Stat. -- is set out below:

"WHEREAS on September 8, 1939 because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations',

"WHEREAS a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, AND

"WHEREAS indifference on the part of the United States to the increasing menace would be perilous, and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of predatory incursion by foreign agents into our territory and society.

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America,

do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

"I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprize possible may survive.

"I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

"I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

"I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation."

The Missouri State Legislature, in recognition of this unlimited state of emergency, passed House Bill No. 540 creating a State Council of Defense, found in Laws of Missouri, 1941, at page 669, as follows:

"Section 1. Citation of the Act. -- This Act may be cited as the 'State Council of Defense Act.'

"Section 2. Defense Council may be created -- by whom. -- The Governor is hereby authorized and empowered in time of emergency or public need in the Nation or the State to create by proclamation a State Council of Defense hereinafter designated as the 'Council', for the general purpose of assisting in the coordination of the State and local activities related to National and State defense. Whenever he deems it expedient, the Governor may, by proclamation, dissolve or suspend such Council or reestablish it after any such dissolution or suspension.

"Section 3. Membership of Council -- by whom appointed, qualifications. -- (a) The Council shall consist of not less than fifteen members appointed by and holding office during the pleasure of the Governor. The Governor shall serve as chairman of the Council. He shall designate one of the members of the Council as vice-chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture, consumer protection, labor, education, health, welfare, or other subjects relating to National or State defense.

"Section 4. Emergency. -- Because of existing world conditions and the necessity for the complete coordination of all state and local activities in connection with national defense, it is hereby declared that an emergency exists

> within the meaning of the Constitution, therefore, this Act shall be in full force and effect from and after its passage and approval."

Particular attention is directed to the purpose of the State Council of Defense, as declared in Section 2, supra. Pursuant to the existing state of emergency, the Governor of the State, Forrest C. Donnell, has organized by proclamation a State Council of Defense "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense."

Under the first question presented, it is necessary to consider whether the county court of any county within the state may lawfully expend money for defense purposes since such items should not be included in the budget unless expenditure is lawful.

Broad powers are vested in the respective county courts of the state by Section 36, Article VI, of the Missouri Constitution, which provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The trend of the decisions of our Supreme Court has favored the enlargement of the powers of the county court, which were, in some of the older cases, restricted to authority found in the statutes which were strictly construed. In Rinehart v. Howell County, 153 S. W. (2d) 381, which involved the grant of moneys for stenographer hire to a prosecuting attorney where there was no authority for such expenditures in the statute, we find the following (l. c. 383):

> "Our Constitution, Art. 6, Sec. 36, Mo. St. Ann., provides: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law.' In State ex rel. v. McElroy, 309 Mo. 595, 608(II), 274 S. W. 749, 751 (1), we construed said provision to authorize county courts to transact all county business and such other business as may be added to their jurisdiction by law."

Later in the opinion, the court, in commenting on the fact that the statutes provided for stenographers for prosecuting attorneys in certain counties, while there was a complete absence of such statutes in other instances, further said (l. c. 383):

> "Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public." (Underscoring ours)

Briefly stated, under this decision the county court has full power in connection with the expenditure of county moneys except as limited by the Constitution

or statutes. This position is supported by the following quotation from 15 C. J., Section 288.

> "In the absence of statutory provisions on the subject, there would seem to be no doubt that county boards as the fiscal agents of their counties may direct the disposition of the county revenues, and where the power and the duty to determine how the revenues shall be expended is expressly imposed by law on the county board, the courts will not interfere with its discretion, in the absence of proof of fraud or gross abuse of power, the power of the board to expend funds not being confined strictly to claims enumerated in the statutes."

The Constitution limits expenditures of moneys collected by taxation. Section 3, Article X states in part:

> "Taxes for public purposes only -- must be uniform. -- Taxes may be levied and collected for public purposes only. * * * * "

Section 44, Article IV, of the Constitution prohibits the granting of credit or public moneys to private individuals, associations or corporations.

That expenditures of money for the preservation of the lives and property of the citizens of any county from attack or invasion by a common enemy would be for a "public purpose" seems too obvious to require authority. Furthermore, we find that the county court is specifically charged with the duty of preserving all buildings and property of the county from waste or damage. Section 13730, Revised Statutes of Missouri, 1939, is in part as follows:

> "The county court of each county shall have power, from time to time, to alter, repair or build any county buildings * * * ; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

On other occasions our courts have broadly interpreted constitutional provisions and statutes to cover situations brought about by conditions which did not exist when such constitutional provisions or statutes were created. In Dysart v. City of St. Louis, et al., 11 S. W. (2d) 1045, the facts disclose that the city was in the process of building a municipal airport, and an election was held authorizing the issuance of bonds to pay for the construction of the airport. An injunction suit was brought to prevent the issuance of the bonds, it being alleged that the money would not be spent for a public purpose and that the charter of the City of St. Louis did not authorize the construction of an airport. The court, in overruling these contentions, stated (l. c. 1048, 1049):

> "'The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. City of Wichita v. Clapp, supra; State ex rel. City of Lincoln v. Johnson, State Auditor (Neb. 1928) 220 N. W. 273; State ex rel. Hile v. City of Cleveland et al. (Ohio Ct. App. 1927) 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal;

> Laws of Georgia 1927, p. 779; R. S. Kansas 1923, 3--110; Public Acts Conn. 1925, ch. 249; Laws of Mass. 1922, ch. 534, sec. 57; Laws of Mont. 1927, ch. 20; General Code of Ohio, par. 15, sec. 3677; Pa. Act No. 328 of 1925 (Pa. St. Supp. 1928, secs. 4606--1 to 4606--3); Act 254 of the 69th Congress (the Federal Air Act (49 USCA, section 171 et seq.)) We have no doubt as to the soundness of the view which obtains.'
>
> *
>
> "'The point is suggested, but not pressed, that the power to establish and maintain an airport is not within those granted the City of St. Louis by its charter. While there is no specific reference to an airport in the charter, there can be no doubt but that the power in question is expressly conferred by the broad all-comprehensive language employed in the granting of powers, when construed conformably to the rule of construction which the charter itself provides. St. Louis Charter, art. I, sec. 1, paragraphs 8, 15, 32, 33 and 35; art. I, sec. 2. See also, St. Louis v. Baskowitz, 273 Mo. 543, 201 S. W. 870; Halbruegger v. City of St. Louis, 302 Mo. 573, 262 S. W. 379.'"

In another instance, our Supreme Court has, by judicial interpretation expanded the powers of local authorities. In Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, an injunction suit was brought to prevent the selling and delivering of bonds to care for paupers, children and the sick, aged and insane. The language used by the court in holding the issuance

of said bonds a proper governmental function is so nearly applicable to the case at hand that we quote from the opinion at length (l. c. Mo. 179, 180, 181):

> "The Supreme Court of Pennsylvania directly passed on this question in the recent case of commonwealth v. Liveright, 161 Atl. 697, l.
>
> "'We again l[illegible] the support of the poor -- mea[illegible] persons as have been understood [illegible] within that class ever since [illegible]zation of the Government, perso[illegible]e without means of support, th[illegible]sons stated in the . . . Bill . . . .[illegible]nd has always been a direct charge on the body politic for its own preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expenditure of money by the state for such purposes is in performance of a governmental function or duty, and is not controlled by the constitutional provision, if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels. The appropriation in providing for relief of poor comprehended those who had been driven into that situation through enforced unemployment; they having no means to support themselves. From this cause the ranks of the poor had increased so rapidly as to stagger the people of our state. The fact that their numbers are swollen through unemployment does not change the established concept of poor persons. <u>To hold that the state may not under the Constitution now aid such people, even though it had a governmental</u>

duty, would be to deny to the state the right to perform, not only an important, but at this time a most pressing, governmental function. To hold that the state cannot or must not aid its poor would strip the state of a means of self-preservation and might conceive untold hardships and difficulties for the future.'

"The Supreme Court of the State of Washington, Rummens v. Evans, 13 Pac. (2d) 26, l. c. 30, said:

"'Under our statutes and decision, therefore, it being a positive governmental function and duty of the country to care for the poor, the statute emphasized by appellant does not govern.'

"The court also said:

"'Unquestionably, in the stress of these times, when unemployment is the rule rather than the exception and has increased immeasurably, in this state and region, within the last two years, an emergency exists under Sec. 3997-6, supra.'

"The opinion closes with these words:

"'Upon the plainest dictates of humanity, such a condition must be relieved immediately or in many hundreds of cases it may be too late or useless. . . . While the funds could be accumulated, as suggested by appellants, thousands of men, women and children might die or be driven to crime to relieve their necessities, or to reprisal and disorder.'

* *

"We, therefore, hold that the ordinances authorizing the issuance of these bonds are for a'public purpose.' They undertake to provide relief for people of the city of St.

> Louis who are unable to care for themselves, and to relieve them of their condition, and it is immaterial what caused their condition." (Underscoring ours)

Protection against a foreign enemy is, under these circumstances, no less a governmental function than protection against the hardships of hunger and unemployment. The Legislature unquestionably contemplated that local authorities would support the national effort for the common defense because the avowed purpose of the enactment of the statute creating the State Council of Defense was to coordinate efforts of the "state and local" authorities. It doubtless believed that the authority already existed in favor of local authorities to exert efforts for the common defense.

There appears to have been but one limitation on the definition of a "public purpose" if all the elements above set out are present. The benefits must be derived by the inhabitants of the governmental unit involved. In State ex rel. City of Jefferson v. Smith, 154 S. W. (2d) 101, Judge Gantt clearly expressed this rule in the following language taken from the opinion (l. c. 103):

> "In this connection we quoted with approval from 26 R. C. L. 46, as follows:
>
> "'It may * * * be conceded that that is a public purpose from the attainment of which will flow some benefit or convenience to the public. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own land to in his own right, and take into his own use at his own option, upon the same reasonable terms and conditions as any other citizen

thereof.' Dysart v. St. Louis, 321 Mo. 514, 11 S. W. 2d 1045, loc. cit. 1047, 62 A. L. R. 762."

It is therefore the opinion of this office that county courts have authority to expend moneys within the geographical limits of their respective counties for the purpose of preserving the lives, property and general welfare of the citizens of the county and for the protection of the property of the counties against invasion or damage by a common enemy.

The next question concerns the manner in which expenditures for defense are to be classified in the budget and how they are to be disbursed.

Section 10911, having been amended by the Sixty-First General Assembly, appears on page 650 of Laws of Missouri, 1941, and is as follows:

"Classification of proposed expenditures. -- The court shall classify proposed expenditures in the following order:

"Class 1. The County court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2. Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

"In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county.

"Class 4. The county court shall next set asidethe amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified.

> No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.
>
> "Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

From an examination of this statute, it appears that expenditures for defense such as contemplated herein, should be classified under Class 5 as emergency expense of the county. We find the following definitions of "emergency" in Words and Phrases, Volume 14, l. c. 307:

> "The word 'emergency' is defined in Cent. Dict. as follows: '(2) A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. (3) A sudden or unexpected occasion for action; exigency; pressing necessity.' United States v. Sheridan-Kirk Contract Co., 149 F. 809, 814.
>
> *
>
> "'Emergency' in statute authorizing members of board of supervisors to make emergency expenditures is unforeseen occurrence

> or combination of circumstances calling for immediate action (Code 1930, sec. 6064). Attala County v. Mississippi Tractor & Equipment Co., 139 So. 628, 162 Miss. 564.
>
> "'Emergencies,' as used in cases permitting employee to recover where he has performed some act in an emergency, have been interpreted as unforeseen events happening in and about the premises which threaten or menace life, limb, or destruction of property. Davis v. North State Veneer Corporation, 156 S. E. 859, 861, 200 N. C. 263."

We are, of course, unable to find any direct authority as to the language to be used in setting up such items in the budget, but it is our opinion that the following language would be sufficient:

> "For defense expenditures within the county, to be disbursed under the direction of the State Council for Defense."

In passing, we call your attention to the provision under Class 4, which requires that furniture and office machines and equipment of all kinds must be listed under Class 6, and if any such expenditures are contemplated as a part of the defense effort, they should be listed under Class 6 and not under Class 5, as above suggested. Warrants against funds to the credit of the item for defense should be drawn in the usual manner by the court after consideration of the certificate of the duly authorized agent of the State Council of Defense properly submitted to the county court for that purpose.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

ROY McKITTRICK
Attorney General

VANE C. THURLO
Assistant Attorney General

RLH:VC

FEES: TAXATION: - Witnesses and jurors in criminal cases must furnish evidence of no indebtedness to state or county before paid by treasurer.

February 6, 1942

2-16

FILE
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 29, 1942, which reads as follows:

> "Our audits have disclosed that a number of counties of the state are paying no attention to Sec. 4249 R. S. MO. 1939 relative to paying witness fees in criminal cases; also to the method of paying jurors. We find that a number of jurors and witnesses are receiving fees when indebted to both the state and county for several years delinquent taxes.
>
> "I would like an opinion as to whether a juror or witness may be paid money from the county treasurer when it is shown on the tax books of that county that they have delinquent state and county taxes charged against them.
>
> "Second, I would like an opinion as to whether the County Treasurer is liable on his bond for the payment of money to jurors or witnesses who are indebted to the state or county for delinquent taxes."

Section 4248 R. S. Missouri, 1939, prescribes the method of certification and payment of criminal cost fee bills.

Section 4249 R. S. Missouri, 1939, reads as follows:

> "The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file

> with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 4248 to 4252, inclusive."

Section 4249, supra, refers to Section 4248 which section only prescribes the method of payment of criminal cost fee bills. Section 4249, supra, specifically prescribes that the county treasurer shall pay out all of the fees as described in Section 4248 to the proper owner as the same may be called for. The first provision in Section 4249, supra, specifically states that before any such fees shall be paid to the party to whom the same is due shall furnish certain satisfactory evidence to the treasurer. The evidence required, before the treasurer shall pay the proper owner of such fees, is satisfactory evidence first that the party is not indebted to the state or county on account of delinquent back taxes, or is not indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances or costs for a violation of any criminal statute of this state, or for contempt of any court, even if the same had been satisfied by oath of insolvency; or is indebted to the state or county on account of funds coming to his hands by reason of holding a public office. The above provisions state delinquent back taxes, but this does not apply to real estate taxes, for the reason that the owner of property is not personally liable for delinquent real estate taxes. The taxes referred to are personal taxes, where a judgment may be had against the taxpayer personally, and is not a tax that is a lien against his real estate.

It is very noticeable that the word "shall" is used. "Shall", as a general rule, means that it is mandatory upon the officeholder to comply with that part of the section. It was so held in the case of State v. Wymore, 119 S. W. (2d) 941, Pars. 7-10, 343 Mo. 98, 119 A. L. R. 710, where the court said:

> "* * * On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. * * * "

In Section 4249, supra, although it is mandatory that the county treasurer pay out such criminal cost fees to the proper owner, yet, there are certain methods prescribed before he shall pay out such fees. The methods set out in Section 4249 relate to the essence of that section, and specifically states that the procedure must be followed.

In the case of Morris et al. v. Karr et al, 114 S. W. (2d) 962, l. c. 964, the court, in holding that a provision was mandatory under such a statement of facts said:

> " * * * As said in State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104, 107, quoting from 25 R. C. L. par. 14: 'Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' * * * "

Section 4249, supra, specifically excludes the payment of such criminal cost fees to the proper owners unless they comply with certain provisions as described in said section. The method is specifically set out in the section

as to how the criminal cost fees should be paid to the proper owners and that is the only method that can be used by the county treasurer. It was so held in the case of Kroger Grocery & Baking Co. v. City of St. Louis, 106 S. W. (2d) 435, l. c. 439, 341 Mo. 62, 111 A. L. R. 589, where the court said:

> " * * * that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S. W. 755, 758, 21 Ann. Cas. 1218."

Section 4250 R. S. Missouri, 1939, reads as follows:

> "All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."

This section defines the fees that are considered criminal costs.

It is customary in many counties for the fees described in Section 4248, supra, to be assigned to persons who claimed to be innocent holders and are not aware of

the witness, juror, or other person owing delinquent taxes or other obligations to the county. The Legislature saw fit to define such persons as being not innocent holders for failing to inquire if the original purchaser owed any taxes, by enacting Section 4252 R. S. Missouri, 1939, which reads as follows:

> "In order to make said sections 4248 to 4252 effective, it is hereby declared that all fees due by the state or county on account of any criminal case, or due witnesses before the grand jury, or as a juror or witness in an inquest, shall not be negotiable or assignable except subject to all the set-offs herein provided for, and that the state and county holds a prior lien on the same for the purpose of indemnification against loss by reason of the nonpayment of personal back taxes, and for the payment of the fines, penalties, forfeitures and costs hereinbefore mentioned."

The above section specifically sets out: " * * * by reason of the nonpayment of personal back taxes, * * *." There has been some complaint on the part of county treasurers because, as set out in Sections 4248 and 4249 R. S. Missouri, 1939, before they can pay any other fees to a person who is entitled to same as a witness, juror or other legal party to a criminal cause, it is necessary to obtain satisfactory evidence that the party was not indebted to the state or county as set out in Section 4249, supra. In order to protect himself, the county treasurer should require either an affidavit, from the person who receives the check from the treasurer as to the indebtedness of the original person, or else, he should personally check all of the accounts set out in the first provision of Section 4249, supra.

CONCLUSION

It is, therefore, the conclusion of this department, that Section 4249 R. S. Missouri, 1939, is mandatory and the county treasurer should not pay any juror or witness when it is shown on the tax books of that county that he has delinquent state and county taxes charged against him, or that he is indebted to the state and county under the other section of the first revision of Section 4249 R. S. Missouri, 1939.

Your second question relates to the question of whether or not the county treasurer is liable on his bond for the payment of money to jurors or witnesses who are indebted to the state or county for delinquent taxes and other obligations as set out in the first revision of Section 4249, supra.

Section 13795 R. S. Missouri, 1939, reads as follows:

> "The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Under the above section the treasurer must enter into a bond to the county in a certain amount and with certain sureties, conditioned for the faithful performance of the duties of his office. Since we have held that Section 4249, supra, is mandatory, and it is the duty of the county treasurer to comply with said section before paying out

the fees described in Section 4248, without satisfactory evidence that the person who appeared as a witness or juror in a criminal case which would entitle him to receive fees, then upon failure to comply with that section he is not faithfully performing the duties of his office and would be liable upon his bond for any void payment of such fees without following the procedure as set out in said Section 4249 R. S. Missouri, 1939.

That the treasurer would be liable on his bond for not faithfully performing the duties of his office was held in the case of State v. Blakemore, 205 S. W. 626, l. c. 628, 275 Mo. 695, where the court said:

> "It is insisted the bond does not cover drainage district funds. The condition of the bond is that if Blakemore 'shall faithfully discharge the duties of said office of treasurer of said county according to the laws of the state of Missouri in receiving, handling, and disbursements of all funds, except school funds of said county, school township and school district funds, then this obligation to be void, otherwise,' etc. Section 3752, R. S. 1909, requires the county treasurer to give bond 'conditioned for the faithful performance of the duties of his office.' Section 5605, R. S. 1909, requires him to 'enter into a separate bond, for each drainage district organized in the county * * * conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come' into his hands. The bond in suit is not conditioned exactly as prescribed by either of these statutes. Nevertheless, its terms plainly include all county funds except school funds. The obligation to give bond for all these moneys is clear. If not good as a statutory bond, it is good as a common-law bond. It contravenes no public policy,

> violates no statute, was voluntarily given, and secures, by its terms, moral and legal obligations of the treasurer. The statute provides no form and does not purport to nullify bonds conditioned otherwise than as prescribed. It is good to the full extent of its conditions.
> * * * * * * * * * * * "

Also, in the case of State v. Maryland Casualty Co., 66 S. W. (2d) 537, the court, in passing upon the question, where the county collector did not follow the statute, said, at l. c. 539:

> "And it is provided in section 9932 that upon payment by the collector to the treasurer of the amount found due on said monthly settlements with the county court, the treasurer shall give the collector duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant the collector a full quietus.
>
> "Defendant Matkins did not comply with these sections. However, as stated, he made quarterly statements and settlements with the county court as treasurer. We do not think that Matkins should be permitted to profit by his failure to perform his duty as an official. Indeed, we have so ruled. In State ex rel. Dunklin County v. Blakemore, supra, we held that a treasurer under township organization and the surety on his bond are estopped to set up the failure of the treasurer to perform his duty as a defense to an action on the bond given to secure the faithful performance of the official duties of the treasurer."

CONCLUSION

Therefore, it is the conclusion of this department that the county treasurer is liable on his bond for the payment of money to jurors or witnesses in criminal cases who are indebted to the state or county for delinquent taxes, other than real estate taxes, or who are indebted to the state or county on account of any fine, penalty, forfeiture or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, even if the same shall have been paid by oath of insolvency, or indebted to the state or county on account of any funds coming to his hands by reason of any public office.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. ~~THURSO~~
~~(Acting)~~ Attorney General

WJB:RW

SCHOOLS: Sale under mortgage without suit, circuit court need not be in session.

February 17, 1942

2-77

Mr. Ramey Smith
County Clerk
Douglas County
Ava, Missouri

FILE
83

Dear Sir:

This department is in receipt of your letter of February 12, 1942, requesting an opinion, which is as follows:

> "A problem has come up with reference to the sale of real estate that was given as security on a School Fund Mortgage. Your assistant, Mr. Roberts, will recall that I was in and discussed this problem with him and that he asked me to state the problem in writing and that a written opinion would be sent to us with regards to the matter.
>
> "The circumstances leading up to our problem are as follows: A school fund loan was made by the Douglas County Court on a certain 80 acres of land in the sum of $400.00 secured by a School Fund Mortgage and Bond as is required by Section 10384. The Interest became delinquent and the Douglas County Court made order directing the Sheriff to sell the said 80 acres of land for payment of the $400.00 loan. (Sec. 10387) This order was delivered to the Sheriff on November 5, 1941. The Sheriff gave the notice by Legal Publication in the Douglas County Herald for three consecutive issues and sold said tract on the 20th of December. We feel certain that the Notice as given by the Sheriff was

> regular in that it gave the proper description and the required 20 days notice. Upon the sale of the land the Sheriff made and delivered deed to the purchaser of said tract of land,
>
> "Since that time, however, a question has been brought up in that this deed might be void and the sale set aside because the Sheriff did not conduct the sale while Court was in session.
>
> "Our question is this: Should Sheriff conduct sale of this kind (Foreclosure under School Fund Mortgage) while County Court or Circuit Court is in session?
>
> "If, in your opinion, the answer to the above question is in the affirmative, could the sale mentioned be set aside on that ground only?"

The sections of the 1939 statutes which are applicable to your request are Sections 10384, 10385 and 10387.

Section 10384, R. S. Mo. 1939, mainly sets out the security that must be included in bonds secured by mortgage for the loan of school funds.

Section 10385, R. S. Mo. 1939, reads as follows:

> "Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in

> some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

It is very noticeable under the above section that the following words are used: "* * * without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, * * *." In other words, under the above section it is not necessary that a suit be filed either in the circuit court or the county court to foreclose the mortgage, but the same can be foreclosed under the same procedure as set out in the foreclosure of deeds of trust, providing that the notice set out in said section is properly followed.

Section 10387, R. S. Mo. 1939, reads as follows:

> "Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff

> reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

The question involved in your request refers mainly to the above section in that it says: " * * * shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly." The question involved in your request also is whether or not a foreclosure on a school mortgage is valid if the sale is made while the circuit court or county court is not in session. This question, as above set out in the partial quotation, only applies when a judgment has been had either in the circuit court or the county court upon the mortgage, and in that event the sale under the execution must be made, if the judgment is either in the county court or in the circuit court, while the circuit court is in session.

The first case on the subject is McClurg v. Dollarhide, 51 Mo. 347, where the court, at l. c. 349, said:

> "The defendant then offered a Sheriff's deed for the same premises, made under an execution issued from the County Court upon a judgment of the County Court, given for the principal and interest of a School debt under the statute of 1855, which was excluded because the sale appeared to have been made at the County Court and in vacation of the Circuit Court. The exclusion of this deed is the only point raised by this record.

"Whilst it is the duty of the courts to protect purchasers at Sheriff's sales, it is also their duty to see that no injustice is done to the parties to the execution. We know of no provisions in our statutes authorizing a sale to be made of a debtor's land, under an execution like this, during the session of the County Court, and whilst the Circuit Court is not sitting. This execution was issued on a judgment of the County Court, recovered under section 29, Revised Laws of Missouri 1855, page 1425, by which such judgment is to have like effect as a judgment of a Circuit Court. Section 30, same page, provides for the foreclosure of a Mortgage, before the County Court, and provides that a copy of the order, foreclosing the Mortgage, shall have the same effect as a fieri facias on a judgment of foreclosure in the Circuit Courts, and shall be proceeded on accordingly by the Sheriff. Section 27, on same page, provides for the recovery of interest on School debts, by issuing a warrant in the nature of a fieri facias, a judgment of a Circuit Court, except that such warrant shall be returnable in thirty days from its date, and except also, that such Sheriff shall have power to sell during the sitting of the County Courts, etc.

"These provisions taken together, clearly show that the only execution under which a Sheriff can sell lands during the sessions of a County Court, is the one in the nature of a fi. fa., issued under section 27.

"The other executions, authorized to be issued from the County Court, have the force and effect and must be proceeded

> on in like manner, as executions issued by the Circuit Court. It is so well known that lands cannot be sold on executions except during the sessions of the Circuit Court, that a notice to sell at a County Court would be wholly disregarded, and a sale under such notice might be ruinous to all parties for want of bidders. If a Sheriff can disregard the plain provisions of the statute, by selling at a County Court, he might do so when no Court at all is in session, or at a place where Court is never held."

It is very noticeable under the above case that there was a judgment given by the county court on the foreclosure of the mortgage and an execution issued.

The above case is set out in the case of Grant v. Huston, 105 Mo. 97, l. c. 101, where the court said:

> "The plaintiff also objected to the sheriff's deed on the ground that there was no court in session at the time of the sale. The mortgage provides that, in case of default in the payment of the bond, the sheriff of the county may, without suit, sell the land to the highest bidder for cash at the courthouse door in said county, after giving twenty days' notice of the time, terms and place of sale by handbills, or advertisement in some newspaper published in said county; and it is also provided that the deed shall be as effectual as if made by virtue of a judgment of a court of competent jurisdiction. The debt not having been paid, the county court by its order made in February, 1860, directed the sheriff to sell the property, and he sold the same pursuant to the terms of the mortgage.

"It is agreed there was no court in session at the date of the sale. Where the county court by virtue of section 30, page 1425, Revised Statutes, 1855, orders the sheriff to sell the mortgaged premises, he should make the sale during a session of the circuit court, and it has been held that a sale not thus made under such an order is void. McClurg v. Dollarhide, 51 Mo. 547; Wilcoxon v. Osborn, 77 Mo. 622-632. These cases are cited by the plaintiff as authority for the contention that the sale made by the sheriff in this case is void; but in our opinion they do not sustain the proposition. Section 22 of the last-named statute provides what recitals and conditions these mortgages given to secure school funds shall contain, and among others they must contain a provision that in case of default the sheriff of the county may sell the mortgaged property, but the mortgage need not say where the sale shall be made or what notice shall be given, for all that is provided for by the subsequent sections of the statute.

"In this case the mortgage contains stipulations not required by the statute. Thus it provides for a sale at the courthouse door, after giving notice of the time, terms and place of sale for twenty days, in either of the two specified methods. It is, therefore, more than a statutory school-fund mortgage. In short, it provides for all the details of a sale, and is a good common-law mortgage with power of sale. In Mann v. Best, 62 Mo. 490, the mortgage authorized the county to appoint an agent for the purpose of selling the land after giving a specified notice,

> and was not a statutory mortgage; but it was held, a sale made in compliance with the powers contained in the instrument would be valid. The statute was held to be directory only. As the mortgage in the present case provided for the place of sale and all the terms thereof, a sale made pursuant to its provisions should be upheld. It is a good common-law mortgage with power of sale, and may be enforced as such. The order of the county court directing the sale is no more than a demand upon the sheriff that he proceed to execute the powers specified in the mortgage. The fact that the sale was not made during the sitting of any court is, therefore, immaterial; for the sale was made under the stipulations of the parties as set forth in the mortgage, and not under the provisions of the statute, and the mortgage contemplates a sale at the courthouse door at any time after giving the specified notice. The defendant, therefore, has a good title, and it is unnecessary to examine the questions suggested in the brief, based upon the theory that there was no valid foreclosure of the mortgage."

In the above case the Supreme Court specifically stated: "The fact that the sale was not made during the sitting of any court is, therefore, immaterial; for the sale was made under the stipulations of the parties as set forth in the mortgage, * * *." In other words, the holding in this case, which is the last case on the subject, is to the effect that the powers of the sheriff as set out in the mortgage should be followed, and it is immaterial whether the circuit court or the county court, in any event, is in session. This case mentions and is construing Section 30, page 1425, R. S. Mo. 1855, which is now Section 10387, R. S. Mo. 1939, which includes the same phrase, that is, " * * *

shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

The above case was approved in the case of Walters v. Senf, 115 Mo. 524, l. c. 531, where the court said:

> "It is first insisted that the deed to plaintiff is of no force, because based on orders of the county court in the nature of a foreclosure which that court had no jurisdiction to make. Those orders were evidently designed to follow the procedure marked out for the enforcement of mortgages of school funds. Revised Statutes, 1889, secs. 8057-8059. But in the law governing the management of the road and canal fund, nothing is said as to the necessity or propriety of such orders.
>
> "By section 7782 (Revised Statutes, 1889, identical with Revised Statutes, 1879, sec. 6925) the county is authorized to loan such funds, 'taking care in every instance to require good and ample security.' No form is prescribed. The bond and mortgage in the case before us followed the form appropriate for school fund loans. It is evident that one of these blanks intended for those loans was used, after changing the recitals so as to apply it to the road and canal fund, instead of to the school fund.
>
> "A grant of power is generally supposed to tacitly comprehend a grant of such incidental powers as may be necessary to make the principal grant effective. Broom's Legal Maxims (8 Am. Ed.) pp. 479, 486.
>
> "The power to loan this fund and to 'require good and ample security,' clearly

> implied the right to accept a mortgage on real estate as security for the loan. When it was executed, the property become subject to the terms and power of sale expressed in that instrument. Mann v. Best (1876), 62 Mo. 491; Grant v. Huston (1891), 105 Mo. 97. The county acquired thereby the right to resort to the security to realize the amount of the loan, to the extent, and in the manner defined in the mortgage."

In this case the court specifically held: "When it was executed, the property become subject to the terms and power of sale expressed in that instrument."

In rendering this opinion we are assuming that the mortgage or deed of trust does not require a suit in either the circuit court or county court for foreclosure, but merely follows the notice as set out in Section 10385, supra. The whole question as to whether or not the property should be sold while the circuit court or county court is in session is a question of fact as to the powers of the sheriff that are set out in the mortgage or deed of trust itself.

CONCLUSION

In view of the above authorities, it is the opinion of this department that if the mortgage or deed of trust set out in your request does not require a suit, judgment or execution to be issued out of the county court or circuit court, a sale by the sheriff upon the order of the county court is valid if it follows the procedure and powers as set out in the original mortgage or deed of trust.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WJB:HR

COUNTY BUDGET ACT : Cannot compile a second budget which
COUNTY COURT : has been reported to State Auditor.

March 4, 1942

Hon. Robert W. Smart
Prosecuting Attorney
Mt. Vernon, Missouri

FILE
83

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"In keeping with provisions of Section 8660, Missouri Revised Statutes of 1939, the duly elected County Surveyor of Lawrence County is serving in the capacity of ex officio County Highway Engineer. Lawrence County being a county of not less than 20,000 inhabitants nor more than 50,000 inhabitants, the salary for the County Highway Engineer ranges from $1200.00 to $2,000.00, to be determined by the Court. Due to the fact that the Court was uncertain as to the amount of salary that should be paid to the Highway Engineer within the prescribed bracket, the salary was set at the minimum of $1200.00 for the year 1941. When the budgets for 1942 were prepared by the County officers, the County Surveyor as ex officio County Highway Engineer prepared his salary budget on the basis of the order of the Court for 1941 at $1200.00. This budget has already been approved by the office of the State Auditor. It now appears advisable to increase the salary of the County Highway Engineer however there is a question in my mind as to whether or not an order of

> the Court increasing this salary, within the statutory limits, would be in violation of Article 14, Section 8 of the Constitution of Missouri. Assuming that to increase the salary would not be in violation of the Constitutional Prohibition, would the previous approval of the budget for this particular office for the year 1942 constitute a bar for such an increase for the current year or could it be accomplished by revision of the budget through the State Auditor's office."

Section 8660 R. S. Missouri, 1939, partially reads as follows:

> "* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

Under the above partial section the county court determines the salary of the ex officio highway engineer, which shall be not less than Twelve Hundred Dollars per annum, nor more than Two Thousand Dollars per annum.

Section 10910 R. S. Missouri, 1939, partially reads as follows:

> " * * * The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. * * * "

Section 10917 R. S. Missouri, 1939, sets out the procedure of the revision of the estimates of county expenditures that are presented to the county court. It also provides for the revision of the individual estimates given by the individual officers of the county.

Under the two above partial sections there is no provision for a revision, or resubmission of the budget to the county treasurer and the state auditor. The two partial sections specifically point out the mode and manner of procedure of arriving at the proper estimates of the county budgets, so as to keep the county within the estimated revenues of that year. That the procedure must be followed was held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860, where the court said:

> "* * * If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same.

> Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."

In the case of Gill v. Buchanan County, 142 S. W. (2d) 665, l. c. 668, the Supreme Court, in commenting upon the same proposition, said:

> "* * This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S. W. 2d 340, 342." (Underscoring ours.)

When special powers are conferred, or special methods are prescribed, for the exercise of the power, the exercise of such power is within the maxim that the expression of one thing is the exclusion of another, and the doing of the thing specified, except in the particular way pointed out, is nugatory. (Kroger Grocery & Baking Company v. City of St. Louis, 106 S. W. (2d) 435).

Section 10915 R. S. Missouri, 1939, partially provides:

> "* * * The estimate of each such officer shall cover the entire year beginning January first and ending December thirty-first, both dates inclusive. * * * "

The officers referred to above means every officer who expects to claim pay for services, or to receive supplies to be paid for from the county funds.

Article X, Section 12, of the Constitution of Missouri, provides that the county court cannot incur expenditures in any year beyond the revenues collected in that year.

Under Section 10914, Class 4, Laws of Missouri, 1941, Page 652, it is provided as follows:

> "Pay or salaries of officers and office expense. List each office separately and the deputy hire separately.
>
> "(County clerk shall prepare estimate for the county court but his failure does not excuse the court.)"

Section 10911, Class 5, Laws of Missouri, 1941, Page 650, provides as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1,2,3,4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

This class is what is known as "the emergency class", and specifically provides that no salaries should be paid out of the emergency fund.

There is no question but that it was the intention of the legislature that once the budget had been passed upon by the county court in the revision it was final for that year as to the amount of money set out as payable under the different classes.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court of Lawrence County cannot re-budget, or cannot again revise the original budget for the year beginning January 1 and ending December 31, 1942.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CRIMINAL:
COSTS:

Juvenile cases and seven questions relating thereto.

March 26, 1942

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion of February 26, 1942, which is as follows:

> "We are enclosing a cost bill received from Johnson County, a cost bill received from Newton County and copies of files and record entries relating to each case. We request your official opinion as to whether the state or county is liable for these costs.
>
> "We are also sending you correspondence relating to a case from Vernon County, wherein the defendant was sentenced to the Missouri Training School for Boys at Boonville, Missouri. The cost bill in this case has not been presented to us for payment. We are sending you; however, the sheriff's bill for transporting the prisoner to the Missouri Training School for Boys. We wish to call to your attention that the information in this case shows that the defendant was charged with larceny of an automobile, which crime is punishable as provided by Section 8404 R. S. Mo. 1939, that is either penitentiary sentence or by jail sentence or fine. Are the costs of this case payable by the state?
>
> "We find that the various circuit judges follow different procedure in the matter of disposing of juvenile cases. In some of the circuits, the judges and prosecuting attorneys deal with most children under the age of seventeen years as delinquents and proceedings

are held under the juvenile delinquent provisions of statutes. Any costs not assessed against the petitioner or other persons are paid by the counties. In most of these cases the records are clear. A petition or information is filed charging juvenile delinquency or sentence and judgment is rendered therefore, and the question of who is liable for cost does not arise.

"In some other counties however, it is difficult to determine whether children are being tried under the general criminal law or as delinquents. We understand that any person under the age of seventeen years must be tried in juvenile court either for delinquency or as a criminal. Is this correct?

"In some counties they never have a juvenile delinquent. If they do, there is no record to show that they are being tried for juvenile delinquency. There is nothing in regard to age or other reason to show why the case is in juvenile court, The prosecuting attorney files an information charging the child with burglary, etc. The child is brought in, pleads guilty and is sentenced to the Missouri Training School for Boys. The state is billed for costs in most of these cases.

"In still other counties they do not use a juvenile division of the circuit court. If they do, the records do not so indicate, because on account of expenses or for other reasons the general court record is used to record all proceedings and nothing is recited about the age of the defendant althought sentence and judgment is assessed at confinement in the Missouri Training School for Boys.

"Can a child under the age of seventeen years being tried in juvenile court under the general criminal law be sentenced on a plea of guilty to imprisonment to the Missouri Train-

ing School for Boys, or does the sentence first have to be to the penitentiary and then commuted. Can a person over the age of seventeen be sentenced to the Missouri Training School for Boys or is the requirement, first penitentiary sentence and then commution or sentence. In this connection, please refer to the correspondence in regard to the Vernon County case. You will note there is nothing therein to show the age of this defendant other than his sentence terminates at the age of twenty-one years.

"Is it necessary for the court records to recite the ages of children under the age of seventeen years where they are being tried under the general criminal law and sentence is to the Missouri Training School for Boys? For example, the prosecuting attorney files an information in circuit court charging a boy with burglary. The boy is presumed to be fourteen years of age although no mention is made of his age in the records. The boy pleads guilty and is sentenced to the Missouri Training School for Boys. Is this sufficient record for entrance into the Missouri Training School. Is the judge presumed to have established the facts in regard to age, etc. before sentence and judgment or should the records bear out these facts?

"Where a burglary charge is filed against a child under seventeen years of age, is the judge required to enter of record the fact that he or she is being tried under the general criminal law or would the information filed by the prosecuting attorney be the determining factor, even though no information was recorded in regard to the age of the defendant?

"The state, of course, does not wish to refuse payment of costs for which it is legally entitled to pay. We have heretofore obtained an opinion in regard to juvenile cases, but

> the information requested herein involves other points not raised in the former request and which points we wish to have clarified. We request your further opinion in regard thereto."

For the purpose of this opinion we are dividing your letter into separate questions and will render the opinion accordingly.

The first question is "In some other counties however, it is difficult to determine whether children are being tried under the general criminal law or as delinquents. We understand that any person under the age of seventeen years must be tried in juvenile court either for delinquency or as a criminal. Is this correct?"

Juvenile laws and laws providing for the treatment and correction of delinquent and other minors are in Chapter 56, R. S.Mo. 1939; Article IX, Sections 9673 to 9695, inclusive, apply to counties having a population of 50,000 inhabitants or more, and Article X, Sections 9696 to 9718 apply to counties having a population of less than 50,000. Under the law applicable to counties of less than 50,000 population, Section 9698 in part provides:

> "This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. * * * * * * "

Section 9699 in part provides:

> "The Cape Girardeau court of common pleas and all circuit courts in counties less than 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose, and known as the juvenile records, and the court shall be known as the Cape Girardeau court of common

> pleas and the circuit court, and may for convenience be called the juvenile court. * * * "

In those counties the circuit courts and the Cape Girardeau court of common pleas have jurisdiction of proceedings conducted under the juvenile law, and there is no juvenile court. Properly speaking, the term "juvenile court" is applied to the circuit court merely as a matter of convenience. It was so ruled under the same statutes in State ex rel. Wells v. Walker, 34 S. W. (2d) 124, 326 Mo. 1233, and the court said, at l.c. 128, 129 of 34 S. W. (2d):

> "There are no separate juvenile courts nor juvenile divisions of the circuit courts in counties of less than 50,000.
>
> *
>
> "That does not mean a separate court. It merely means that 'for convenience' separate records of the different methods shall be kept, but it is the circuit court in its capacity as such while entertaining juvenile cases and 'for convenience' is called the juvenile court.
>
> *
>
> "It is the circuit judge who sits and tries the case whether it is tried under the general law or under the juvenile law. As judge of the circuit court, he must determine whether the relator may be prosecuted under the general law. The distinctions which are made are not in the different courts which may have jurisdiction of one prosecuted as a delinquent or as a criminal but in the application of a law in the same court."

As to counties having a population of 50,000 or more, Article IX, Section 9673, in part provides:

> "This article shall apply to children under the age of seventeen (17) years, not now or

> hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children: * * * * * *"

And section 9674 in part provides:

> "The circuit courts exercising jurisdiction in counties now or hereafter having a population of fifty thousand (50,000) inhabitants or more shall have original jurisdiction of all cases coming within the terms of this article: Provided, that in counties containing a city of the first class the criminal court shall have such original jurisdiction. For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article.
>
> *
>
> " * * * and the proceedings of the court in such cases shall be entered in a book or books to be kept for that purpose, and known as the juvenile records, and the court may for convenience be called the juvenile court. The clerk of the circuit court in such county shall act as the clerk of the juvenile court ."

In those counties the circuit court has jurisdiction and there is no such thing as a juvenile court; the term "juvenile court" is used merely as a matter of convenience. It was so ruled under the same statutes in State ex rel.MacNish v. Landwehr, 60 S. W. (2d) 4, l.c. 6, 8, 332 Mo. 622, and the court said:

> "Relator is wrong in his contention that the complaint against Opal Brown was filed in the juvenile court because there is no such court. The statute does not create a juvenile court. The Juvenile Law, so called, vests original jurisdiction of all cases arising under that law in the circuit court."
>
> *

> "Evidently the writers of these opinions referred to the court as the 'juvenile court' for convenience only, because the statute provides that the circuit court shall have original jurisdiction of all cases arising under the Juvenile Law, and the court may for convenience be called the juvenile court. Section 14137, R. S. 1929 (Mo. St. Ann., Sec. 14137). Neither of these cases hold that there is, in fact, a juvenile court."

The circuit courts may proceed under either the juvenile delinquent law, or under the general criminal law. Section 9700 in Article X applies both to counties of less than 50,000 and to counties having a population of more than 50,000 (State ex rel. MacNish v. Landwehr, 60 S. W. (2d) l.c. 8 (10), and it provides:

> "In the discretion of the judge of any court having jurisdiction of delinquent children under the provisions of articles 9 or 10, chapter 56, R. S. 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law, and any motion, petition or application, made to any court or judge having general jurisdiction of criminal causes, to transfer the case of or charge against any delinquent child to a court having jurisdiction of delinquent children under the provisions of said articles 9 and 10, may be denied in the discretion of the judge, when in the judgment of the judge such child is not a proper subject to be dealt with under the reformatory provisions of either said article 9 or said article 10."

The power of the circuit judge to make that election was recognized in the last portion of the above quotation from State ex rel. Wells v. Walker, supra.

Section 9704, R. S. Mo., 1939, in part provides:

> "In case of a delinquent child the court may

> commit such child, if a boy, to a training school for boys, or to the Missouri reformatory, or, if a girl, to the state industrial home for girls, or, if a colored girl, to the state industrial home for negro girls."

The reference to the "Missouri reformatory" means the Missouri Training School for Boys at Boonville (Section 8993, R. S. Mo., 1939).

With reference to counties having a population of more than 50,000 inhabitants, a delinquent child is defined in Article IX, Section 9673, substantially as above stated, and Section 9688 in part provides:

> "In the case of a delinquent child * * * the court may commit the child, if a boy, to the Missouri training school for boys, or, if a girl, to the state industrial school for girls;* * * * *"

The foregoing applies to boys under seventeen. Both Article IX, Section 9673, and Article X, Section 9698, contain a provision that when jurisdiction has been acquired under the juvenile law over the person of a child under seventeen, such jurisdiction shall continue until the child shall have attained the age of twenty-one years. Under those provisions, in order to have jurisdiction over a child over seventeen years of age, the court must have by some process brought the child within its jurisdiction while he or she was under seventeen. But another statutory provision is broader, Section 9696, Article X.

Proceeding under the juvenile law either in counties having a population over or under 50,000, circuit courts may sentence to the Missouri Training School for Boys any boy under twenty-one years of age, if he is charged and tried as a delinquent child, instead of being charged and tried under the general criminal law, because Section 9596 provides:

> "Whenever in the State of Missouri any minor of the age of seventeen years or over sha[illegible]

commit any of the acts constituting a delinquent child as defined in the statutes of this state; applicable to children under seventeen years, such minor may be caused to be brought by his or her parents or lawful guardian or by the probation officer or by any person interested in said minor, before a court of record having jurisdiction over misdemeanors, and tried in the same manner, as a person charged with the commission of a misdemeanor. Upon the finding of delinquency, the court may proceed to make such order in the case as may seem to be for the best interests of said minor, either by commitment to any public institution, or to any private institution willing to receive such minor, or to the care and custody of any individual willing to care for said minor may be left in the care of his or her parents or guardian, subject to the supervision of the court under suspended sentence; or the court may proceed to make any other lawful disposition of the case." (Italics ours)

Other sections refer specifically to counties having a population either over or under 50,000. Section 9696 applies to both such counties. It is of general application, and applies "in the State of Missouri." It refers not only to Article X, in which it is found, but refers to all "statutes of this state". Under that section a court other than the circuit court may also have jurisdiction of boys between the ages of seventeen and twenty-one. Said section 9696 confers jurisdiction on "a court of record having jurisdiction over misdemeanors". For example, in the City of St. Louis exclusive jurisdiction over certain classes of misdemeanors is vested in the St. Louis Court of Criminal Correction. Section 2253, R. S. Mo., 1939; State ex rel. MacNish v. Landwehr, supra, 60 S. W. (2d) l.c. 6 (2, 3). It is noted that the Landwehr case, supra, recognized the application of another section in Article X to counties otherwise falling within the application of Article IX, because of

the use of general terms.

It has been seen above that a person under seventeen years of age may be prosecuted in the circuit court under the general criminal law. In State v. Flores, 55 S. W. (2d) 953, l.c. 955, 332 Mo. 74, the court said:

> "These statutes were construed in State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124. It was held that, in a prosecution against a juvenile commenced under the general law, the circuit court had a right to proceed under that law. It was pointed out that since no petition was filed alleging the defendant to be a delinquent child, it was not necessary for the court to exercise the discretion provided under that section. That ruling was approved by this court in Ex parte Bass, 328 Mo. 195, 40 S. W. (2d) 457." Also see State v. Naylor, 40 S. W. (2d) 1079, 1082 (6), 328 Mo. 335.

The offense committed by a boy under seventeen may be a misdemeanor. As to that, Section 8998 in part provides:

> " * * * * * Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafterbe committed to the county jail as a punishment for such offense. * * * * * "

A boy over seventeen convicted of a misdemeanor by a court of record may be sentenced to the county jail the same as other persons under the

general criminal law. A justice of the peace court is not a court of record. Of course, the circuit courts (Section 1990, R. S. Mo., 1939), the Cape Girardeau Court of Common Pleas (Section 2329, R. S. Mo., 1939), and the St. Louis Court of Criminal Correction (Section 2238, R. S. Mo., 1939) are courts of record.

With reference to persons under seventeen convicted of felonies, Section 8998 further provides in part:

> "Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary of committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of <u>any other felony</u>, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. * * * * * * * * " (Underscoring ours)

It is, therefore, the opinion of this office that a person under the age of seventeen years must be tried in the circuit court under the juvenile law unless the circuit judge shall order that he be tried under the general law, in which latter case he would be tried as any other person charged with a crime for trial.

In answer to your second question, "We are enclosing a cost bill received from Johnson County, a cost bill received from Newton County and copies of files and record entries relating to each case. We request your official opinion as to whether the state or county is liable for these costs.", we have examined the fee bills from Johnson County and from Newton County and in regard thereto and with reference to the fact that the court has in his discretion the right to try a case either as provided under the Juvenile Delinquent Law or under the Gen-

eral Law as set out above.

Section 9004 R. S. Mo., 1939, sets out the general rule as to who shall be liable for criminal costs and that section is as follows:

> "In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

Section 4221 R. S. Mo., 1939, provides as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the

> sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."(Underscoring ours.)

It is, therefore, the opinion of this office that the fee bills in both of these cases should be paid by the State for the reason that the court in each case elected to try the defendant under the General Law rather than under the Juvenile Delinquent Law and,in the light of the above set out Statutes,the State would be liable in any event.

With reference to your third question, ("We are also sending you correspondence relating to a case from Vernon County, wherein the defendant was sentenced to the Missouri Training School for Boys at Boonville, Missouri. The cost bill in this case has not been presented to us for payment. We are sending you; however, the sheriff's bill for transporting the prisoner to the Missouri Training School for Boys. We wish to call to your attention that the information in this case shows that the defendant was charged with larceny of an automobile, which crime is punishable as provided by Section 8404 R. S. Mo. 1939, that is by either penitentiary sentence or by jail sentence or fine. Are the costs of this case payable by the state?") we have examined the bill presented by the sheriff of Vernon County and in view of the Statutes in cases set out above it is the opinion of this office that the Superintendent of the Missouri Training School for Boys of Boonville, Missouri, was in error when he billed the sheriff's fees to the county. The record of this case shows that the Circuit Judge elected to try the defendant under the General Law, and,as set out heretofore, the State would be liable for the costs.

In answer to your fourth question,("Can a child under the age of seventeen years being tried in juvenile court under the general criminal law be sentenced on a plea of guilty to imprisonment to the Missouri Training School for Boys, or does the sentence first have to be to the penitentiary and then commuted.") we can find no statutes in this State which require a person under the age of seventeen (17) years to first be sentenced to the penitentiary and then afterwards have a commutation of sentence.

In answer to your fifth question, ("Is it necessary for the court records to recite the ages of children under the age of seventeen years where they are being tried under the general criminal law and sentence is to the Missouri Training School for Boys?"). In the case of State v. Darling, reported in 199 Mo., l.c. 197, 198, the court said as follows:

> " * * * * A point is made upon the fifth instruction which defendant insists is erroneous in that it told the jury that if they found the defendant guilty of murder in the second degree, they should assess his punishment at imprisonment in the penitentiary for any term of years not less than ten, when at the time of the trial defendant was under eighteen years of age, and, under section 7759, Revised Statutes 1899, the jury might have fixed his punishment at imprisonment in the penitentiary for a term of not less than ten years or might have committed him to the state reform school for boys for a term of not less than five years, if the jury had been so instructed. This statute does not change the mode of trial under such circumstances, nor is it found in the statute in regard to crime and punishments but under a separate and distinct chapter entitled, 'Reform School for Boys,' and while it is inartistically drawn,

> it clearly means that a boy old enough to commit and who does commit a crime the punishment for which is death or imprisonment in the penitentiary for not less than ten years, is to be tried just as any other person committing such an offense, and after conviction if the court is satisfied that he is under eighteen years of age, he may, in the discretion of the court, 'be imprisoned in the penitentiary or committed to the state reform school for boys for a term not less than five years.'* * * "

Further, we can find no Statutes in this State which require the court records to recite the age of the party being tried for a crime.

In question six you ask: "Is the judge presumed to have established the facts in regard to age, etc. before sentence and judgement or should the records bear out these facts?" The court said,in the case of State v. Walker, reported in 34 S. W. 2d, l.c. 129, the following:

> "* * *In order to set at rest any dispute as to the jurisdiction of the circuit court to entertain a proceeding under the general law where a child is charged while under seventeen years of age with the commission of a crime, the other act of 1927 (Page 129) covers any case that might be in doubt, but providing that <u>any</u> petition or application made to <u>any</u> court or judge having <u>general jurisdiction of criminal cases may deny</u> any motion, petition, or application to transfer the case to a court having jurisdiction of delinquent children. An earlier act could not nullify that provision. All these provisions, taken together, contemplate that an information like that under consideration here must first be <u>filed</u> in the circuit court, and, if the person affected desires to have the case conducted under the provisions of the juvenile law, he must file some motion or petition to transfer the case from the circuit court to

> the juvenile court, so called for 'convenience,' which would merely mean that the defendant must ask the court to conduct the case as provided for a juvenile delinquent and not prosecute him under the general law. The record shows no motion or suggestion to the trial court that the proceeding be so transferred. The court could not then be without jurisdiction to proceed in the case when no proper method has been attempted by relator to have the proceeding transferred. He has no right to have the proceeding dismissed because he is properly and lawfully in court upon the charge under the authority of the provisions quoted. It is the circuit judge who sits and tries the case whether it is tried under the general law or under the juvenile law. As judge of the circuit court, he must determine whether the relator may be prosecuted under the general law. The distinctions which are made are not in the different courts which may have jurisdiction of one prosecuted as a delinquent or as a criminal but in the application of a law in the same court. We could not make the preliminary rule absolute and thus compel the judge to dismiss the case. We could only order him to stop the proceeding under the criminal law.* * * * * * * "

And in the case of State v. Flores, 55 S. W. 2d, l.c. 954 and 955, the court said as follows:

> " * * * * The appellant in his motion for new trial assigned several errors not argued in his brief. He first claims that the court had no jurisdiction of the cause, and it should have been transferred to the juvenile court, because he was under the age of seventeen years, citing section 14162, R. S. 1929 (Mo. St. Ann. Sec. 14162), which section provides that circuit courts in counties of less than fifty thousand shall have original jurisdiction of cases coming within the terms of the juvenile court act.

> That section further provides that a petition alleging a child to be delinquent shall be dismissed, and such child shall be prosecuted under the general law when in the judgment of such court such child is not a proper subject to be dealt with under reformatory provisions of this article.
>
> "Section 14163, R. S. 1929 (Mo. St. Ann. Sec. 14163) provides that in the discretion of the judge any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law.
>
> "These statutes were construed in State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124. It was held that, in a prosecution against a juvenile commenced under the general law, the circuit court had a right to proceed under that law. It was pointed out that, since no petition was filed alleging the defendant to be a delinquent child, it was not necessary for the court to exercise the discretion provided under that section. That ruling was approved by this court in Ex parte Bass, 328 Mo. 195, 40 S. W. (2d) 457.
>
> "In this case the defendant was charged by information filed in the circuit court of Pettis county by the prosecuting attorney and the cause proceeded to trial on that information. No petition nor request of any kind on the part of the defendant was made to have the cause transferred to the juvenile court. The court had jurisdiction to proceed as it did with the trial.* * * * * * * * * "

In view of the above and other cases cited and the statutes set out, it is our opinion that in the case you mentioned the record is sufficient for entrance in the Missouri Training School and the Circuit Judge is presumed to have established the facts in regard to the age, etc. before sentence and judgment.

Your seventh question reads as follows:

> "Where a burglary charge is filed against a child under seventeen years of age, is the judge required to enter of record the fact that he or she is being tried under the general law or would the information filed by the prosecuting attorney be the determining factor, even though no information was recorded in regard to the age of the defendant?"

In this question the court record would show whether or not the defendant was prosecuted under the General Law or the Juvenile Delinquent Law, the information of the prosecuting attorney would not be the determining factor in as much as it is in the discretion of the court, as we have set out above, to decide under which law the defendant will be prosecuted.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:ES

SPECIAL ROAD DISTRICT: Number of commissioners and method of their selection in "eight mile" road district.

- -

April 10, 1942

4-15

Hon. Robert W. Smart
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

FILE
83

Dear Sir:

Under date of April 8, 1942, you wrote this office requesting an opinion, as follows:

> "The Monett Special Road District, being a special district formed under the provisions of Article 9, Chapter 42, R. S. 1939, has been operating with four commissioners whereas the law prescribes that the number shall be three. This situation probably arises from the fact that the greater portion of the district lies in Barry County, the smaller portion lying in Lawrence County and contributing about $1400 in taxes to the whole district. The City Council of Monett has apparently certified three names to the County Court of Barry County annually for the selection of one new commissioner and has certified the same number of names to the County Court of Lawrence County for the selection of a commissioner. One individual served for a period of twenty three consecutive years as a commissioner from the Lawrence County portion of the district but has died and the three commissioners in the Barry County portion of the district refuse to recognize as a legal commissioner the individual who was appointed as his successor.

> "It is readily apparent that the law makes no provision for four commissioners. I would appreciate your opinion as to the proper procedure in appointing commissioners in such a district when it lies in two counties. I would also appreciate your opinion as to the proper procedure for the County Court to follow in the event the Mayor and Council fail or refuse to certify the three names from which the new commissioner is to be selected annually, as provided in Section 8675, R. S. 1939."

There appears to be some inadvertent typing mistakes in your letter. It states the Monett Special Road District is organized under the provisions of Article 9, Chapter 42, R. S. Mo. 1939. Inasmuch as Chapter 42 relates to brokers and has no Article 9 we are assuming the typist made a mistake and struck a 2 instead of a 6, as Chapter 46 relates to Roads and Bridges; and we are assuming further that a mistake was made in the number of the Article given, for Article 9 of this Chapter pertains to Highway Engineers, while Article 10 relates to Special Road Districts. And this opinion is written on the assumption the Monett Special Road District was organized under the provisions of Article 10, Chapter 46, R. S. Mo. 1939. Section 8675, mentioned in your letter is found in this Article and Chapter, and is as follows:

> "The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed dis-

> trict shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."
>
> (Underscoring ours.)

This section provides for the appointment of the three commissioners and when the territory of the district is in

more than one county, which is made possible by the provisions of Section 8708 of the same Article and Chapter, then each additional county in which there is territory of the district is authorized by this section to appoint one commissioner to serve with the three commissioners. The following extract is quoted from Section 8708, at l. c. 2288, right hand column:

> "* * * If any territory added to any such original district be in any county outside of the county of such original district, each county outside of such original district may appoint one road commissioner to act with the commissioners appointed in the county of the original district. Such commissioners so appointed outside of the county of the original district shall serve for a term of three years from the date of such appointment, and until their succcessors shall be appointed and qualified. Such commissioners shall be resident taxpayers of such added territory in such county of their appointment. Except as herein provided, such commissioners shall be governed by this article. No change shall be made in the number of commissioners appointed by the county of the original district or in the manner of their appointment. * * * * *"
>
> (Underscoring ours.)

The district as originally organized was wholly in Barry County and later the portion of land in Lawrence County was taken into the district. (See case of State ex rel. Monett Special Road District v. Hackmann, 278 Mo. 602.)

The foregoing is the authority for four commissioners in the district.

In the event of a failure or refusal of the Mayor and members of the City Council of any city or town within the

district to attend the meeting for selecting a director, if no meeting was held the holding officer at the time would continue to function. Section 8675, supra.

Section 8675, supra, directs how, by whom and the month the election for Commissioner shall be had in each year after the organization of the district. In the case of State ex inf. Holt, ex rel. Jones v. Meyer, 321 Mo. 859, 12 S. W. (2d) 489, this section was before the Supreme Court and it was ruled that the Mayor, Councilmen and members of the County Court are each entitled to one vote when present or when the Mayor and Councilmen certify their selections. The section does not provide how many persons must be present or vote by certificate to constitute a quorum for the purpose of electing a commissioner.

A "quorum" is such a number of the members of a body as is competent to transact business in the absence of other members. Morton v. Talmadge, 144 S. E. 111, 166 Ga. 620.

Absent a provision as to what constitutes a quorum a majority of the body is, under the common law, required to constitute a quorum. Seiler v. O'Malley, 227 S. W. 141-2, 190 Ky. 190; see also West v. Stephenson, 151 S. E. 853-5, 108 W. Va. 545; Ex parte Willocks, N. Y. 7 Cow. 402, 17 Am. Dec. 525; Gumaer v. Cripple Creek T.T. & M. Co., 90 Pac. 81, 40 Colo. 81.

This office does not have knowledge as to the number of Councilmen in the City of Monett, but if the Mayor and Councilmen by remaining away or failing to certify their choices for commissioner would cause the meeting to have in it fewer votes than a majority of the whole number, then the meeting could take no valid action and the commissioners then serving would continue to serve.

If a majority of the whole number were present the selection of a commissioner could be proceeded with.

In the event of a continued failure or refusal of the Mayor and Councilmen they could be compelled by mandamus to attend or certify in their preferences.

As to the manner in which the commissioners shall be selected in a road district of this type when it includes

land in more than one county the three commissioners to be selected from the county where the district was originally organized must be selected in accordance with the manner prescribed in Section 8675 referred to in your letter. The authority for an additional commissioner, or commissioners, if territory from more than one county has been taken into the district, which is found in Section 8708, and herein set out, specifically provides the number of commissioners from the county of original organization and their method of selection shall remain the same. But the Statute is indefinite as to the manner of selection of the commissioner or commissioners from the added county or counties.

Attention is called to the following language from Section 8708:

> "* * * *, each county outside of such original district may appoint one road commissioner to act with the commissioners appointed in the county of the original district. * * * * * * * * * *"
>
> (Underscoring ours.)

The three commissioners are appointed not by the county or city or town, but by a group of designated persons and it could be urged this same group should also appoint the additional commissioner or commissioners from the other county or counties. This would appear to be the logical thing to do in connection with the appointment of an additional commissioner, or commissioners.

The primary purpose of statutory construction is to ascertain the intent of the legislature from the language used, if possible. Cummins v. Kansas City Pub. Serv. Co., 66 S. W. (2d) 720, 334 Mo. 672; Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452. At no place did the legislature indicate the additional commissioner or commissioners should be appointed in the same manner or by the same group. And the language used, to the mind of the writer, indicates a different intention. As pointed out, the section provides each county may appoint, and it further says except as herein provided the commissioner shall be governed by the Article;

and further provides there shall be no change in the manner or time of appointing the three commissioners. This would seem to indicate the intention of the legislature to have the additional commissioner or commissioners appointed in a different manner. As the section directs the appointment by the county without prescribing what agency of the county may make the appointment, the duty of making the appointment should fall on the county court, the county court being the managing body of the county.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

CRIMINAL COSTS: Seven questions on fees allowed non-resident witnesses and to sheriffs.

April 10, 1942

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. R. K. Nutter

Dear Sir:

This will acknowledge receipt of your recent request for an official opinion.

Paragraph "(a)" of your first question reads as follows:

> "(a) Where a subpoena is issued for a witness who resides in some other county in the state, but not in the county where proceedings are bing held, and a subpoena is sent by mail to the party for whom it is issued and the said party writes on the back thereof that he accepts service; is the witness entitled to fee for mileage from his place of residence to the place of trial and return? We are sending you copies of four subpoenas from Audrain County and two from Benton County which will explain the procedure referred to and upon which this question is bases."

The statutes applicable to the question of fees for witnesses, are Sections 13420 and 13421. We are not setting out these sections on account of the length of both of them. In the above question the main inquiry is whether or not acceptance of service of a subpoena in writing is sufficient to allow the witness mileage and fees per diem. The last and very early case upon this subject is the case of Wilson v. The St. Louis, K. & N. W. Ry. Co., 53 Mo. App. 342, in which the court first said:

> "* * * There was a trial, which resulted in a verdict and judgment for the defendant. The clerk of the court allowed and taxed as costs mileage in favor of certain witnesses, who had in writing accepted service of the subpoenas. The subpoenas were regularly issued, and the witnesses attended the trial. They lived more than forty miles from the place of trial, and their fees were not tendered. Upon this state of facts the circuit court ruled that the action of the clerk in allowing the witnesses mileage was proper. The plaintiff has appealed."

And the Court, in arriving at its opinion, said, at l. c. 344:

> "The question is, did the witnesses attend the trial in obedience to a subpoena? If so, they are entitled to mileage. While the statute does not provide for acceptance of service of a subpoena, we know of no good reason why a witness could not dispense with the legal forms of service. In Pennsylvania it was expressly decided that he could. Feree v. Strome, 1 Yeater (Pa.) 303. A subpoena is not directed to an officer, but to the witness himself.
>
> "In the case of Herson v. Railroad, 18 Mo. App. 439, subpoenas were not issued. The witnesses attended the trial at the request of the defendant. The Kansas City Court of Appeals held, and we think properly, that the attendance of the witnesses in that case was purely voluntary, and that they were not entitled to claim mileage. But this cannot be said of wit-

> nesses who have accepted service of subpoenas. Attendance by them should be regarded as in obedience to or 'under subpoena.' And we think this is true, although the witnesses live more than forty miles from the place of trial, and the legal fees have not been tendered or paid. The right to have fees paid in advance may also be waived."

Under the holding in the above case there is no question but that the witness is entitled to fees and mileage, even though the lawfully issued subpoena was not served by a sheriff.

CONCLUSION

It is, therefore, the opinion of this department that a witness who resides in some other county in this State is entitled to mileage and fees per diem when the witness accepts the service of the subpoena in writing.

Paragraph "(b)" as set out in your request reads as follows:

> "(b) Would such witnesses be entitled to per diem fee if no further subpoena were issued or other return made on said subpoena?"

This paragraph is answered by the above case, but, in a case where the subpoena was not lawfully issued the courts have held that the witness is entitled to fees per diem while testifying.

It has also been held that in order for the witness to obtain mileage and fees the subpoena must be lawfully issued by the circuit clerk. It was so held in the case of James R. Lucas v. Lucy M. Brown, 127 Mo. App. 645, l. c. 651, where

the subpoena is not lawfully issued the witness is still entitled to his fee only for attendance while testifying. It was so held in Knight v. Donnelly, 135 Mo. App. 105, l. c. 106, where the court said:

> "It was shown that plaintiffs' attorney had in his office a printed, blank subpoena, having the name of the clerk printed thereon, but not having the signature of the clerk or any of his deputies. The attorney filled in the blank spaces, name of witness, title of the cause, date for attendance, party on whose behalf she should attend, dated and mailed it to her at Detroit. Before mailing it, the attorney wrote on the back these words, 'I hereby accept service of the within subpoena.' The paper when introduced in evidence read as follows: 'I hereby accept service of the within subpoena at St. Louis, Mo., Mrs. D. D. Lewis.' Mrs. Lewis entered the State on her route at St. Louis and there accepted service of the subpoena by writing said acceptance.
>
> "As no instructions were asked or given, strictly speaking, there is nothing before the court to review. On the merits of the case, it may be said however, that the action of the court should be approved. The attendance of the witness was purely voluntary. 'A subpoena is a process of court and must be issued in the manner prescribed by the statute. It must contain the names of the witnesses to whom it is directed and be signed by the clerk and attested by the seal of his office.' (Lucas v. Brown, 127 Mo. App. 645.) The so-called subpoena was not such because it was not signed by the clerk or one of his deputies, which is an absolute re-

> quirement of the statute; therefore, the witness' attendance was voluntary and she was entitled to a fee only for attendance while testifying. * * * "

CONCLUSION

It is, therefore, the conclusion of this department that the witness is entitled to per diem fee even if no further subpoena were issued or other return made on said subpoena, other than the acceptance of the service by the witness in writing.

II

Your second question reads as follows:

> "(a) If a witness resides in a county other than where proceedings are being held and he or she is notified by phone or mail to appear at the trial and the witness does appear and is served with a subpoena at the place of trial on the trial date; is said witness entitled to fee for mileage either in going to or returning from the place of trial?"

The method and procedure of the service of subpoenas are set out in Section 1908 R. S. Missouri, 1939, which reads as follows:

> "The service of a subpoena to testify shall be by reading the same or delivering a copy thereof to the person to be summoned: Provided, that in all cases

> where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read the same or to deliver a copy thereof, and such refusal, shall be a sufficient service of such subpoena. The return shall show the manner of service; and in civil cases, if the witness reside at a greater distance than forty miles from the place of trial, it shall be so stated in the return, and also whether his legal fees have been tendered or paid, and if served by an officer his return shall be conclusive of the facts therein stated; if served by a private person, the return shall be verified by affidavit, which shall be received as evidence, and such affidavit may be made before the sheriff of the county where such service is made."

Under the above section the subpoena must be served specifically as set out in that section and not by telephone. If the service of a subpoena is not made in accordance with Section 1908, supra, the witness is only entitled to fee per diem, and not for mileage in accordance with the holding of Knight v. Donnelly, 135 Mo. App. 105, as set out in the above quotation in that case.

CONCLUSION

It is, therefore, the conclusion of this department that a witness residing in a county other than where the proceedings are being held, who is notified by phone or mail, is a voluntary witness and is not entitled to mileage either way.

III

Your third question reads as follows:

> "(a) If a witness lives outisde of the county where proceedings are being held and an officer calls said witness by phone and recites the terms of a subpoena and asks if the witness will accept service and the witness advises in the affirmative; would this be proper service whereby the officer could make return on a subpoena showing he had served same by reading to the witness?"

In answer to part "(a)" we believe that it is covered by the authorities set out in paragraph two.

CONCLUSION

It is, therefore, the conclusion of this department that service by phone does not comply with Section 1908 R. S. Missouri, 1939.

Paragraph "(b)" of your third question reads as follows:

> "(b) Would the witness be bound to attend in obedience to this service and would he be entitled to a per diem or mileage fee for attendance or travel in relation thereto?"

This inquiry is answered by the authorities set out in paragraph two.

CONCLUSION

According to the authorities set out in paragraph two of this opinion, the witness would not be bound to attend the trial on service by telephone.

It is further the opinion of this department that the witness would be a voluntary witness and would not be entitled to per diem fee.

Paragraph "(c)" of your third question reads as follows:

> "(c) Would the officer be entitled to mileage or per diem fee for serving this subpoena?"

CONCLUSION

In view of the above authorities set out, it is the opinion of this department that the officer reading a subpoena over the telephone would not be allowed mileage or per diem fee for serving this subpoena.

IV

Your fourth question reads as follows:

> "(a) Is actual travel necessary before a witness is entitled to fee for mileage;

for example, a witness who resides in some county other than where proceedings are being held is subpoenaed at the place of trial two or three days or more prior to trial, and on account of distance or for other reasons the witness remains at the place of trial after being subpoenaed until he is used, then returns to his place of residence; is he entitled to mileage fee?"

Section 13420 R. S. Missouri, 1939, reads as follows:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, $1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by

> the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

Under the above section it should be specifically noticed that the witness should be examined under oath and state the actual number of miles necessarily traveled. Under the facts of your fourth question the witness has not actually traveled any necessary miles. The language in the above section is unambiguous and is not open to construction. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 1667.)

Also, under Section 13421, supra, it is provided that the court shall make a record and shall swear the witness to the facts contained in said entry. Unless the witness swears to the truth of the entry of the clerk, as to the actual number of miles necessarily traveled by reason of the subpoena, he is not entitled to mileage. It was so held in the case of Veidt v. Railroad, 109 Mo. App. 102, l. c. 103, where the court said:

> " * * * While it was made to appear from the fee book that the clerk made the entry therein required by the statute, it stands in effect admitted that he did not swear the witnesses to the truth of the facts contained in said entry as further required by it; or, in other words, the allowance of the fees claimed by the several witnesses was not made under oath, but without it.
>
> "The question thus arising is, whether or not the fees of the witness so allowed were taxable against the defendant as costs in the case. At common law no recovery of

> costs was allowable, and when statutes were passed authorizing their allowance they -- the statutes -- were always strictly construed. State ex rel. v. Seibert, 130 Mo. l. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. Steele v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Sinclair v. Railroad, 74 Mo. App. 500; Houts v. McCluney, 102 Mo. 13; Thompson v. Elevator Co., 77 Mo. 520; St. Louis v. Meintz, 107 Mo. 611; Hoover v. Railroad, 115 Mo. 77; State ex rel. v. Oliver, 116 Mo. 188; State ex rel. v. Seibert, 130 Mo. 202.
>
> "Applying this rule to the case before us, and we must conclude that as the witnesses were not first sworn to the truth of the fee-book entry by the clerk, he was neither authorized to allow the fees for which they applied, nor to tax the amount thereof as costs in the case. * * * * * *."

It is very noticeable in this opinion that most of the authorities cited are Missouri Appeal cases which is necessary for the reason that the decisions are founded mostly on motions to retax costs.

CONCLUSION

It is, therefore, the opinion of this department that in order that a witness be allowed mileage it is necessary that he actually travel the miles which he claims under the subpoena.

Part "(a)" of your fifth question reads as follows:

> "(a) Would the State Auditor be justified in refusing payment of witness fees for state witness whose names were not indorsed on the indictment or information if there was not a written order or written affidavit by the Prosecuting Attorney for said witnesses to be subpoenaed?"

Section 4229 R. S. Missouri, 1939, reads as follows:

> "No subpoena for a witness in any criminal case shall be issued on the part of the state, unless the name of such witness be indorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication of the case; and no subpoena shall issue for any witness unless the defendant is in custody or on bail, or the clerk or justice shall have good reason to believe that he will be apprehended. Subpoenas may be issued to different counties at the same time, but all the witnesses ordered at one time, and living in the same county, shall be included in one subpoena."

Section 4230 R. S. Missouri, 1939, reads as follows:

> "The clerk shall attach to each fee bill a certified copy of the names of all witnesses indorsed on the indictment or information and all orders of the prose-

> cuting attorney and affidavits of the prosecutor as provided for in the next preceding section and no costs shall be paid any state witness not therein."

Section 4229, supra, was solely enacted with regard to the question of costs, (State v. Rasco, 239 Mo. 535); and, in construing Section 4229, supra, one must take into consideration Section 4230, supra. In Section 4230 it is specifically stated that unless the witnesses are indorsed on the indictment or information and the orders of the prosecuting attorney, and the affidavits of the prosecutor, are ~~are~~ not attached to the fee bills, no cost shall be paid any state witness. Both Sections 4229 and 4230, supra, are plain, common language and are unambiguous, therefore they need no construction.

CONCLUSION

It is, therefore, the conclusion of this department that the State Auditor would be justified in refusing payment of witness fees for state witnesses whose names were not indorsed on the indictment, information, or the fee bill, or did not have attached the written order, or written affidavit, of the prosecuting attorney for said witnesses to be subpoenaed.

Part "(b)" of your fifth question reads as follows:

> "(b) Would the State Auditor be justified in refusing payment of fees for defendant witnesses whose names were not on the original subpoena issued for witnesses in any certain county, but who were listed on a subsequent subpoena, if the court records did not show that same was ordered by the Judge or if no affidavit by the defendant was on file showing the request?"

Section 4231 R. S. Missouri, reads as follows:

> "The defendant shall be entitled to process for witnesses to be issued and directed to the sheriff of the county in which such witnesses may be; but all the witnesses in the same county shall be included in one subpoena, and no subsequent subpoena shall be issued for any witness, unless the court in which the cause is pending or the judge or justice, shall for good cause shown, order a subpoena for another witness; or if, in absence of the judge, the defendant shall file with the clerk his affidavit that other witnesses ordered by him are material and positively necessary in his behalf, to a full and complete adjudication of the case, the clerk shall issue subpoenas for such witnesses."

This section is plain ordinary language, and is unambiguous and needs no construction.

CONCLUSION

It is, therefore, the opinion of this department that the state auditor would be justified in refusing payment of fees for defendant witnesses whose names were not on the original subpoena issued for the witnesses in any one county, and who are not listed on a subsequent subpoena which is ordered by the judge and no affidavit is attached to the fee bill by the defendant, showing the request.

VI

Your sixth question reads as follows:

> "(a) We understand that where a witness has once been legally subpoenaed within the state or recognized to appear for the trial within the state and subsequently attends court from his residence in a foreign state, he is entitled to a fee for mileage from his place of residence in the foreign state to the place of trial in this state and return. There have been instances where it was not clear that a witness was a bonefide resident of another state, perhaps on a visit or on a temporary residence, for instance, a witness who was a resident of this state was legally subpoenaed to attend a trial in the county where he resides, the cause was continued and subsequent to that date and prior to the next term of court, the witness claimed that he had moved to another state and he was a resident thereof and claimed attendance from the foreign state and return. What would constitute residence in a foreign state and would such witness be entitled to mileage fee?"

The main authority on the above question is fully decided in the case of State ex rel v. Wilder, 196 Mo. App. 418, where the court first said, at page 430:

> "It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the sub-

> poenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in State ex rel. v. Seibert, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion.
> * * * * * * * * * * * * "

And, later, at page 432, said:

> "There is a marked distinction between a witness who has been duly subpoenaed or recognized in this State and one upon whom the process was served at his place of residence in a foreign State. In the first place, the service of the subpoena in the foreign State is of no force and effect, and is just the same as if no process at all had been served, and the witness under that sort of service might return to this State and would not by reason of it be subject to the compulsory process of attachment. But on the other hand, a non-resident witness who is duly and legally served with a subpoena in this State, while no compulsory process could be issued for him to his place of residence in a foreign State, yet if he should return to this State he would be subject to such compulsory process the same as any other witness residing in the State, hence it may very well be ar-

gued that the non-resident witness who has been duly served in this State with process, attends the trial of a cause in obedience to the commands of such subpoena, for the very reason that the moment he visits this State, it matters not how far distant from the place of trial, he could be compelled to obey the process so served upon him. By service of the process in this State, while the court was powerless to compel obedience to it, as long as the witness remained in a foreign State, yet the court did acquire such jurisdiction over the person of the witness as to enable it to compel obedience to the commands of such process in any county of this State where the witness may be found, hence the witness who has been served with process in this State, though a resident of a foreign State, who attends the trial, may very appropriately say to the court that he did not care to be deprived of his liberty in visiting the State when occasion required in order to avoid the issuance and service of compulsory process, therefore, I am here and have traveled from my residence in a foreign State in obedience to the process which was properly and legally served upon me in this State. It follows under such circumstances as was ruled in State ex rel. v. Seibert, supra, the State could not be heard to complain that a witness, though living in another State, had obeyed the commands of its process and submitted to the jurisdiction of the court by reason of the proper and legal service of it in this State. However, that is not this case. The claim for mileage by the witnesses in this proceeding is based upon the service of process at their places of residence in another State. As before stated, this process and the service of it was without any force or effect, hence it must logically follow, there being no process served, their mileage traveled and attendance upon court

> was voluntary, and not in obedience to the commands of any process issued by the court.
>
> "This court has uniformly held that no costs can be taxed except such as the law in terms allows, and it being essential that the witnesses actually and necessarily travel the mileage in consequence of a subpoena legally served upon them, and there being no legal service of process upon the witnesses claiming fees in this case, it must be ruled that the auditor was warranted in refusing to allow the fees for such witnesses as certified by the judge and prosecuting attorney."

In your sixth question you further ask what would constitute residence in a foreign state and would such witness be entitled to mileage fee. That question is a question of fact, and not of law. But, in view of the holding, in the case of State ex rel v. Seibert, 130 Mo. 202, as set out in the majority dissenting opinion on that question, we believe that if the witness would swear under oath, as set out in Section 13421, supra, he should be entitled to his mileage. In the above cited case the court, at page 224, said:

> "I recognize the rule that no fees are allowed unless expressly given by statute but I think the nonresident witness who regards the obligation into which he has entered with the state and attends and testifies is entitled to his mileage from his place of residence both by letter and spirit of an express statute, and I find nothing in the statute upon which to base the distinction that his mileage should be restricted to our state lines.

"Sound policy and justice alike dictate that the state should render some just compensation to a witness who attends our courts from our sister states in the same manner that we reward our own citizens for a similar service. I regard it as a matter of prime importance in the enforcement of the criminal law that the statute should continue to be construed so as to place the nonresident witness on the same footing in regard to his fees and mileage as a resident witness. * *"

CONCLUSION

Therefore, it is the opinion of this department that a witness served with a subpoena in this state, who removes to another state, with the intention of being a resident of that state, should be entitled to mileage from the foreign state, the same as if he was under recognizance in this state.

VII

Your seventh question reads as follows:

"(a) Section 1907 R. S. Mo. 1939 provides that:

'Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshall or any constable in any county in which the witness to be summoned resided or may be found, or by any disinterested person who would be competent witness in the cause and the sheriff, coroner, marshall or constable in any county may serve any subpoena issued out of any court of their county, in term time, in any county adjoining that in which the court is held.'

"There have been some instances where a sheriff or other officer has served subpoenas on witnesses in counties far removed from the place or proceedings, but not within own county or adjoining county. Would a subpoena served in this manner be legal service and would the sheriff or other officer be entitled to fee for mileage in going to and returning from the place of service if such service was not within his own county or in an adjoining county?"

It will be specifically noticed under the above section that it is stated that service of a subpoena may be had out of the court in "term time" in an adjoining county. This language is unambiguous and the only time that a subpoena can be served in an adjoining county is "term time." When special powers are conferred, or special methods are prescribed for exercise of power, the exercise of such power is within the maxim that - the expression of one thing is the exclusion of another, and the doing of the specified, except in particular way pointed out is nugatory. (Kroger Grocery & Baking Co., v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589.) In view of the above case service of a subpoena under no circumstances can be had by a sheriff in any county except the county where the cause is pending, and during "term time" in an adjoining county.

CONCLUSION

It is, therefore, the conclusion of this department that a subpoena served by a sheriff in another county, other than in the county where the cause is pending, or during "term time" in an adjoining county is void.

It is further the opinion of this department that since the subpoena is void, the sheriff is not entitled to mileage, for the reason that in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Pars. 5-7, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * * * * (Cases Cited)."

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

BUREAU OF MINES AND MINING:

Person mining shale which is manufactured into brick before sale is liable for mining inspection fee.

May 4, 1942

57

FILE 83

Mr. John A. Skinner
Chief Inspector
Missouri Bureau of Mines
Jefferson City, Missouri

Dear Sir:

We are in receipt of your communication of April 8, 1942, in which you inquire whether a certain manufacturing company is liable for the inspection fee provided in Section 14842, R. S. Mo. 1939, where the company in question mines shale deposits on its own lands and uses such product in the manufacture of brick and tile. It is contended by the company officials that this does not constitute a sale, shipment or disposal of said shale within the meaning of the section above cited.

Section 14842, R. S. Mo. 1939, is a provision enacted by the Legislature to insure the safety of miners engaged in taking certain mineral and other products from the soil by mining methods. It is as follows:

> "Every person, firm or corporation engaged in the mining or production within this state, of lead, zinc, coal, clay, shale, silicate or calamine, shall, within thirty days after the expiration of the quarter-annual period ending on the last day of March, 1917, and within thirty days after the ending of each quarter-annual period thereafter, file with the chief mine inspector and the state treasurer, a statement, under oath, on forms to be prescribed and furnished in triplicate by the chief mine inspector, showing the total number of tons of coal,

> clay, shale, lead concentrates or galena, zinc ore or concentrates thereof, lead carbonate or concentrates thereof, zinc carbonate or concentrates thereof, zinc silicate or calamine or concentrates thereof, sold, shipped or otherwise disposed of during the last preceding quarter-annual period; and shall at the same time pay to the state treasurer mine inspection fees as follows: On all lead concentrates or galena, three cents per ton; on all zinc ore or concentrates thereof, three cents per ton; on all lead carbonate or concentrates thereof, one and one-half cents per ton; on all zinc carbonate or concentrates thereof, one and one-half cents per ton; on all zinc silicate or calamine or concentrates thereof, one and one-half cents per ton; on all coal, two mills per ton; on all clay, two mills per ton; on all shale, one mill per ton."

The contention of the manufacturer in the instant case appears to be that the conversion of shale into brick and tile and the subsequent sale of such manufactured products does not constitute a sale, shipment or disposal of such shale. We are unable to agree with this contention. It is obvious to us that a sale of the manufactured product is a sale within the meaning of the statute, but even if this be not true, the courts of Missouri and other jurisdictions have given a wide meaning to the term "disposed of", which clearly includes the process in question.

In Bullene v. Smith, 73 Mo. 151, the court interpreted the word "disposed" as used in the statutes which provide a basis for attachment, as follows, l. c. 161:

> "The word 'disposed,' as used in this subdivision of the statute was, we think, intended to cover and does cover all such alienations of property as may be made in ways not otherwise pointed out in the statute; * * *."

In Holland v. Bogardus-Hill Drug Co., 314 Mo. 214, our Supreme Court gave the following definition of the term "dispose of," l. c. 236:

> "This court has expressed itself in no uncertain language, in defining the words 'use' and 'dispose of' in the above will as will be seen by reference to St. Louis Union Trust Co. v. MacGovern Co., 297 Mo. l. c. 535, where Small, J., said: 'It is a general rule that the words 'dispose of' have a broader meaning than the word 'sell,' and include the power to exchange and sell unless restricted by the context or circumstances, which cannot be soundly asserted in the case before us. (3 Words and Phrases, pp. 2117 and 2118; 2 Words and Phrases (2d Series) pp. 80 and 81; Ironside v. Ironside, 150 Iowa, 628, 130 N. W. 414, 416; Pearre & Co. v. Hawkins, 62 Tex. 434, 437; Whitfield v. Thompson, 38 So. 113-117; Williams, Lessee, v. Veach, 17 Ohio, 171, 181; Gould v. Head, 41 Fed. 240, 245; Rogers v. Goodwin, 2 Mass. 475, 477; Noyes v. Lane, 45 N. W. 327, 328; Appeal of Waddell, 84 Pa. St. 90, 96; Burr v. Boyer, 2 Neb. 265, 267; In re Hesdra's Estate, 20 N. Y. Supp. 79, 80.)'"

Numerous definitions of the term are to be found in Words and Phrases (Perm. Ed.), Vol. 12, pp. 681 to 695. As examples of the definitions there found, we quote the following, l. c. 691, 692:

> "Words 'disposed of' mean to part with, to relinquish, to get rid of. Montgomery v. Carlton, 126 So. 135, 142, 99 Fla. 152.
>
> "To 'dispose of' means to part with, to relinquish, to get rid of, to alienate, to effectually transfer. Connely v. Putnam, 111 S. W. 164, 166, 51 Tex. Civ. App. 233.

* * * * * * * * * * * *

> "Expression 'to dispose of' is very broad, and signifies more than 'to sell,' and includes every possible mode of alienation or disposition of property. State ex rel. Cross v. Board of Land Commissioners, 62 P. 2d 516, 517, 50 Wyo. 181."

Regardless of whether the transition of shale into brick constitutes a sale under the statutes, it certainly constitutes an alienation or disposal of the product within the application of the above definitions.

CONCLUSION

It is, therefore, the opinion of this department that every person, firm or corporation engaged in the mining or production within this state of shale which is made into brick and tile and subsequently sold or otherwise disposed of is liable for the inspection fee set out in Section 14842, R. S. Mo. 1939.

Yours very truly

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:HR

STATE MINE INSPECTOR: May obtain surveys of all mines in the State.

- -

June 12, 1942

6-16

Mr. John A. Skinner
State Mine Inspector
Bureau of Mines
Jefferson City, Missouri

FILE
83

Dear Sir:

We are in receipt of your request for an opinion, under date of June 8, 1942, in which you inquire as to the rights of individuals owning land adjacent to premises on which there are mining operations, and as to the rights of the State Mine Inspector, if any, to obtain surveys where there is a complaint that mining operations are extended so as to constitute a trespass.

We believe that an answer to your first question is to be found in Section 14789 of the Revised Statutes of Missouri for the year 1939. It provides a summary remedy for the complaining property owner in the following language:

> "When any owner, tenant or subtenant of a lot or lots or tract of land, shall file with any justice of the peace within the county in which said lot or lots or tract of land may be situated his or her affidavit, or the affidavit of any other credible person for them, stating that from knowledge, information or belief, the party or parties owning, controlling or working the adjoining lot or lots or tract of land, and upon which said party or parties are sinking shafts, mining, excavating and running drifts, and that said

> drifts in which said parties are digging, mining and excavating mineral ore or veins of coal extend beyond the lines and boundaries of said lot or lots or tract of land, owned, controlled or worked by them, and have entered in and upon the premises of the party or parties making said affidavit, or for whom said affidavit is made, the justice of the peace, after first being tendered his lawful fees, shall issue his written order and deliver or cause the same to be delivered to the county surveyor or his deputy, commanding him, after his reasonable fees have been tendered, to proceed without delay to survey said drift by entering any and all shafts upon said lot or lots or tract of land that he (the surveyor) may see fit, for the purpose of ascertaining the course and distance of said drift or drifts, and to locate the same upon the surface."

Section 14790, R. S. Mo. 1939, provides that the order entered by the justice of the peace shall be read to the party owning or working shafts and conducting the activities concerning which complaint is made.

Section 14791, R. S. Mo. 1939, subjects any person controlling or operating mine activities concerning which complaint is made to the penalties of a misdemeanor if he refuses to permit the surveyor to make the survey.

These sections provide a full and complete remedy. If the survey shows trespass on the land of the complainant through mining operations the trespasser would, undoubtedly, cease such operations, and, if not, further proceedings may be had through an action for trespass or ejectment.

With regard to your second question, that concerning the powers of your office with regard to complaints of trespass through mining operations, we are unable to find that you have any statutory authority to determine the rights of

the parties. The State Mining Inspector is empowered to obtain an accurate map of the workings of any mine, this authority being granted by Sections 14816 and 14817, R. S. Mo. 1939, which are as follows:

> "Sec. 14816. The owner, agent or operator of each and every mine in this state, employing ten or more men, shall make or cause to be made, at the discretion of the inspector or other person acting in that capacity, an accurate map or plan of the workings of such mine and each and every vein thereof, showing the general inclination of the strata, together with any material deflections in the said workings and the boundary lines of said mine, and deposit a true copy of said map or plan with the clerk of the county court of each county wherein may be located the said mine; which said map or plan shall be so filed or deposited within three months after the time when this article shall take effect, and a copy of such map or plan shall also be kept for inspection at the office of the said mine; and during the month of January of each and every year after this article shall have taken effect, the said owner, agent or operator shall furnish the inspector and the clerk of the county court as aforesaid with a statement, and a further map or plan of the progress of the workings of such mine, continued from the last report to the end of the month of December next preceding, and the inspector shall correct his map or plan of said workings in accordance with the statement and map or plan thus furnished; and when any mine

> is worked out or abandoned, that fact shall be reported to the inspector, and the map or plan of such mine in the office of the clerk of the county court shall be carefully corrected and verified."
>
> "Sec. 14817. Whenever the owner, agent or operator of any mine shall neglect, fail or refuse to furnish the said inspector and clerk as aforesaid with a statement, the map or plan or addition thereto, as provided in section 14816 of this article, at the times and in the manner therein provided, the said inspector is hereby authorized to cause an accurate map or plan of the workings of such mine to be made at the expense of the said owner, agent or operator, and the cost thereof may be recovered by law from said owner, agent or operator, in the same manner as other debts, by suit in the name of the inspector and for his use."

We are unable to find that the State Mining Inspector has any authority to adjudicate any rights of the parties, after having obtained a map of a mine, either by voluntary action of the owner or after compulsion as provided in the last section, supra.

CONCLUSION

It is the conclusion of this department that any owner or tenant of any tract of land in this state, upon complaint to a justice of the peace within his county, may obtain a survey of any mining operations which, in his opinion, unlawfully extend to his premises, under the pro-

visions of Section 14789, but that the State Mine Inspector although entitled to a survey of all mining operations has no authority to prevent trespass through mining operations by virtue of his office as such State Inspector.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

RLH:CP

APPROVED:

ROY McKITTRICK
Attorney-General

BONDS: The ten year statute of limitation is applicable to drainage district bonds.

- -

August 27, 1942

9-3

Honorable Alvin Smyth, Treasurer
and Ex-Officio Collector
Stoddard County
Bloomfield, Missouri

FILED
83

Dear Mr. Smyth:

This is to acknowledge receipt of your letter of August 19th, 1942, in which you request the opinion of this department. Your letter is as follows:

> "I am writing you relative to some information about paying a bond drawn on drainage district No. 17 Old.
>
> "This bond was presented here at my office for payment and I have thus far refused payment on the grounds that the bond is over ten years old. This bond was issued on June 1, 1915 and was due June 1, 1931. There has been no payment of any sort on this bond.
>
> "I would like to know if this bond is outlawed or should I go ahead and pay this bond."

The question as we interpret your letter is whether or not the statute of limitations has run against the drainage bond mentioned in your letter, which you say was executed June 1st, 1915, and was due June 1st, 1931. It will be observed that the bond has been due more than eleven years.

Sections 1012 and 1013, R. S. Mo. 1939 (R.S.A. Vol. 4, pp. 131 and 153), provide in part as follows:

Section 1012:

"Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: * * * * * * * * *"

Section 1013:

"Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; * * * * * * * * * * * * * *"

The question then to be determined is whether or not bonds issued by drainage districts and the bond in question, come within the provisions of the ten year statute of limitations.

We do not think there is any question but that the bond issued by the district comes within the terms of a sealed writing for the payment of money or property, as used in Section 1013, supra. There is a scarcity of cases reported bearing on the question of a municipal corporation pleading the statute of limitations in cases involving bond issues.

The general rule is stated in Jones, Bonds and Bond Securities, Vol. 1, 4th Ed., Sec. 510:

"The statute of limitations is available to a municipal corporation as a defense to an action to obtain judgment against it upon its bonds or the interest coupons originally attached thereto. The applicable limitation is that prescribed by the statutes of the State wherein the particular municipality is located, for there is where the remedy must be solved."

The United States Supreme Court, in the case of Clark v. Iowa City, 22 Law Ed. 427, 87 U. S. 583, recognized the application of the statute of limitations to bond issues by a municipality, and said the following with reference to same:

> "The case of Lexington v. Butler (14 Wall. 282, 20 L. ed. 809) arose in Kentucky, where the statute prescribes fifteen years as the limitation for actions on bonds, and only five years for actions on simple contracts. The action was upon coupons of certain bonds issued by the city, and the city pleaded the Statute of Limitations of five years, but the court answered that bonds were specialties not falling within the period prescribed; that suits on bonds might be maintained if commenced within fifteen years after the cause of action accrued, and that a suit upon a coupon was not barred by the statute unless the lapse of time was sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, was but a repetition of the bond in respect to the interest for the period of time therein mentioned, and partook of its nature."
>
> (22 Law Ed. l. c. 429.)

And, also, in the case of Curtis, et al. v. Rialto Irr. Dist., 187 Pac. 117, l. c. 118, the Court had this to say, citing many cases supporting its statement:

> "In the absence of any provision to the contrary, each bond and each coupon is a distinct obligation; and the rule is--and we think it supported

> by reason as well as by overwhelming authority - that the statute of limitations begins to run when the right of action is complete. As already intimated, it would be a strange contention, and, as we see it, an illogical conclusion, to hold that the statute sleeps with respect to bonds or coupons, detached of otherwise, whilst a complete right of action upon such claims exists in the holder. * * * * *"

From the above and foregoing we think that the ten year statute of limitation of Missouri is applicable to the drainage bond mentioned in your letter, unless there is some peculiar circumstance with relation to the drainage bond in question which would toll the statute of limitations.

CONCLUSION

It is, therefore, our opinion that if suit was not instituted on the bond in question within ten years after the cause of action accrued, that is, within ten years from June 1, 1931, that in the event that suit is brought by the owner on the bond in question the drainage district could plead the statute of limitation as a bar to the action on the bond and the plea would be sustained.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:CP

CRIMINAL COSTS -

PROSECUTING ATTORNEY - Prosecuting Attorney not allowed fee where punishment was not assessed in the penitentiary, county jail or by fine.

September 23, 1942

10-2 FILED 83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 18, 1942, which reads as follows:

> "We hand you herewith cost bill #2091, Oregon County in the case of State vs. Charley Baird Turner et al, wherein the cost bill shows that one defendant on a plea of guilty to the crime of burglary was sentenced to two years in the Industrial School for Boys (Missouri Training School) at Boonville, Mo. The two other defendants on pleas of guilty were sentenced to two years each in the Industrial School for Girls at Chillicothe, Mo.
>
> "We call your attention to the Prosecuting Attorney fee of $37.50 charged at item 102 on this cost bill. This amount represents a charge of $12.50 for convicting each of these defendants of the crime of burglary. We request your official opinion as to whether or not this is a proper charge against the State. In other words, is the State liable for a $12.50 fee for conviction of burglary where a defendant is sentenced to either of the above mentioned institutions. If not, what is the proper amount chargeable."

Section 9676 R. S. Missouri, 1939, partially reads as follows:

> " * * * On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear the case in a summary manner, and if it shall determine that the child is a 'neglected child' within the definition thereof contained herein, shall enter its order or judgment accordingly under the provisions of this article; and the cost of the proceedings may, in the discretion of the court, be adjudged against the petitioner, or any person or persons summoned, or appearing as the case may be, and collected as provided by the law in civil cases. All costs not so collected shall be paid by the county. * * * "

The above partial section is contained in Article 9, of Chapter 56, of the Revised Statutes of Missouri, 1939, which applies to procedure of juvenile courts in counties of fifty thousand inhabitants and over. It is also provided in this partial section that where a petition is filed against the child as a delinquent, and the child is declared a delinquent by the court, the costs, not collected as provided by law in civil cases, or assessed against the petitioner, must be paid by the County.

Section 9703 R. S. Missouri, 1939, provides a similar procedure for the collection of costs. Section 9703, supra, applies to counties having a population of less than fifty thousand inhabitants. Under Section 9704 R. S. Missouri, 1939, a delinquent child, if a boy, may be committed by the court to the Missouri Train-

ing School for Boys, at Boonville, Missouri, if a girl, to the State Industrial Home for Girls, at Chillicothe, Missouri, and if a colored girl, to the State Industrial Home for Negro Girls, at Tipton, Missouri.

Under the delinquency procedure, and under Section 9702 R. S. Missouri, 1939, thereof, a notice must be issued requiring the parents, or the person having custody and control of the child, to appear with the child at the place, and at the time set, in the summons. This procedure of summoning the parents, or person having control and custody of the child, only appears in the delinquency proceeding, and not in a proceeding under the general criminal law.

Under Section 9700 R. S. Missouri, 1939, in the discretion of the judge, of any court having jurisdiction of delinquent children, under the provisions of Articles 9, or 10, Chapter 56 R. S. Missouri, 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general criminal law.

When a child is prosecuted under the general criminal law, the question as to how the costs hsall be paid is set out in Sections 4220 to 4225 R. S. Missouri, 1939, inclusive. Under Section 4237 R. S. Missouri, 1939, it is the duty of the prosecuting attorney to strictly examine each bill of costs which is presented to him by the clerk of the court, under Section 4236 R. S. Missouri, 1939, and it is the duty of the judge and prosecuting attorney to certify the bill of costs to the state auditor if the State is liable for the costs, or to the clerk of the county court if the county is liable for the costs. This certificate is not binding on the state auditor. (State ex rel v. Wilder, 196 Mo. 418, 95 S. W. 396.)

Section 13405 R. S. Missouri, 1939, partially reads as follows:

> " * * * for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; for the conviction of every defendant in a capital case, twenty-five dollars; for his services in all actions which it is or shall be made his duty by law to prosecute or defend, five dollars. * * * * * * * * * * * * * "

Under the above partial section fees are allowed prosecuting attorneys wherein they obtain a conviction in which the punishment assessed is confinement in the penitentiary, in the county jail, or a fine, or by both such fine and imprisonment in the county jail. We find no provision for the payment of a fee to the prosecuting attorney wherein the defendant is sentenced to the Missouri Training School for Boys, the State Industrial Home for Girls, or the State Industrial Home for Negro Girls. All fee statutes should be strictly construed against the officer and where no fee is allowed by statute the officer in performing his duty acts gratuitously. It was so held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Par. 8, where the court said:

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Under Section 8998 R. S. Missouri, 1939, the court may commute sentence of any person under the age of seventeen years who has been convicted under the general criminal law of this State, so that the person can be sentenced and committed to the Missouri Training School for Boys, and the same applies also to the State Industrial Home for Girls and the State Industrial Home for Negro Girls.

In reading the bill of costs in the case of State v. Charley Baird Turner, Dorothy Finney and Elmina Finney, we find the following fees set out: First, "Issuing two notices to parents . . . . . $2.00"; which the clerk claimed. Under the general law we find no such fee allowed the clerk, but evidently the case was on a petition filed for delinquency, although it states "burglary." Many charges of delinquency are founded upon general law such as burglary, larceny, robbery etc., but his charge is merely evidence in determining whether the defendant is guilty of delinquency or not. Also, in reading the bill of costs, we find the prosecuting attorney claiming $37.50, as a fee for the convicting of three of the defendants set out in the bill of costs. We find nothing, however, which mentioned a sentence to the penitentiary, county jail, or assessment of a fine or a commutation directing that the defendants be confined in the Missouri Training School for Boys, and in the Industrial

Home for Girls. On its face, the bill of costs appears to be the costs of the delinquency case for which the State is not liable.

CONCLUSION

It is therefore, the conclusion of this department that the fee of Thirty-seven Dollars and Fifty Cents ($37.50), charged as "Item 102" on the within described cost bill should not be paid by the State or by the county, for the reason that we find no statute authorizing such payment.

It is further the opinion of this department that the bill of costs herein described, on its face, shows that the defendants were convicted of delinquency and not burglary.

It is also the opinion of this department that before the State is liable for the costs in such actions, where the defendants are sent to the Missouri Training School for Boys, at Boonville, Missouri, the State Industrial Home for Girls, at Chillicothe, Missouri, and the State Industrial Home for Negro Girls, at Tipton, Missouri, the conviction first must be had under the general law and the sentence then commuted to the above mentioned Industrial Homes.

We would suggest that in the payment of such cost bills the State Auditor should require a certified copy of the information, so that he may determine whether the conviction was had under the general criminal law, or under the Delinquency Act. The fact that the bill of costs

states that an information was filed is not conclusive, for the reason that an information is filed both under the Delinquency Act and under the general criminal law.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION:
ASSESSORS:
COMPENSATION: Compensation allowed assessors. Maximum amount of fees which he may retain.

October 20, 1942

10-26

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: W. A. Holloway, Chief Clerk

Dear Mr. Smith:

This is in response to your request on the question of what fees and expenses the assessor may charge and claim in counties containing a population in excess of forty thousand population. The particular assessor to which you refer is the Assessor of Jasper County, Missouri. This county, according to the last decennial census, has a population of 78,705.

From the letter to you from Mr. Tout, your county auditor, who with the Assessor of Jasper County is seeking the above information, we find that the following questions are at issue.

1. What is the maximum amount of salary or fees which an assessor may retain?

2. In arriving at the net salary of the Assessor, is he permitted to deduct his automobile expense?

3. Is the assessor authorized to make a charge for "compiling land blotters" and for correcting land blotters?

In speaking of the charges which the assessor may make, the Supreme Court in State ex rel. Buder v. Hackman, 265 S. W. 532, l. c. 534, said:

"Before the state can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer

> claiming such fee or expense must be able to point out the law authorizing such payment. (Citing cases)"

See also Nodaway County v. Kidder, 129 S. W. (2d) 857.

And again in the case of State ex rel Buder v. Hackman, supra, at l. c. 535, the court said:

> "The argument of hardship, and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. * * * * *"

And, the court, in speaking of necessary expenses allowed the assessor, in the Buder case said, l. c. 534:

> "* * * The 'actual necessary expenses' provided for do not include salaries of any character. The clear meaning of sections 13116 and 13124 is that the assessor, in addition to the fees allowed by law, shall be entitled to have furnished to him, without deduction from such fees, all his necessary printing, stationery, postage, and office equipment, and that he shall be reimbursed for all outlays made by himself and his deputies by way of expenses in doing the work, for the doing of which work he and they are fully paid out of the fees allowed by law."

Sections 10996 and 11364, R. S. Missouri 1939, fix the compensation of assessors for their services. Section 10996 provides as follows:

> "The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties

> having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list: Provided further, that in the city of St. Louis the assessor shall perform the duties now performed by the county clerk in extending taxes on the assessment books and such other services pertaining thereto as may be required by law, and shall be allowed the same compensation as is allowed by law to county clerks for such services; and provided also that in all counties of this state having more than one hundred and fifty thousand inhabitants except in such counties as the assessor may now or hereafter be paid an annual salary in lieu of such fees, the compensation of the assessor shall be twenty-five cents per list together with such other fees as may be authorized by law."

Section 11364, R. S. Missouri 1939, provides in part as follows:

> "Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: * *"

In State v. Gomer, et al, 101 S. W. (2d) 57, 66, the court in speaking of the duties and compensation of the assessor said:

"That as compensation for making the numerical assessment in the land list, an assessor should be paid such amount as may be allowed by the county court not to exceed the sum of 3 cents for each and every tract so assessed; but that all contiguous tracts in the same section and all contiguous lots in the same square or block which can be consolidated into one tract, lot, or call shall be counted as one tract.

"That as for compensation for taking the lists required to be delivered to him by owners of personal property (in counties of not more than 40,000 population) an assessor should be paid 35 cents for each list taken and should also be paid a fee of 3 cents per entry for each entry, of a property owner's name and the personal property assessed to him, in the alphabetical list in the part of his book covering personal property.

"That an assessor is entitled to thirty-five cents per list for each list he takes which contains personal property, whether he takes it from the owner or makes it on his own view or other information obtained as specified under Section 9760 or section 9763, R. S. 1929 (Mo. St. Ann. Secs. 9760, 9763, pp. 7877, 7879), but he is not required to make or entitled to receive any compensation for making a list containing only real estate."

In our review of the statutes, we fail to find where it is provided that the assessor shall be allowed "expenses for his automobile," "compiling land blotters," "correcting land blotters" or for preparing a "motor vehicle registration list."

Even though it is necessary for the assessor to perform the aforesaid acts in making assessments, since no provision for compensating him for this is made by the statutes, then, following the ruling in the Buder case, supra, he cannot be allowed compensation therefor.

Further, referring to the question of the maximum amount of compensation an officer may retain, we find that Section 13450, R. S. Missouri 1939, provides as follows:

> "The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

In speaking of the application of the provisions of this section to various county officers, the Court, in State ex rel. Saline County v. Price, 246 S. W. 572, 573 said:

> "The first question confronting us in the record arises upon the contention of the respondent that section 11036, R. S. 1919, is unconstitutional because it reduces the maximum compensation allowed to public officers, including the sheriffs of the several counties, to be paid out of the fees of the office, to $5,000 per annum, while section 13, art. 9, of the Constitution fixes the maximum amount at $10,000.

"The constitutional provision referred to is as follows:

"'The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistant, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury.'

"It will be seen that this provision applies to all executive and ministerial officers of the counties and municipalities of the state, and there is nothing in the words in which it is expressed that either fixes the amount of their total compensation or the amount which they may retain from the fees of their respective offices for such compensation. It is simply a limitation on the maximum amount of compensation which may be allowed them by the Legislature, without interfering with its right to confine the compensation of any one or all of them to what it may consider the actual value of the service rendered in the office. The theory of the provision seems to be that all fees are imposed by the state through its laws, and that when collected by is officers they become the property of the state to be disposed of at its pleasure. This duty of collection may be and is performed by salaried officers as well as by those depending upon the fees for their compensation, and in many instances they bear no relation to the service involved in connection with the matter to which they pertain. The prominent and only idea expressed in this constitutional provision is the protection of the state from unreasonable charges by ministerial and executive officers affected, and provided for their compensation out of a fund created in the

> performance of their duties. The only limitation upon the legislative branch of the government, either expressed or implied, is, as we have said, a limitation of the maximum amount of the compensation to be so paid. The provisions of sections 11036 and 11037, R. S. 1919, have no tendency to interfere with that purpose. This point must be ruled against the respondent."

In this case the court held that the sheriff was only entitled to retain $5,000 per annum of fees earned.

On the question of what are "fees" the court, in the Price case, supra, said at l. c. 575:

> "This court, in Callaway County v. Henderson, 119 Mo. 32, 24 S. W. 437, adopted a definition of the word 'fees' as used in a similar case to the one now before us as follows:
>
> "'Fees are a reward or wages given to one as a recompense for his labor and trouble for the execution of his office or profession, as those of an attorney or physician.'
>
> "The case then in judgment involved the question whether the compensation allowed by law and actually received by the county clerk for the labor and services of keeping the accounts of his office with the county treasurer were such as he should account for in determining the amount which he might retain as his compensation, and this court held that it must be so accounted for, adopting the rule that it included all compensation received for work done by him and his deputies in the performance of a duty imposed by law. * * * *"

Following these principles, the officer is limited to $5,000 as the maximum salary or fees, and his fees are all amounts received for work done by him or his deputies in the performance of a duty imposed by law.

CONCLUSION

From the foregoing, it is the opinion of this department that the maximum amount of salary or fees which the assessor may retain is $5,000 per annum. We are further of the opinion that such officer is not authorized to deduct from his gross fees earned the expense of his automobile in arriving at his net salary.

Further, we are of the opinion that the statutes do not authorize the assessor to charge a fee for "compiling land blotters," "correcting land blotters" or for making a "motor vehicle registration" for a county. Such services are incidental to his duties in preparing assessment lists for which he receives compensation under the statutes above quoted.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

TWB:NS

APPROVED:

ROY McKITTRICK
Attorney General

JUDICIAL COMMISSION: Appropriation by the Legislature necessary for the payment of the expenses of the judicial commissions.

November 13, 1942.

11-16

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of November 12, 1942, requesting an opinion of this Department. This opinion request, omitting caption and signature, is as follows:

> "At the November 5, 1940 General Election, a Constitutional Amendment was adopted, providing for the nomination of persons for Appellate Judges.
>
> "Section 5 of this Amendment found on page 725 of the 1941 Missouri Laws provides: 'Expenses - How Paid. All expenses incurred in administering this amendment, when approved by the Supreme Court of Missouri shall be paid out of the State Treasury. The Supreme Court shall certify such expenses to the State Auditor who shall draw his warrants therefor payable out of funds not otherwise appropriated.'
>
> "I would like an opinion from your office as to whether I have authority to pay the expenses of this Commission in the absence of an appropriation duly passed by the legislature and signed by the Governor.
>
> "Since it will be necessary for this commission to meet in the near future to make recommendations for a successor to Judge Hayes, I would appreciate an early reply."

As stated in your request above, on November 5, 1940, at the General Election a Constitutional Amendment was adopted providing for the nomination of persons for appellate judges. In such amendment there is a provision made for the forming of a Judicial Commission and the procedure for forming such Judicial Commission is found on page 724 of the Laws of Missouri for 1941. This Commission is given specific duties in the placing of men on the several courts in this State, and as a consequence of their meetings in the furtherance of their duties aforesaid there are certain expenses incurred in the administration of this Amendment. In Section 5 of such Amendment, which can be found at page 725, Laws of Missouri, 1941, and which you have cited in your request, provides that all of the expenses incurred in the manner stated above shall be paid out of the State Treasury but before such expenses can be paid it is necessary that they shall be certified by the Supreme Court to the State Auditor "who shall draw his warrants therefor payable out of the funds not otherwise appropriated."

Section 19 of Article X of the Constitution of Missouri, in dealing with the payment of moneys out of the Treasury of the State of Missouri, provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

It can be seen that this section of the Constitution provides that no moneys can be paid from the Treasury of the

State of Missouri unless there is an appropriation made for the purpose for which the money is to be paid. However, the Constitutional Amendment which deals with the Judicial Commission, and consequently the section thereof which provides for the payment of the expenses of such Commission, has now become a part of the Constitution of the State of Missouri. Under the provisions of Section 5 aforesaid, it might be contended that such provision is an appropriation act in the Constitution for the payment of expenses incurred by the Judicial Commission. If this point of view was correct there would be no violation of Section 19, Article X, since there would be an appropriation made for the payment of these expenses. Appropriations by the Constitution have been approved of in certain cases in the State of Missouri; notably in the case of State ex rel. Publishing Company v. Hackmann, 314 Mo. 33, 282 S. W. 1007, in which it was held that an appropriation by the Constitution itself was permissible. However, in the recent case of Hunt C. Moore v. Dwight H. Brown, Secretary of State, decided by the Supreme Court (not yet reported), and which was the case involving the "old age" amendment to the Constitution of Missouri, the Supreme Court held that a constitutional appropriation was illegal.

Therefore, in view of the conflict of the decisions at the present time we feel that an appropriation should be made by the Legislature and signed by the Governor. Another item that should be considered is that it might be possible that at some future time, if it is not a fact now, more money will be appropriated by the Legislature than is collected and placed in the Treasury of the State of Missouri. If such should be the case and there are expenses incurred by the Judicial Commission, there could be no payment made on account of such expenses because there would be no "funds not otherwise appropriated."

Conclusion

Therefore, it is the opinion of this Department that the proper way to meet the situation set out in your request, since we have an apparent conflict of the decisions on the matter of constitutional appropriations and also that at sometime more money may be appropriated than there is money in the Treasury,

would be for the Legislature to make an appropriation to be signed by the Governor, for the purpose of paying the expenses of the Judicial Commission.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

FUND COMMISSION:
BONDS:

Type of application required and powers and duties of Board of Fund Commissioners in replacing or paying lost bond or coupons of the State.

- -

December 30, 1942

FILED
83

Honorable Forrest Smith
Secretary
State Board of Fund Commissioners
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 13, 1942, as follows:

"The State Board of Fund Commissioners respectfully request your legal opinion construing the intent of Sections 13075 Article 1 and 13112 Article 5, Chapter 87 Revised Statutes of Missouri, 1939.

"The specific question confronting the Board of Fund Commissioners is based upon the following statement of facts, to-wit:

"Mrs. M. R. Cummings of the City of St. Louis, Missouri, is the legal holder and owner of twelve (12) coupon State of Missouri Road Bonds Series "P" aggregating $12,000. The coupons due February 1, 1942 were detached from said bonds and have now become lost, stolen or destroyed before payment and the said Mrs. M. R. Cummings now requests the State Board of Fund Commissioners to accept her personal bond of indemnity to adequately protect the State of Missouri against any losses, costs or damages which the State of Missouri may sustain or incur by making a payment of these various coupons without the physical delivery of the coupons to the fiscal agent of the State of Missouri for payment.

"The Board of Fund Commissioners would like to be advised whether or not the owner of the lost coupons above referred to must furnish the Board

proof of publication together with her application, affidavit and bond relating to the lost, stolen or destroyed coupons under the provisions of Section 13075 Article 1 R. S. Mo. 1939, or whether or not the Board of Fund Commissioners may authorize and order the payment of said lost, stolen or destroyed coupons upon the legal holder or owner filing an application, affidavit and bond as provided in said Section 13112 Revised Statutes of Missouri 1939."

As we view this question, the pertinent statutes are as follows: Section 13075 R. S. Mo. 1939, providing:

"Whenever any state bond or bonds or coupon or coupons shall be lost, stolen or destroyed, the owner or owners thereof may make application for a renewal thereof, under the provisions of articles 1 and 2 of this chapter. Such application shall be verified by affidavit stating the fact of such loss, and the cause and circumstances of the same, how, when and where such loss occurred. Said application shall also be accompanied by proof of publication for four weeks successively, in some newspaper published in the city of New York, and one published in the city of St. Louis, that certain bonds or coupons of the state of Missouri, describing them by date, amount, number and object of their issue, have been lost, stolen or destroyed, and that application will be made to the state auditor, on a day therein specified, for the issue of duplicates of the same, under the provisions of articles 1 and 2 of this chapter."

Section 13076 R. S. Mo. 1939, providing:

"The said application shall also be accompanied by a bond, to be given by such owner or owners, on unencumbered real estate within this state, or bonds of the United States or of the state of Missouri, in double the amount of the principal and unpaid interest of said bond or bonds at the time of application, conditioned to save the state harmless from all damages or loss by reason of such issue of duplicates or warrants, which said bond shall be approved by the governor, and shall be filed in the office of the state auditor; and suit may be brought upon said bond in behalf of the state at any time within ten years after the original bond or coupons shall be presented to the state treasurer or state auditor or any fiscal agent of this state for payment. If, thereupon the governor is satisfied that said bonds or coupons have been destroyed or lost or stolen, then and in that case he shall order duplicate bonds or coupons, of like number, date and amount of the original bonds or coupons, to be issued; or they may, in their discretion, order a warrant for the amount of such bonds and coupons to be drawn on the sinking fund for the payment of the same. When bonds are issued, semi-annual coupons shall be attached thereto in the same number as on the original bonds at the time of their loss, destruction or theft."

Section 13112, R. S. Mo. 1939, providing:

"Whenever application is made for reissue of lost bonds or coupons, and proper bond has been given by the applicant and approved by the governor, as required by section 13075, R. S. 1939,

> the board of fund commissioners shall examine the matter, and if they are satisfied that said bonds or coupons have been destroyed, lost or stolen, then they shall order duplicate bonds or coupons of like numbers, date and amount of the original bonds or coupons to be issued, or they may, in their discretion, order a warrant for the amount of such bonds or coupons to be drawn on the appropriation made by the general assembly for state sinking fund or state interest fund, for the payment of the same."

We think the solution to this question is simple if the background of the statutes is understood. Sections 13075 and 13076 R. S. Mo. 1939 have their origin in the General Statutes of 1865, page 93, where the substance of both was contained in Section 70. Certain amendments thereafter were made and adopted at the 1879 revision session and the substance of said section 70 emerged as Sections 7619 and 7620 R. S. Mo. 1879. No changes thereafter appear until the 1909 revision session where the words "of articles 1 and 2" were added as they now appear in Section 13075 R. S. Mo. 1939. These words and figures were added by the revision commission, and were not added to said section by any act adopted by the General Assembly. A revision commission has no legislative powers (Ex Parte Hutchens 296 Mo. 331, 335) hence the addition of these words and figures is ineffective for any purpose and they may be disregarded. Also the reference to Article 2 is clearly erroneous. In R. S. Mo. 1909, Article 2 of this Chapter pertained to "Depositories of State Moneys" as it now does, and nothing therein, then or now, refers to lost bonds or coupons. The reference as added in 1909 by the revision commission should have been to article 5 which in 1909 and at present does contain provisions relating to lost bonds and coupons.

Section 13112 R. S. Mo. 1939 stems from an Act in Laws 1891, page 16, Section 4. It has come down to date without change. Section 18 of this act was a provision repealing all acts

or parts of act in conflict with the provisions of the new act. It appears that Section 13112 R. S. Mo. 1939, by providing that the Board of Fund Commissioners should examine the facts and replace or pay off lost bonds or coupons, causes a conflict to exist between these provisions and the same provisions of Sections 13075 and 13076 R. S. Mo. 1939, wherein the Governor is alone given those duties and powers. Therefore, under Section 18, Laws of Mo. 1891, page 16, Sections 13075 and 13076, in so far as their provisions conflict with Section 13112, have been repealed. However, due to the reference to Section 13075 R. S. Mo. 1939, made in Section 13112 R. S. Mo. 1939, it is clear that the General Assembly intended that Sections 13075 and 13076 R. S. Mo. 1939, still to be effective for all purposes except that part thereof which vests the Governor with the sole power to examine the facts and order lost bonds or coupons replaced or paid.

Under the above three statutes, in our opinion, the following is necessary for the replacement or payment of a lost bond or coupon. The owner of the bond or coupon should make written application to the State Auditor stating the fact of a loss, the cause and circumstances and how, when and where such loss occurred. The application must be verified by affidavit and shall be accompanied by proof of publication for four successive weeks in some newspaper published in New York City and one newspaper published in the City of St. Louis. The publication notice shall state that certain bonds or coupons of the State of Missouri have been lost, describing them by date, amount, number and object of their issue and that on a day certain application will be made to the State Auditor for the issuance of duplicates of the lost bonds or coupons. The application must also be accompanied by a bond given by the owner of the lost bonds or coupons, on unencumbered real estate within this state or on bonds of the United States or of the State of Missouri, in double the amount of the lost bonds or coupons that are to be replaced, conditioned to save the state harmless from all loss that may be occasioned by reason of the replacement or payment of the lost bonds or coupons. This bond is to be approved by the Governor and filed with the State Auditor. Upon this application the Fund Commissioners are to act and said body may either

cause duplicates of the lost bonds or coupons to be issued or they may pay off the lost bond or coupon by causing a warrant to be drawn in payment of the same.

CONCLUSION.

It is, therefore, our opinion that Sections 13075 and 13076 R. S. Mo. 1939, govern the form of application for replacement or payment of lost bonds or coupons and must be complied with; that Section 13112 R. S. Mo. 1939, vests the Board of Fund Commissioners with the sole authority, after the statutory application has been filed, to determine whether said lost bonds or coupons will be replaced or paid.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:AW

TAXATION:
SPECIAL ROAD DISTRICTS: Commissioners of special road districts not authorized to levy a tax

April 22, 1942

4-30

FILE
84

Hon. B. F. Spratt
Presiding Judge
County Court
Platte City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

> "Can a board of Special Road Commissioners legally set a levy in excess of the twenty-five (25¢) cents provided for in Section 8527 for the maintenance of roads and bridges within that district without a vote of the people in such district?"

We are unable to tell from your request, whether or not the special road district to which you refer is one which is organized under Article 11, Chapter 46 R. S. Mo., 1939, relating to special road districts and benefit assessments, or whether it is a special eight mile road district organized under Article 10 of Chapter 46 R. S. Mo., 1939.

If you refer to a special road district benefit assessment organized under article 11, chapter 46 R. S. Mo. 1939, we think your inquiry will be answered by the copy of the opinion herewith enclosed, dated April 7, 1942, directed to Honorable Leon W. Coe, Prosecuting Attorney of Atchison County, Missouri.

If you refer to the special road district under Article 10 of Chapter 46 R. S. Mo., 1939, which applies to the ordinary

eight mile district, we make the following observations and conclusions:

The office of Commissioner of a special road district is created by statute and such commissioner must look to the statute for his authority to act. In our examination of the provisions of said Article 10, Chapter 46 R. S. Mo., 1939, relating to such special road districts, we fail to find where any authority has been granted to commissioners of such districts to set a levy for a tax.

Under Section 8691 R. S. Mo., 1939, all taxes for road purposes including special road and bridge taxes on property within such special road districts are paid to the commissioners of that district upon demand.

Revenue for special road districts, which is derived from a levy of taxes is provided for by Sections 8526, 8527 and Section 23 of Article 10 of the Constitution. The levy for general road and bridge purposes which may not exceed twenty cents (20¢) on the one hundred dollars assessed valuation is authorized by virtue of the provisions of Section 8526 R. S. Mo., 1939, and is included within and classed as taxes for "county purposes". This levy must be within the limits authorized by Section 11 of Article 10 of the Constitution. It will be noted that the county court is the body which makes the levy.

The levy authorized by Section 8527 R. S. Mo., 1939, is designated as "special road and bridge tax". It is in addition to the tax authorized under provisions of said Section 8526 R. S. Mo., 1939, and Section 12 of Article 10 of the Constitution and is authorized by Section 22 of Article 10 of the Constitution. It will be noted that the maximum amount of this tax which may be levied is twenty-five cents (25¢). You will also note that the county court makes this levy.

The only other ad valorem tax authorized to be levied for road and bridge purposes is provided for by Section 23 of Article 10 of the Constitution. This section is as follows:

"In addition to the taxes now authorized

> to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less then ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

It will also be noted that this section only permits the tax to be levied by the county court, and then only when authorized by a vote of the qualified voters of the district.

In State ex rel. Kersey v. Pemiscott Land & Cooperage Co., 317 Mo. 41, 295 S. W. 78, it was held that the constitutional provision (Article X, Sec. 22) authorizing a special tax for roads and bridges was an express grant of discretionary power to the county courts and was a limitation of the power of the Legislature. The court said, l. c. 80, 295 S.W.:

> "It will be noted that this section of the Constitution, in plain and simple

> language, provides, in addition to taxes authorized to be levied for county purposes (under Section 11 of Article X of the Const.) the county courts may levy and collect, as state and county taxes are collected, a special tax of not more than twenty-five cents on each one hundred dollar valuation, to be used for roads and bridges, but for no other purposes whatever; and the power thus conferred upon the county courts is declared to be discretionary. This is an express grant of power to the county courts, and is a limitation of the power of the Legislature; a power granted to the county courts to levy and collect a special tax for road and bridge purposes."

So it will be seen here, that the people by this constitutional amendment, have expressly granted to the county court, the power of making a levy in addition to that authorized by Sections 12 and 22 of Article 10 of the Constitution. Even if the Legislature were to attempt to pass an act authorizing the commissioners to make a levy such legislation, according to the Pemiscott case, supra, would be in violation of said Section 23 of Article 10 and would therefore be void.

CONCLUSION

From the foregoing, it is the opinion of this Department, that special road district commissioners may not set a levy in excess of the twenty-five cents (25¢) provided for in Section 8527 R. S. Mo., 1939, for the maintenance of roads and bridges within that district.

We are futher of the opinion that if a levy is authorized

by a vote of the people under the provisions of Section 23 of Article 10 of the Constitution, that the county court is the body which should make the levy.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

STATE BOARD OF HEALTH: There is no legal duty for the State Board of Health to make tests of medico-legal nature. There is no statute prohibiting the same to be made by the State Board of Health when the requisite cost is paid by the official or county requesting the same.

January 6, 1942

1-6

FILE

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an official opinion under date of August 25, 1941, upon the question submitted by your office, in substance, as follows:

> "As to whether the State Laboratory of the Board of Health could be used for an analysis of a medico-legal nature for the testing of blood specimen of man killed in accident for the presence of alcohol, upon the request of a prosecuting attorney."

Most public health laws are a constitutional and proper exercise of the police power of the State, and the powers conferred on the Board of Health and State Health Commissioner in order to enable them to perform their important functions in safe-guarding the public health should receive a liberal construction as held by the Supreme Court in State ex rel. Horton vs. Clark, et al. 9 S. W. (2d) 635. Nevertheless, the State Board of Health and State Health Commissioner are creatures of statute and their powers and duties are generally limited by the legislative enactments. See Ruling Case Law, Vol. 12, page 1268.

Among the statutes setting forth the powers and duties of the State Board of Health and State Health Commissioner are:

Section 9735 R. S. Missouri, 1939, which provides for the creation of the State Board of Health and provides for its powers and duties and which states that the State Board of Health is:

> "* * * to safeguard the health of the people of the state, counties, cities, villages, and towns,* * *" and "* * * to study causes and prevention of diseases and prevention of contagion, etc., * * * * * *."

Section 9288 R. S. Missouri, 1939, provides that it shall be the duty of the State Board of Health or its Secretary (Commissioner):

> "* * * to make bacteriological tests and other scientific analyses and investigation when requested by the health supervisor or the superintendents of the state eleemosynary institutions in caring for the health of the patients in any of said institutions."

Section 9751 R. S. Missouri, 1939, provides that the State Board of Health shall in making and enforcing rules and regulations for the maintenance of a safe quality of drinking water dispensed to the public:

> "* * * to collect samples of and analyze drinking water dispensed to the public when requested by municipalities corporations or individuals * * *" upon payment of fee for said analyses.

We find no statutory provision making it the duty of the State Board of Health or the State Health Commissioner or the State Board of Health Laboratory to make tests or

analyses of a medico-legal nature for individuals or officials. Unless the laboratory tests or analyses requested are for the safeguarding of the public health or the promotion thereof, or required in the necessary administration of the office of the State Health Commissioner in performing his duties and functions for the State Board of Health authorized by statute or in caring for the health of patients in state eleemosynary institutions, then any such laboratory tests made by the State Board of Health Laboratory would be purely voluntary on the part of the State Health Commissioner.

CONCLUSION

It is, therefore, the opinion of this department that there is no legal duty imposed on the State Board of Health, the State Health Commissioner or State Board of Health Laboratory to make laboratory tests of a medico-legal nature unless they be required for the safeguarding of the public health of the citizens of the State or in connection with necessary duties and functions required by statute of the State Board of Health or State Health Commissioner. So it would necessarily follow that the State Board of Health Laboratory has no legal duty under the law to make laboratory tests of a blood specimen of a man killed in accident for the presence of alcohol. However, in reviewing the statutes and the duties of the State Board of Health as outlined, supra, we find no section which prohibits a blood test of persons killed in accidents for the presence of alcohol, and are of the opinion that the State Board of Health is not prohibited from making such tests, provided that the reasonable cost of same is paid by the county or official requesting the same.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

OWN/rv

BOARD OF HEALTH: May select same employees to administer merit system that may already be employed to administer some other merit system, but may not maintain joint records, etc.; may not enter into joint merit system even though upon request of Children's Bureau.

January 16, 1942

1-17

FILE

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 27, 1941, which is in part as follows:

> "November 5th, I wrote you a letter asking your office to review your recent opinion on House Bill #501, regarding the establishment of a single merit system agency or a joint merit system. On November 13th, 1941, I received a letter from your office asking that we be more definite on our word 'cooperating' with other merit systems in the State.
>
> "It is the desire of this Department to follow your indications as to the legality of setting up and operating the merit system. It was pointed out to us, by the Children's Bureau, in Washington, D. C., that the Health Departments, in other states, were cooperating in what they termed 'joint merit systems', i. e., each individual agency paid for parttime services of a single merit system council, of a single merit system supervisor, and paid its pro rata share in maintaining the necessary office space, equipment, and office personnel so that the duties and

functions of the merit system established would carry out the intent of the merit system for each individual agency that was cooperating. By this method of function the total cost to the various agencies would be materially reduced.

"* *

"The Children's Bureau had a policy in existence at the time House Bill #501 was enacted in several other states that complied with this policy by entering into single merit systems and joint merit systems. If the Children's Bureau requests the State Board of Health to enter into a joint merit system, would it not be the right and duty of the State Board of Health to comply with this regulation?

"* *

"It should be noted that the appointment of personnel of any Department utilizing the merit system council is made by the Department itself, and the rules and regulations of the merit system council are formulated insofar as they apply to that particular department, by that department itself.

"* *."

On September 15, 1941, we rendered an opinion to Mr. A. L. Landwehr of your Department, respecting the establishment of a merit system under House Bill #501, Laws of Missouri, 1941, page 370. In that opinion we said, page 11, as follows:

"In connection with this you ask in your request whether House Bill 501 allows the Board of Health 'to come under the State

Merit System or whether it will be necessary to set up its own merit system. We are of the opinion the Board will have to set up a merit system of its own. There is no such thing as a State Merit System in Missouri. The only other merit system in operation in this state are those carried on by the Unemployment Compensation Commission and the Social Security Commission. The first has for its authority Section 9426 d, R. S. Missouri, 1939, which relates to the Unemployment Compensation Commission alone. So far as we are informed, unless the Sixty-first General Assembly took some action, the Social Security Commission has no statutory authority supporting the merit system there in use. At any rate, neither plan is available to the Board of Health. House Bill 501 adopts statutes and regulations of the Federal Government, not of the Unemployment Compensation Commission or the Social Security Commission.

"We think this holds true even if the Federal regulations permit the Board to adopt or come under one of the merit systems already in operation in this state. The reason for this is the fact that House Bill 501 imposes a duty upon the State Board of Health which it must perform. To merely come under either of the other merit systems in operation in this state, would be a delegation by the board to another governmental agency of this state of its authority in this respect. This, we think, the board may not do. Further, to do so, would violate the intent of the Legislature of this State. To date that body has enacted House Bill 501 and Section 9426 d, R. S. Missouri, 1939, on the subject of merit systems. The fact there are two separate acts in no way referring to each other, indicates an intention

on the part of the General Assembly to require separate merit plans. That intention is, of course, controlling."

What was there said was, of course, ruled in a general way, since we had no specific outline before us as to what the Board of Health considered a joint merit system. The plan, which you outline in your letter of November 27th, does not, in our opinion, run contrary to what we have heretofore expressed to be our view as to the legal authority granted by House Bill 501. As we view the law, there is nothing to prohibit the State Board of Health from selecting the same persons to administer its merit system as have already been selected by some other department to administer another merit system. By this, however, we do not mean that joint employee registers and like records can be maintained from which, for example, the State Board of Health, the Social Security Commission and the Unemployment Compensation Commission would all pick similar employees. In order that there be a separate merit system for the State Board of Health, we feel that it would be necessary for the Board to adopt its own rules and regulations, which would outline the method of operation with respect to the merit system for the employees of the Board of Health and to establish their own qualifications and examination procedure.

After that is done, the Board may appoint any persons it sees fit to administer said plan but, in the administration of such plan, the same separation would have to be observed and the persons qualifying by examination as eligible for positions in the Board of Health would have to be listed upon a register which pertains only to employees for the Board of Health, and which would have to be used solely for that purpose. To better illustrate, separation in administration should be observed to the extent that, if the State Board of Health should decide it no longer desired its Merit System to be administered by the same employees or persons that are also administering the Merit System of some other department, it could pick up its files and records, place them in the hands of another administrator, and that person could go right ahead, with no break occurring in the continuity of operation, and with no need to sift and separate

that which pertains to the Board of Health from that which pertains to some other department.

Your second question is whether or not if the Federal Children's Bureau requested the Board of Health to enter into a joint merit system, would it be within the authority of the State Board of Health to comply with that request. What we said on this subject in our previous opinion is completely applicable to this question, and we do not feel, under the law, the State Board of Health would be authorized to do what you suggest, even though that should be requested by the Federal Children's Bureau.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

STATE:
INSURANCE: State Board of Health may insure money against hazard of theft and robbery.

January 21, 1942

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion under date of January 19, 1942, which reads as follows:

> "The State Board of Health hereby requests an opinion as to whether it has the authority to pay an insurance premium for the insurance of such cash as is collected by the Board of Health in fees from its various departments, such as Vital Statistics, Food and Drug, and Cosmetology and Hairdressing.
>
> "These fees are collected in cash or money order and transferred to the State Treasurer for deposit to their respective funds. These fees frequently amount to several thousand dollars and are transferred by messenger from the offices of the State Board of Health in the State Office Building to the State Treasurer's office in the Capitol Building, the liability for safe transfer of these funds resting with the State Board of Health."

From your request we understand that the State Board of Health has large sums of money on hand at various times belonging to the State which is derived from the collection of fees in the above department, and you desire to know whether or not you have authority to insure this money against

theft and robbery. We also understand that it is necessary for you to send this money by messenger from the offices in the State Office Building to the office of the State Treasurer in the State Capitol Building. We have heretofore held that various institutions of the State have authority to insure their property against fire and windstorm and other hazards.

In accordance with the general rule, it is usually held, under statutes giving public officials general control and management of public property, that such officials have implied power to carry insurance on the property. Clark School Twp. v. Home Ins. & T. Co., 20 Ind. App. 543, 51 N. E. 107; Walker v. Linn County, 72 Mo. 650; French v. Millville, 66 N. J. L. 392, 49 A. 465; King v. United States M. & S. Ins. Co., 150 Wash. 626, 274 Pac. 704.

We can see no difference between insuring buildings and equipment of the State against the hazards of fire and windstorm and insuring the State's money against the hazards of theft and robbery. We do know that those departments of State which are required to handle large sums of money do have those funds insured against the hazards of theft and robbery, and this has been the custom over a long period of time. We are not passing on the question of the advisability of taking out such insurance in favor of the State or the necessity for same, but will leave that question to the proper authorities of the State.

It is, therefore, our opinion that you may, in your discretion, insure the State funds mentioned in your request against theft and robbery if you deem it necessary and expedient.

Respectfully submitted

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRH:HR

BOARD OF HEALTH: May not use fees for birth certificate to pay additional help, but must pay into treasury.

VITAL STATISTICS:

January 23, 1942

1-24

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

FILE 85

Dear Sir:

This will acknowledge receipt of your letter of January 19, 1942.

You state that the Legislature appropriated to the State Board of Health, for the Division of Vital Statistics for the biennium of 1942-42, the sum of $74,160.00 (Laws 1941, p. 216); that, due to demands arising from those who are seeking employment in National Defense work, there has been a large increase of requests for birth certificates; that during 1941 there was 134,617 birth certificates issued for which $169,489.00 in fees was collected and turned into the treasury. You advise that the demand for such certificates is increasing daily and that the present staff cannot keep pace with the demand and that there is not sufficient money remaining in the appropriation to increase or enlarge the working force.

Upon these circumstances you ask if the fees collected may be diverted from the treasury and be used to employ more help in the Vital Statistics Division.

Our answer is no.

The reasons being as follows: Section 9775, R. S. Missouri, 1939, provides for a fee of $2.50 for furnishing birth certificates to persons born in this state before the effective date of the first vital statistics law (Laws 1909, p. 536, effective August 16, 1909) or to persons, residents of Missouri, but born outside of the State before August 16, 1909. Section 9781, R. S. Missouri, 1939, provides for a

fee of $0.50 for furnishing death and birth certificates and a fee of $0.50 per hour, or fraction thereof, for making a search of the records where no certificate is made. These are all the fees the State Registrar is authorized to collect.

Section 9871 provides:

> "* * * the State Registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the State Treasurer. * * * * * * * * * * * *."

This requirement, by the use of the words "these provisions," has reference to the whole of Article II, Chapter 57, R. S. Missouri, 1939, and is a legislative requirement that all fees collected by the State Registrar be turned into the treasury. Not only is this true, by virtue of the statute, but also by virtue of Section 43, Article IV of the Constitution, which provides:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, * * * * * *." (Underscoring ours)

In State v. Bradshaw, 281 S. W. 946 (Mo. Sup. in Banc, 1926), the statute required the fees collected for grain inspectors be paid into the treasury. The court said, l. c. 948:

> "The purpose of having the fees collected and paid into the state treasury is apparent. Section 43, article 4, of the Constitution, requires that all revenues collected and 'moneys received by the state from any source whatsoever'

> shall go into the state treasury and must be paid out on appropriations by the General Assembly. When the charges for inspecting grain are paid to the commissioner, the inspector, his deputy, or assistants, they must be paid, of course, to the state of Missouri. The money must go into the state treasury. This is done so that the proper authorities may keep a check upon all the operations of every department of state. To allow a department of state, which is self-supporting from charges paid for services rendered, to have charge of the money received without accounting to the state in any way would probably lead to abuses. * * * * * * * * * * *."

In State ex rel. Curators of Mo. Univ. v. Walker, 240 Mo. 708, in banc (1912), the court, in speaking of the above constitutional provision, said at l. c. 723:

> "* * * The language is ample to cover not only all revenue derived from general taxation, but moneys collected by authority of the State from any source whatsoever; * * * * * * * * * * *."

There is no distinction between the fees in question and those for the inspection of grain and, without doubt, fees for birth certificates are "moneys collected by authority of the State."

There is some authority to the contrary as to the meaning of the constitutional provision above quoted, Ex parte Lucas, 160 Mo. 218 (1901); State ex rel. Thompson v. Board of Regents, 264 S. W. 698 (1924), but in view of the statute and the application of the Constitution in the last controlling case by the Supreme Court of Missouri, in Banc in 1926, there is no question but what these fees for birth certificates

must be paid into the State Treasury. In the face of the legislative mandate to the State Registrar to pay these fees into the treasury, and the Constitutional mandate to the General Assembly not to divert such moneys from the Treasury, there can be no doubt that, no matter what hardships it may entail, the registrar cannot use any of the fees collected for hiring more help.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv

BOARD OF HEALTH:

TOURIST CAMPS AND RESORTS:

Persons failing to obtain license from the State Board of Health are guilty of misdemeanor under Section 4794, R. S. Missouri, 1939.

February 4, 1942

25

FILE
83

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 6, 1942, which is as follows:

> "Since the enactment of the State Resort Law in 1939, this department has made inspection of each resort in this State at least annually. In most instances at least two inspections have been made of each resort during each calendar year. Following each inspection a comprehensive report has been submitted to the operator of the resort listing features not in compliance with State Board of Health regulations and containing recommendations that should be carried out in order that such regulations would be complied with.
>
> "To date many of the resorts in this State have failed to provide the recommended improvements with the result that our regulations are being flagrantly violated. Such establishments have not been licensed by the Secretary of the State Board of Health, but practically without exception, have continued to operate even though license renewal had been refused.

"I feel that many of the establishments constitute a distinct public health menace. I further feel that such establishments offer unfair competition to the proprietor who has voluntary or by reason of our activities provided all possible public health protection for his patrons.

"I request that you advise me as to what action the State Health Commissioner should take concerning resorts which have not complied with the minimum requirements of this Board.

"I have been advised that inasmuch as the resort law does not include a penalty clause, the law is not enforceable. In our opinion the resort law is an amendment to previously enacted Hotel laws and the penalty clause contained therein would also apply to the amendment.

"It is requested, therefore, that you advise me whether or not the resort law may be construed to include the provision of penalty for violation. It is further requested that whether or not the resort law is deemed to include provision of penalty for violation, we be advised if such penalty provision or other power to close such establishments is provided under the general regulation powers granted to the State Board of Health."

Section 9955, R. S. Missouri, 1939, contains the authority of the State Board of Health relative to tourist camps, cabins or resorts. This section is, in part, as follows:

"The State Board of Health is empowered and it is hereby made their duty through their deputies to have inspected, at least annually and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodations of guests. For this purpose the said inspectors shall have the right of entry and access thereto at any reasonable time.

"To carry out the provisions of this law the State Board of Health shall be empowered to promulgate such rules and regulations as they deem necessary for the proper cleanliness and sanitation of said tourist camps, cabins or resorts and for the proper regulations of water supplies in connection therewith.

"No person shall open or conduct a tourist camp, cabin camp or tourist resort in this State without procuring a permit from the Secretary of the State Board of Health for such tourist camp, cabin camp or resort and after the passage and approval of this law, the fees contained in subsection 'd' shall be due and payable to the State Board of Health and thereafter all permits shall be issued as of June 1st of each year,"

As you state in your letter, the Legislature, at the time the above section was passed, did not provide any express penalty to be attached in the event the operator of a tourist camp or resort failed to comply with the rules adopted by the Board to insure the proper cleanliness and sanitation of such camp or resort.

We do not think that any of the penalty provisions contained in Article VI, Chapter 58, R. S. Missouri, 1939, relating to hotels can be made applicable to tourist camps or resorts. The only general penalty section contained in that Article is Section 9951 and, by its own terms, it is confined to the "owner, proprietor or agent of such hotel." Section 9949, R. S. Missouri, 1939, is an express penalty section, providing for certain punishment upon failing to comply with the preceding section, No. 9948, which section, by its own terms, applies only to hotels. Section 9953, R. S. Missouri, 1939, provides a penalty for hindering and obstructing an inspector in the discharge of his duty under the article, but by its own terms that section is confined to hotels.

Section 9931, R. S. Missouri, 1939, defines what shall constitute a hotel and clearly the resort and tourist camp defined in Section 9955 do not fall within the scope of that definition, and for that reason the penalty sections, heretofore mentioned, cannot be made applicable to tourists camps or resorts.

However, this legislative oversight is not fatal to the powers of the State Board of Health with respect to compelling compliance with the rules and regulations. The Legislature, in enacting Section 9955, expressly gave the State Board of Health power to promulgate rules and regulations deemed necessary for the proper cleanliness and sanitation of tourist camps and resorts. Said section also provides that "no person shall open or conduct a tourist camp, cabin camp or tourist resort in this State without procuring a permit from the Secretary of the State Board of Health for such tourist camp, cabin camp or resort." Under the broad powers granted to the State Board of Health, it would no doubt have authority to refuse to issue such license to the operator of such a camp or resort, who had refused to comply with the Board's regulations. From your

opinion request it is apparent that the Board of Health has refused to issue licenses to those failing to comply.

With that being the situation, the terms of Section 4794, R. S. Missouri, 1939, are brought into play. That section provides:

> "If any person shall carry on or transact any business or occupation without license therefor, when such license is required by any law of this state, he shall be deemed guilty of a misdemeanor, and when no other punishment is prescribed for such offense, be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not exceeding three months, or both."

The terms of this statute are clear and there is no doubt that a person operating a tourist camp, cabin camp or resort without procuring a license from the State Board of Health is guilty of a misdemeanor and subject to a fine of not exceeding one hundred dollars or imprisonment in the county jail or both.

CONCLUSION.

It is, therefore, our opinion that, under the terms of Section 4794, R. S. Missouri, 1939, the State Board of Health, acting through the county prosecuting attorney, has ample authority to compel compliance with its regulations relative to tourist camps, cabin camps or resorts.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

LLB/rv

SHERIFFS: May only charge from place of arrest for
FEES: transporting insane person to State Hospital.

- -

April 16, 1942

Hon. Alex Stephenson, Sheriff
Lewis County
Monticello, Missouri

FILE 85

Dear Sir:

Under date of April 15, 1942, you wrote this office requesting an opinion as follows:

> "Referring to Section 9355 of the Revised Statutes of Missouri 1939 would like a written opinion or decision as to where a Sheriff is entitled to charge mileage from under the wording of this Section.
>
> "Is not the Sheriff entitled to the actual number of miles traveled from the said County Seat of the County. Or is it construed to mean that the Sheriff can only charge mileage from where the arrest is made after he starts for the hospital. The mileage lost between said county seat and the place where said patient is picked up is accountable for where and when.
>
> "Would appreciate a written opinion as to the exact location where mileage is chargeable from by said Sheriff in these cases."

Section 9355, Revised Statutes of Missouri, 1939, referred to in your letter, is as follows:

> "To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and $1.00 per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, $4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled: Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

It is desired to first call your attention to Section 655, R. S. Mo., 1939, from which the following extract is taken:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * * * *."

The words used in Section 9355, supra, are all words in ordinary use, none of them having a technical meaning.

Attention is directed to the following brief quotation from the case of Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, l. c. 925:

> "* * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, *."

Also, to the following quotation from the case of State ex rel Wabash Ry. Co. v. Shain, 106 S. W. (2d) 898, l. c. 899:

> "* * * The cardinal rule to be followed in the construction of statutes is to arrive at the legislative intent. 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, "and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker." Sutherland on Statutory Const. Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.'"

The words are those in ordinary use, the intention seems clearly to be expressed, to fix the point from which the compensation of the Sheriff or other person shall be paid for transporting insane persons to or from state hospitals and the amount of compensation and expense allowable. No other intention could be given to the Statute by construction. In this instance the lawmakers left nothing to be construed with reference to your question.

CONCLUSION

It is the conclusion that the mileage of a sheriff or other person for transporting an insane person to a state hospital under warrant of the county clerk properly issued is to be paid from the point where the arrest is made under the warrant.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

BOARD OF HEALTH: Legality of rules and regulations construed.

May 7, 1942

5-13

FILE 85

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

Your letter of May 6, 1942, enclosing a list of "rules and regulations" of the State Board of Health governing construction and operation of canneries, has been referred to me for an opinion. The letter reads as follows:

> "We are enclosing herewith tentative regulations prepared for adoption by the State Board of Health, which are designed to govern the construction and operation of canneries in accordance with general powers granted under Chapter 58, Articles 1, 2, and 3, Revised Statutes of Missouri, 1939, and specifically as provided in Sections 9857, 9863, 9871, 9888, 9889, and 9898, R. S. of Missouri, 1939.
>
> "As State Health Commissioner, I wish to be advised whether or not, in your opinion, the enclosed regulations constitute a legal means of governing and regulating the construction and operation of these establishments as based upon statutory powers of this Board.
>
> "Inasmuch as the State Board of Health desires to act upon these regulations at its May 21st meeting, we would appreciate your opinion in this matter at your earliest convenience."

Powers conferred upon boards of health to enable them effectually to perform their important functions in safe-guarding the public health should receive a liberal construction. See 29 C. J., Sec. 30,p248.

In the case of State ex rel. Horton v. Clark et al., 9 S. W. (2d) 635, l. c. 638, it is held,"While boards of this character (health) can not act arbitrarily, or without substantial evidence, yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be interfered with."

As to the items and rules which you have submitted, it will be necessary for me to take these up in numerical order:

Item I. Floors -

> "The floors of all rooms, platforms receiving sheds, except those rooms used for storage of cans and canned goods, shall be constructed of concrete or other equally impervious material, and shall be smooth, graded to drain, provided with trapped drains, and kept clean at all times."

This item is in conformity with Sections 9888 and 9890, R. S. Mo. 1939, and constitutes a legal regulation.

Item II. Walls and Ceilings -

> "The walls and ceilings of rooms in which the preparing and canning of fruits and vegetables are done, shall be smooth and washable, free from dirt accumulations and shall be kept clean and in good repair during the entire canning season."

"Ceilings" are covered in Section 9890, R. S. Mo. 1939, but the regulation as to "walls" does not come under the statute. However, on the rule of construction cited above, we feel it is a legal regulation.

Item III. Screening -
"All openings to the outer air shall be effectively screened. Doors shall open outward and be self closing unless other effective means are used to prevent the entrance of flies. Tables used for peeling and packing shall be further protected by fans where needed."

The reference to "screening" is covered in Section 9891, R. S. Mo. 1939. As to the tables used for "peeling and packing," this would be a reasonable regulation.

Item IV. Lighting and Ventilation -
"All rooms in which fruit and vegetables are prepared or processed shall be well lighted and ventilated."

This rule comes directly under Section 9888, R. S. Mo. 1939, and is a legal regulation.

Item V. Protection from Contamination and Flies -
"The various canning operations shall be so located and conducted as to prevent any contamination from one to the other. All means necessary for the elimination of flies shall be used."

The authority for such a rule comes from Sections 9889 and 9891, R. S. Mo. 1939.

Item VI. Toilet Facilities -
"Every cannery shall be provided with toilet facilities conforming with the regulations of the State Board of Health. Toilet rooms shall not open directly into any room used for the processing or canning of fruit and vegetables. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept clean, be properly ventilated and contain hand-

washing signs. In case privies are used they shall be constructed and maintained in conformity with State Board of Health Regulations."

Regulation of toilet facilities is granted to the Board of Health under Section 9892, R. S. Mo. 1939, and we feel is a reasonable regulation.

Item VIII. Lavatory Facilities -
"Handwashing facilities, including warm running water, liquid or powdered soap, and approved sanitary towels shall be provided. The use of a common towel is prohibited."

This rule is authorized under Section 9892, R. S. Mo. 1939.

Item XI. Cleaning of Containers and Equipment -
"All containers and equipment with which the food product comes in contact shall be thoroughly cleaned after each usage."

Section 9889, R. S. Mo. 1939, is the authority for the legality of this rule.

Item XV. Use of Spoiled Fruits and Vegetables -
"No spoiled, decomposed, or worm infected fruit or vegetables shall be used. Special attention shall be given to the sorting of all food products that are to be used for canning and preserving purposes."

This regulation has legality conferred upon it by Section 9868, R. S. Mo. 1939.

Item XVII. Personnel Health -
"In conformity with Section 9895, R. S. of Missouri, 1939, which forbids the employment of persons affected with any venereal or other infectious or contagious disease, in any industry which has to do with the production or distribution of food, all persons

so employed shall have a health certificate signed by a reputable physician, which shall declare such employees free from infectious or contagious disease."

This requirement is a reasonable and legal requirement whose authority is Section 9895, R. S. Mo. 1939.

Item XVIII. Cleanliness of Employees -
"All persons employed in the preparation of food for canning and processing shall wear clean outer garments and shall keep their hands clean at all times while thus engaged. All employees who prepare food for processing shall wear clean washable caps."

This item likewise can be traced to Section 9895, supra.

This department is of the opinion that the above numbered items which are taken from your "rules and regulations" concerning the operation and construction of canneries, have statutes which give legality to such rules and regulations, and we are of the opinion that they are valid requirements.

However, the following items which we will set out, do not have any definite statutory provisions to which they can be traced. These items are:

Item VII. Water Supply -
"The water supply shall be easily accessible to all rooms where processing and canning is done, shall be adequate and of a safe sanitary quality."

Item IX. Construction of Equipment -
"All equipment with which the uncanned food product comes in contact shall be constructed of non-corrodible material and shall be kept in such a state of repair that it can be easily cleaned."

Item XII. Bactericidal Treatment -
"After cleaning and immediately before

the days run, all equipment with which the food products come in contact shall be given an approved bactericidal treatment. A bactericidal treatment is the application of any method or substance for the destruction of bacteria which, in the opinion of the State Board of Health, does not adversely affect the equipment or food product or the health of the consumer, and which is effective."

Item XIII. Storage and Handling of Equipment - "After cleaning and bactericidal treatment, all pans, pails, and other multi-use equipment shall be stored on racks above the floor protected from splash, dust, and flies. Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled in a manner that will permit contamination. Storage of new cans, bottles and other enclosures shall be in a place protected from dust, flies and other contamination."

Item XIV. Processing and Cooking - "All products must meet specific requirements as to exhaust, initial temperature, cooking time and cooking temperature, as determined for each product. All apparatus used in the processing and cooking operations must be properly designed and equipped."

Item XVI. Sorting of Canned Goods - "At the time of labeling, crating, or other handling of canned goods, all cans showing abnormal exterior shall be discarded."

Item XIX. Miscellaneous Requirements and Waste Disposal - "The surroundings of all canneries shall be kept neat and clean and free of all rubbish. None of the operations connected with the cannery shall be conducted in rooms used for domestic purposes. No cats, dogs, fowls, or

other animals shall be allowed in the cannery. Waste products from the plant shall be disposed of in conformity with the requirements of the State Board of Health."

Although the seven sections cited above are not given specific basis by any statute, it is our opinion that Section 9857, R. S. Mo. 1939, is authority for the promulgation of these rules. Said section is as follows:

"It shall be the duty of the food and drug commissioner to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to arrest and prosecute, or cause to be arrested and prosecuted, any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. Said commissioner shall make rules and regulations for carrying out the provisions of this article, and such rules and regulations shall conform as nearly as practicable to the rules and regulations at present established and which may hereafter be established for the enforcement of the act of congress, approved June 30, 1906, and known as the food and drug act."

The only regulation which we have not taken up is Item X. Such rule provides as follows:

Item X. Cans, Bottles and Jars -
"Only new unused cans, bottles or jars

> shall be used as containers for canning or processing food products. Enameled or other approved metal pans or pails shall be used for carrying peeled stock."

Section 9889, R. S. Mo. 1939, provides in part as follows:

> "Contents of Places and Utensils Used Must be Protected.--* * * * * * * * * * The use of second hand bottles for vinegar or other liquids, used as food or drink, is forbidden unless the same are first sterilized with live steam. * * *"

As can be seen from a reading of the above Item X and Section 9889, R. S. Mo. 1939, the two provisions conflict in that Item X prohibits the use of "any used cans, bottles or jars." On the other hand, Section 9889, R. S. Mo. 1939, provides that bottles for "vinegar or other liquids" shall not be used unless treated with live steam. The law will not permit rules or regulations set up by a board of health or other board of like description to overrule statutes passed by the legislature. See 29 Corpus Juris 249, which provides as follows:

> "Health authorities cannot, by the operation of their rules and regulations, enlarge or vary the powers conferred upon them by the law creating them and defining their powers, and any rule or regulation which is inconsistent with such law, or which is antagonistic to the general law of the State, is invalid."

Therefore, it is the opinion of this department that Item X is antagonistic to the statute and is invalid.

All the other rules and regulations, we feel are legal and in compliance with the Statutes of Missouri.

Respectfully submitted,

APPROVED:

JOHN S. PHILLIPS
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

JSP:EC

HEALTH COMMISSIONER: The salary of the Health Commissioner of the State of Missouri is $5,000.00 per year.

June 3, 1942

69

FILE

Doctor James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

Your request for an opinion has been referred to me. This request is as follows:

> "Was Section 9024 R.S. 1929 (now Section 9744), as amended (Laws 1933, page 269), intended to supplant the right of the State Board of Health to fix the salary of the State Health Commissioner as now constituted. If so, would Section 9024 as amended repeal Section 9041 R.S. 1929 (now Section 9761) by implication as to the salary of the Secretary of the State Board of Health. In other words is the State Health Commissioner entitled to receive a salary of $7,400.00 per annum or $5,000.00 per annum?"

In order to arrive at the law in this matter, I think that the history of this matter should be gone into.

Section 9019 R. S. Mo., 1929, empowered the State Board of Health to select a secretary. This section is as folbws:

> "The meetings of the board shall be in January and July of each year, and at such other times as the board shall deem expedient. The meeting in January of each year shall be held in the City of

> Jefferson, and four members shall constitute a quorum. They shall choose from their number a president, vice-president and a secretary, and they may adopt rules and by-laws for their government, subject to the provisions of this article."

Section 9020 R. S. Mo., 1929 provided for the duties of the secretary. It is as follows:

> "The secretary shall perform such duties as may be prescribed by the board and this article; he shall receive a salary, which shall be fixed by the board; he shall also receive his traveling and other expenses in the performance of his official duties. The other members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. The president of the board shall certify the amount to the secretary, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

Section 9024 R. S. Mo., 1929, provided for the appointment for a commissioner of Health by the Board of Health. The section reads as follows:

> "A commissioner of health may be selected by the board, who shall be a physician skilled in sanitary science and experienced in public health administration. It shall be his duty to enforce the rules and regulations of the board and he shall submit to the state board of health an annual report with his recommendations."

These statutes remained in force and effect until 1933, at which time the Legislature repealed Sections 9020 and 9024, Article 1, Chapter 52, R. S. Mo., 1929, and in lieu thereof passed two new sections known as Sections 9020 and 9024 Laws of Missouri 1933. These sections provide as follows:

> "The Commissioner of Health shall perform such duties as may be prescribed by the board and this article. The members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. The president of the board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

> "TheGovernor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars

> ($5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

Also in force in 1929 was Section 9041 which was reenacted in 1939 and became Section 9761, R.S. Mo., 1939. This Section provides as follows:

> "The secretary of the state board of health shall have supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and shall act as state registrar of vital statistics. As secretary he shall receive an annual salary at the rate of twenty-four hundred dollars, payable monthly. The state board of health shall provide for such clerical and other assistance as may be necessary for the purpose of this article, who shall serve during the pleasure of the board, and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. Suitable apartments shall be provided by the custodian of the capitol for the bureau of vital statistics and the state board of health in the state capitol at Jefferson City, which shall be properly

> equipped with fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under this article."

In 1935, Section 9020 Laws of Missouri 1933, was repealed and a new section enacted in lieu thereof, which section was to be known as Section 9020 Laws of Missouri 1935. This section directs as follows:

> "The commissioner of health shall perform such duties as may be prescribed by the board and this article. Each member of the board shall receive as compensation for his service the sum of Ten Dollars ($10.00) for each day engaged in this service and all legitimate and necessary expense incurred while employed on the business of the board. The president of the board shall certify the amount to the commissioner of health and the per diem, traveling and other expenses of members and on presentation of this certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

In 1939, Section 9019 R. S. Mo., 1929, was re-enacted and became 9739 R. S. Mo., 1939. Section 9020 Laws of Missouri 1935, was re-enacted and became Section 9740 R. S. Mo., 1939; Section 9024 Laws of Missouri 1933, was re-enacted and became Section 9744 R. S. Mo., 1939 and as stated above, Section 9041 R. S. Mo., 1929 was re-enacted and in 1939 became Section 9761 R. S. Mo., 1939. These are the sections which have reference to the Secretary of the Board of Health and Commissioner of Health.

From a reading of all of these Sections of the Statutes, we find the following: The Commissioner of Health now performs the duties formerly performed by the Commissioner and the Secretary of the Board of Health; the office of Secretary has been abolished; the salary of the Commissioner is $5,000.00

per year. Where the term "Secretary of theBoard of Health" is mentioned the term "Commissioner" shall be substituted; and in Section 9761 R. S. Mo., 1939, it is provided that the Secretary of the Board of Health is to receive $2,400.00 salary as such. Does the latter provision regarding $2,400.00 salary remain in effect and inure to the benefit of the Commissioners of Health?

We feel that the intention of the Legislature should be examined in order to reach an intelligent conclusion. Such intention is of graat importance in construing statutes and is as much a part of such provisions as the written words themselves. See 26 Mo. Dig. "Statutes" Key number 180. Going back to 1929, there was at that time two officers, towit, the Secretary of the Board of Health and the Commissioner. In 1933, the office of Secretary of the Board of Health was abolished and the duties pertaining to that office were then assumed by the Commissioner. At that time the salary of the Commissioner was definitely set at $5,000.00. Therefore, it would seem that the intention of the lawmakers was to put all of the duties involved in the hands of one officer and that a salary be set, commensurate with the amount of work necessary; and it was clearly the intention of the Legislature to abolish the office of Secretary of the Board of Health.

Now what effect does the abolishment of the Secretary's position have on Section 9761 R. S. Mo., 1939. Citing the first few lines of such section, we find the following:

> "The secretary of the state board of health shall have <u>supervision</u> over the central bureau of vital statistics, which is hereby authorized to be established by said board, and shall act as state registrar of vital statistics. As <u>secretary</u> he shall receive an annual salary at the rate of twenty-four hundred dollars, payable monthly.* * * * *"

It will be noted that the Secretary of the Board of Health is to have <u>supervision</u> over the bureau of vital statistics and is to act as state <u>registrar</u> of vital statistics.

Following the statute, the Commissioner of Health shall then become the registrar and have supervision over the bureau of vital statistics. However, the Secretary was to receive $2,400.00 for salary as such secretary, but not for supervising the bureau of vital statistics or for acting as state registrar. Therefore, in view of the fact that he was to receive "such sum "as secretary, it seems that when such office was abolished, that the salary of such secretary was also abolished. Does not the Commissioner have a salary set out by statute at $5,000.00? Should we then say that he should draw his own salary and also that of another officer whose office has been abolished? We think not. Neither do we think it was the intention of the Legislature, to allow the Commissioner to receive one sum as his salary and then draw another sum as head of one of the bureaus in a department where he is the supervisor.

Furthermore, there is now an officer known as the Director of the bureau of vital statistics. He receives the salary of $3,000.00 annually. There are other bureaus in the Health Department all of which have Directors or Heads. Still in none of them does the Commissioner receive remuneration for any duties he has which are connected therewith. Why should the commissioners receive a sum as supervisor of one department and not receive anything as supervisor of the others? Obviously, the Legislature meant that the Secretary of the Board of Health was to receive $2,400.00 per year, as such, and when they abolished the office, the salary ceased.

CONCLUSION

Therefore, it is the opinion of this Department, that when the Legislature abolished the office of Secretary of the State Board of Health and provided that the Commissioner of Health was to perform the duties formerly performed by such Secretary and that he should receive an annual salary of $5,000.00, both of which actions were made at approximately the same time, said Legislature intended that the provision regarding salary of the Secretary in Section 9761 R. S. Mo.,

1939, was to be abolished along with the office, since it was the pay he was to receive as Secretary of the Board and not as supervisor of the Bureau of Vital Statistics or as State Registrar of Vital Statistics. In other words, his salary is to be $5,000.00 instead of $7,400.00 since he has no right to the additional stipend of $2,400.00 as provided in Section 9761 R. S. Mo., 1939.

Respectfully submitted

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JSP:AW

HEALTH, BOARD OF: Trailer Camps not governed by Sec. 9955 R. S. Mo., 1939, which deals with Tourist Camps and Resorts.

June 11, 1942

6-16

FILE
8-5

Dr. James Stewart
Commissioner of Health
Jefferson City, Missouri

Dear Dr. Stewart:

Your letter requesting an opinion has been referred to me. This request was as follows:

> "Reference is made to Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri, 1939, the law under which our state wide resort law is administered, and to Section One of State Board of Health Regulations Governing Sanitation of Summer Resorts, Tourist and Other Camps as quoted on Page 5 of the enclosed pamphlet. The aforementioned statutes cover, 'all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs are furnished for the accommodation of guests'. No specific mention is made of trailers or trailer camps in this statute.
>
> "Section One of our regulations reads as follows, 'The following regulations shall apply to any municipality, community, institution, corporation, as-

sociation, firm or person operating, or maintaining for use within the State of Missouri, any tourist camp, trailer camp, resort, cabins, courts, camp or tract of land in or on which persons may reside, camp or picnic, either free of charge or by payment of fee. For the purpose of this regulation all places covered by this definition shall hereafter be termed resorts.' You will note that specific reference is made to trailer camps in this regulation, approval of which was given by the Attorney General's office under date of July 27, 1939.

"The public health need and significance of sanitation and regulation of trailer camps is quite parallel to sanitation and regulation of tourist camps. It is apparent from our experience that facilities for sanitation at trailer camps are even more inadequate than at tourist camps. It is our belief that the legislature by its action desired to insure adequate sanitation in resort and camp areas and intended coverage of trailers as well as resorts and camps. Trailer camps constitute, in certain defense areas of this state, significant public health problems due largely to migratory workmen and families of civilian workmen and military personnel congregating in defense areas.

"We wish to be advised, therefore, whether or not trailer camps may be construed to be within the jurisdiction of our resort law, and if under the provision of the resort law, under what fee schedule should these establishments be licensed. In event trailer camps do not, in your opinion, come under the resort law, your advice is requested as to the manner in which these establishments may be satisfactorily supervised under our regulations.

"We will appreciate early receipt of the information requested herein."

Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri, 1939, provides as follows:

"The State Board of Health is empowered and it is hereby made their duty through their deputies to have inspected, at least annually and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodations of guests."

Section One of the Regulations Governing Sanitation of Summer Resorts, Tourists and Other Camps, prepared by the State Board of Health is as follows:

"The following regulations shall apply to any municipality, community, institution, corporation, organization, association, firm or person operating, maintaining or offering for use within the State of Missouri, any tourist camp, trailer camp, resort, cabins, courts, camp or tract of land in or on which persons may reside, camp or picnic, either free of charge or by payment of fee. For the purpose of this regulation all places covered by this definition shall hereafter be termed resorts."

We are unable to locate any instance wherein the Courts have defined "Trailer Camps". However, the common understanding is that it is a large parking lot or area wherein people who have trailers attached to their motor vehicles may park same and where certain facilities such as electric lights, water and sewage disposals may be present. At the present time there are many of these located in this State, due to housing conditions. Persons owning these trailers may stop in such camps overnight or they may set up a more or less permanent residence while they are employed in the immediate neighborhood.

On the other hand a "tourist camp" is a place where there are permanent dwellings already constructed, such as cabins, and they are regulated more or less in the same manner in which hotels are. Further, the larger part of their trade is transient and is composed of motorists staying therein overnight. It is possible to tax them under the statute, as there is a specific provision, to wit Section 9955, supra, which prescribes the manner in which they are to be licensed. They are taxed according to the number of units or cabins which they have in their camp. However, a "trailer camp" in the strict sense of the term, may have one trailer in the camp one night and fifty in the camp the next night. So it is apparent that they can not be licensed under the terms of Section 9955, Revised Statutes of Missouri, 1939.

Neither does it appear that at the time of the passage of the above Section, the legislature intended that "trailer camps" were to be included. At no place in the statute is such a term mentioned and we have no intimation whatever to show that they were even considered.

Furthermore, we do not think that the State Board of Health can bring such "trailer camps" within the provisions of the statute by incorporating them within a regulation promulgated by the State Board of Health. It is true that the Board of Health has the power to set up rules and regulations as set out in Section 9735, Revised Statutes of Missouri, 1939. However, we do not believe that the Board can, by

regulation, place "trailer camps" in the category with "tourist camps" when they have never been mentioned by the legislature.

CONCLUSION

Therefore it is the opinion of this department that "trailer camps" do not come under the terms of the resort law and that the regulations as set up by the Board of Health will not apply to them.

Neither can they be charged a license fee since no provision is made in the Statutes for such license and they can not be licensed in the same manner as "tourist camps".

In order to regulate them in this manner, it will be necessary that legislation be passed for that purpose by the General Assembly.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:jn

STATE BOARD OF HEALTH: Has authority to construct public sewage disposal facilities but all contracts for such construction must be made by State Purchasing Agent.

July 21, 1942.

1-77

FILED
85

Dr. James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

The Attorney-General wishes to acknowledge receipt of your letter of July 15, 1942, in which you requested an opinion from this department. This request, omitting the caption and signature, is as follows:

> "This Board has presented to the Federal Works Agency several applications for allotments of funds for the sanitation of private and semi-public water supplies, private and semi-public sewage disposal facilities and for the collection and disposal of garbage and refuse in areas immediately adjacent to cantonment areas in Missouri. The Federal Works Agency program includes the operation of such sanitation projects. The project applications provide for operating entirely with Federal funds and it is not proposed to use any state funds for the construction of these facilities.
>
> "When the application is approved and the funds are allotted it is intended by the Federal Works Agency that the State Board of Health shall, with the Federal funds, construct or contract to construct these facilities. We are in receipt of a letter from the Regional Engineer's office of the Federal Works Agency raising a legal Question concerning the authority of this Board to construct or contract to construct the proposed sanitary facilities. It is

> respectfully requested, therefore, that you provide me with an opinion as to whether or not the State Board of Health has legal authority to provide these facilities in this manner."

The powers and duties of the State Board of Health are set out in Section 9735, R. S. Mo. 1939, which section reads as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

Also, Section 9735a of the Laws of Missouri, 1941, at page 370, respecting the use of Federal funds by the State Board of Health, provides as follows:

> "The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service. The Children's Bureau or any other Federal agency in regard to health funds distributed to the states, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United

States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or (for) health purposes under the provisions of such acts of Congress, relating to health; said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health Title VI fund, the Venereal Disease Control fund, the Children's Bureau fund, and any other fund specially designated by a Federal Agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government the General Assembly shall appropriate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government."

As can be seen from the statutes cited above, the State Board of Health has considerable powers conferred upon it and the general rule seems to be that the powers that are conferred upon such board should receive liberal construction. See State ex rel. Horton v. Clark et al., 320 Mo. 1190, 9 S. W. (2d) 635.

The duties of the State Board of Health are of an administrative character and as long as such board exercises a reasonable discretion it is free to act. See State ex rel. Goodier, 195 Mo. 551, 93 S. W. 928. The apparent intention of the Legislature with regard to the State Board of Health seems to be that as long as such board does not abuse its powers and as long as they are acting in the interest of the general health of the public of Missouri, they have practically

unlimited powers along that line.

As to the power to construct or contract to construct the facilities mentioned in your opinion request, we will cite you to Chapter 105, R. S. Mo. 1939, entitled "State Purchasing Agent." Under this chapter in order that there be a contract to construct such facilities it will be necessary that all agreements or contracts made with any individual be made on the part of the State through the office of the State Purchasing Agent and shall not be made by the State Board of Health itself.

Conclusion

It is the opinion of this Department that the State Board of Health has the power to construct private and semi-public sewage disposal facilities for the collection and disposal of garbage and refuse in areas immediately adjacent to cantonment areas in Missouri, but that any contract for the construction or purchase of supplies must be made by the State Purchasing Agent of Missouri, and not the State Board of Health.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

JSP:EG

TAXATION: DORMITORY AT STATE TEACHERS COLLEGE: Property rented to and used by State Teachers College at Warrensburg, Missouri, exempt from taxation.

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August 6, 1942

8-7

FILED
85

Mr. R. W. Starling
Member of the Board of Regents
of the Central Missouri State
Teachers College
Eldon, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

> "At the last meeting of the Board of Regents of the Central Missouri State Teachers College the question was presented as to whether or not the girls dormitory, known as the Laura J. Yeater Hall, is taxable.
>
> "The facts regarding the title and the beneficial interest in the real estate are as follows:
>
> "In 1926 a tract of land known as the 'West Campus' in the City of Warrensburg was acquired and the title taken in the name of 'The Board of Regents of the Central Missouri State Teachers College. Soon thereafter a very definite need developed for dormitory facilities for girl students of the college but no appropriation was forthcoming from the legislature. In order to meet that need the alumni, former students, teachers, students and friends of the college associated themselves together in a voluntary association,

under the provisions of Article Ten of Chapter Thirtytwo of the Revised Statutes of the State of Missouri for 1929, taking the name of the 'College Dormitory and Development Association of Warrensburg, Missouri,' the articles of association being dated July 22nd.1940, a copy of said articles of association being attached hereto and made a part hereof.

"On September 3rd. 1940, without any express authority from the legislature, the Board of Regents conveyed a part of said 'West Campus' described as:

> The South 263 feet of the North Half of the Northeast Quarter of the Southwest Quarter of the Northwest Quarter of Section 25, Township 46, Range 26, Johnson County, Mo., except 10 feet off the South end thereof,

to the said College Dormitory and Development Association of Warrensburg, Missouri, and on the same day entered into a lease and contract whereby the said association agreed to build the dormitory and did lease the building and grounds to the Board of Regents and agreed to re-convey the real estate to the Board of Regents when the mortgage loan on the property was retired a copy of which lease contract is attached hereto and made a part hereof.

"The dormitory was constructed and has been used exclusively to house and keep students of the college, and the Board of Regents, out of the earnings of the dormitory, has paid all of the rental installments provided for in the rental contract.

"The College Dormitory and Development Association has no assets other than this

> Laura J. Yeater Hall property and has no income except the rental paid by the college, and, also, the lease contract above mentioned was by the said association assigned to the trustee in the mortgage indenture and the payments are made direct to the trustee for the payment of the mortgage indebtedness.
>
> "We would like to have your opinion as to whether or not the real estate above described, including the dormitory building, is subject to taxation."

The real estate upon which the dormitory is now situated seems to have been acquired from the State Teachers College by authority of Section 10753, R. S. Mo. 1939, which authorizes the Board of Regents to convey real estate belonging to that institution.

On the question of the exemption of this property from taxation, Section 6 of Article X of the Constitution and Section 10937, R. S. Mo. 1939, are applicable.

Section 6 of Article X reads as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

And Section 10937 in part reads as follows:

> "The following subjects are exempt from taxation: * * * * * * * * * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county, or local purposes."

It will be noted from these sections that if the lands and buildings thereon are used exclusively for school purposes or for purposes purely charitable the same are exempted from taxation for state, county and local purposes. The principle of exemption of properties used for school purposes was discussed by the court in State ex rel. Hammer v. Macgurn, 187 Mo. 238, 242, wherein the court said:

> "The ownership or title to the property is not the determining factor. For if the property is owned by a religious, charitable or school organization and is leased or rented for use for any other purpose than such as the Constitution contemplates, the land is not exempt. So, if the private owner of the land allows his land to be used for such purposes and charges no rent and derives no personal benefit from the land, the land is exempt from taxation, because the land is then devoted exclusively to such a use. This was the case in City of Louisville v. Werne, 80 S. W. 224, relied on by the defendants. For in such cases the owner con-

tributes the use of his land to public or quasi-public use, or to such a use as the Constitution contemplates, and derives no gain or profit for himself, and, therefore, the State does not exact a tax from his land with one hand while accepting a contribution of the use of his land with the other hand.

"But on the contrary, when the owner leases his land to the public for a public use, or to a quasi-public body for a charitable or religious use, and applies the rents derived from the land to his own personal advantage, he contributes nothing to the public or charity, he loses nothing by the use, he is not a benefactor to any one, but he stands before the law in exactly the same light as any one else who leases his land for any other purpose, and uses the rents for his own advantage, and, therefore, he is not entitled to any special consideration at the hands of the law or the government, and his property is not exempt."

The Articles of Association of the College Dormitory and Development Association of Warrensburg, by Article Fifth thereof provide as follows:

"This association is formed for the purpose of acquiring real estate and the erection thereon of a dormitory or dormitories or other facilities which may be needed by Central Missouri State Teachers College or which may be usable and used in the promotion and development of said College and its facilities; and be used in connection with the scholastic training offered by said College to Students, and the

operation and/or rental of such facilities to students of the College or to the Board of Regents of said College for use by such students.

"And in order to carry out said purposes of this Association said Association shall take hold and convey real estate, shall receive gifts, and donations in order to assist in the carrying out of the purposes of this Association and to borrow, money, pledging the credit of this Association for such borrowing, and with authority to mortgage or otherwise encumber any real estate, buildings, or other property belonging to this Association and with authority to pledge the revenues and income of this Association to the payment of such indebtedness.

"It is further the purpose of this Corporation that no member of the Association and no Director or Officer of this Association shall receive any payment of income, or salary, or other compensation for any services rendered. It being the purpose of this corporation to be strictly a non-profit corporation, conducted and managed and operated for the general welfare and the promotion of the best interests of the College; and that the officers and directors thereof shall serve without compensation.

"It is further the purpose of this corporation that as soon as this corporation shall receive, by way of gifts or donations or revenues and income from the operation or leasing of the facilities so built by it, a sufficient amount to pay all indebtedness, together with interest, contracted by it for the acquiring of a site and the erection of

> such facilities thereon, the Board of Directors of said Association shall cause such site and the facilities erected thereon to be conveyed to the Board of Regents of the Central Missouri State Teachers College so that said facilities shall become the absolute property of said Board of Regents."

It would appear from this provision of the Articles of Association that the sole purpose of the organization is to provide a dormitory for the State Teachers College at Warrensburg. The contract and lease which accompanied your request is in furtherance of the purpose of the Articles of Association. From an examination of these it would seem that the State School is the beneficial owner of this property because, under the plan, it receives the ultimate benefits of the rents. Under the plan the State School is to pay to the Dormitory Association $12800 per annum until the entire indebtedness in the amount of $130,000.00 is paid, at which time the Dormitory Association conveys the building and real estate upon which it is located to the State School.

On the question of the building being used for a dormitory for the school and, therefore, being exempt from taxation, we find that the court, in the case of State ex rel. Johnston, 214 Mo. 656, held that the fact that the school operates a dormitory for students in connection with the school does not operate to deprive such school from the constitutional tax exemption.

Under the principle that if the school is the "beneficial owner" of the property then it is exempt, we find that the court, in the case of St. Louis v. Wenneker, 145 Mo. 230, l. c. 238, made the following statement:

> "We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial

> owner, which is held by it 'for its own use' and not merely in trust. It does not include that in which the only interest of the municipality is as <u>trustee</u>. * * "

In that case the city was holding the property as a trustee and the court there held that such property was not exempt on that account. The Articles of Agreement reveal that the property here held is for the benefit of the State School. The question as to the exemption of real property held in trust for the benefit of the state or one of its agencies is exhaustively discussed in the case of Security Savings and Trust Company v. Lane County, 53 Pac. 2nd. 33, decided by the Supreme Court of Oregon in 1935. The court devotes ten pages of the Reporter to a review of the cases on the subject and from them lays down the following rules:

> "Real property, the title to which is vested in the state, whether in its name or in the name of a state agency, is exempt from taxation. It is also exempt if the state possesses the sole beneficial interest; the title being vested in a trustee."

In conclusion, the court reiterated:

> "Applying the principles of law expressed in the above authorities, it is our belief that the exemption claimed in this suit cannot be granted under our statute, unless (1) the fee is vested in the state, or (2) the state's beneficial interest is exclusive of all equities of nonexempt persons. It is clear that these conditions are not present. Therefore, the property is subject to taxation."

In the case of Board of Trustees of Illinois Industrial University v. Board of Supervisors of Champaign County, 76 Ill. 184, it was held that where the University's beneficial interest was exclusive, the property was exempt from taxation, even though the title was vested in a trustee.

From the provisions of the Articles of the Dormitory Association, we think that the Association acts in the nature of a trustee holding this property for the use and benefit of the State School. That being the case, the property would be exempt from taxation under two theories: First, that it is used exclusively for State purposes. Second, that the State School is the beneficial owner of the property.

CONCLUSION

From the foregoing, it is the opinion of this department that the real estate and buildings thereon, including the dormitory building at the State Teachers College at Warrensburg, Missouri, are exempt from taxation.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

TWB:CP

BOARD OF HEALTH: Convalescent, nursing, shelter or boarding home under the provisions of Senate Bill 142, Laws of Mo., 1941, p. 368.

August 13, 1942.

8-18

FILED
85

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

The Attorney-General wishes to acknowledge receipt of your letter of August 7th requesting an opinion from this department. Such request, omitting caption and signature, is as follows:

> "This Board is not carrying out a program to license and otherwise regulate convalescent and nursing homes in accordance with Senate Bill 142 as enacted by the State Legislature in the last general assembly of that body. Senate Bill 142 defines these homes as follows:
>
> > "'Section 2: Definitions.--The term "convalescent", "nursing", "shelter", "lodging", and "boarding" home for the aged, chronically ill or incurables shall mean any place in which three or more aged, chronically ill or incurable persons, not related by blood or marriage to the owner, operator or manager of said place, are received, kept and provided with food, or shelter and care for hire or compensation, however paid; provided that nothing in this Act shall apply to any institution established, maintained or operated by the State or any county, city, town or village thereof.'
>
> "We have encountered certain establishments which in our opinion could or could

not be included in this program depending upon the interpretation of the clause 'for hire or compensation, however paid' as contained in the statute.

"These questionable establishment operate basically as follows:

"1. Homes operating primarily from endowment or contribution but accepting as gratuity that compensation a guest wishes to make, such as a grant, a life insurance policy, etc., but where no such compensation is pre-requisite to entrance.

"2. Homes operating primarily from endowment and contribution but requiring a flat rate entrance fee for each individual. These fees vary from $100 to $500 depending upon the home. This entitles guests to remain in the home for the remainder of their lives with the home assuming all responsibilities for care, <u>including burial</u>. The entrance fee cannot be decreed as adequate compensation for services rendered but definitely is required for entrance.

"3. Homes operated by a lodge to which a member has access upon reaching an established age by reason of having been a member of the lodge in good standing, for which payment of dues is, of course, pre-requisite.

"Our experience indicates these homes to be providing acceptable care for their guests, and in our opinion, it was not the intention of the legislature to include these establishments even though same were not included in the specified exceptions.

"I request, therefore, that you advise me whether or not, in your opinion, these homes come within the provisions of Senate Bill 142, and whether or not the State Board of Health is obligated to license and otherwise regulate these homes."

Your request apparently is whether or not the three specific types of establishments set out in your letter are subject to the provisions of Senate Bill 142 as passed by the General Assembly in 1941, Laws of Missouri, 1941, page 368. We will first cite you to Section 1 of said bill, which is as follows:

> "No person shall establish, maintain, operate or conduct a convalescent, nursing, shelter or boarding home for aged, chronically ill or incurable persons, within this State, without having first obtained a license so to do from the State Board of Health of Missouri. The word 'person' as used in this Act shall include members of any firm, partnership or association and a corporation and any or all of the officers, managers or board of directors thereof. Provided, however, that no nursing home or sanatorium which is conducted in conformity with the tenets of any well-recognized church and in which the treatment provided is solely by prayer or spiritual means as an exercise of religious freedom, shall be required to obtain a license under the provisions of this act."

The language of this statute is very broad and undoubtedly includes any or all persons who shall "establish, maintain, operate or conduct a convalescent, nursing, shelter or boarding home for aged, chronically ill or incurable persons."

We will next cite you to Section 2 of said bill, entitled "definitions," which provides as follows:

> "The term 'convalescent', 'nursing', 'shelter', 'lodging', and 'boarding' home for the aged, chronically ill or incurables shall mean any place in which three or more aged, chronically ill or incurable persons, not related by blood or marriage to the owner, operator or manager of said place, are received, kept and provided with food,

> or shelter and care for hire or compensation, however paid; provided that nothing in this Act shall apply to any institution established, maintained or operated by the State or any county, city, town or village thereof."

It can be seen from a study of the above provisions that any person, association, firm, partnership or corporation operating an establishment such as you speak of in your letter "for hire or compensation," is governed by the provisions of this statute.

Now as to the intention of the Legislature in enacting such statutes: In Section 1, aforesaid, of this bill there is an exception made to this statute which refers to an establishment in this general class conducted in conformity with the tenets of any well-recognized church and in which the treatment provided is solely by prayer or spiritual means. This would infer that when the bill was passed that the Legislature considered exceptions to said bill, but the only exception made by the Legislature is the one mentioned above. It appears to this department, therefore, that it was the intention of the Legislature that no other exceptions should be made to this enactment. Otherwise, such exceptions would have been made.

The only other matter to be considered is whether or not an establishment in this general class is operating such establishment for "hire or compensation." There is no doubt about the first and second class of homes specified in your letter, since they both contemplate the payment of acceptance of a fee or other compensation. However, in the third class which you have specified and which is set out above, where there is no fee or compensation to be paid as a prerequisite for admission into such home, we are of the opinion that such home does not come under the provisions of Senate Bill 142. In this class of establishments the home is merely an incident to a lodge and is not in the business of providing shelter or food to the clients who are kept in such home.

Conclusion

Therefore, it is the opinion of this department that all establishments of the kind which you specify in class 1 and

class 2 of your request are subject to the provisions of Senate Bill 142, due to the fact that they contemplate the acceptance of fees or gratuities as a prerequisite for admission into their home. However, we are further of the opinion that class 3, referring to homes operated by lodges, does not come under the provisions of Senate Bill 142 since there is no payment of fees or the acceptance of gratuities as a prerequisite to admission into such establishments.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

BOARD OF HEALTH: Establishment consisting of two
TOURIST CAMPS: or more cabins and quartering permanent guests subject to regulation by State Board of Health.

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August 15, 1942

FILED
85

Hon. James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We have for answer your opinion request of August 7, 1942, which is as follows:

"The State Board of Health is attempting to enforce the laws of this State regarding tourist camps and resorts. A special effort in this regard is being exerted in the defense areas of this state where numerous workmen and families of military personnel are currently living in temporary quarters.

"In several instances we have encountered individuals who have assembled near a highway two or more one room buildings for rental purposes. These buildings are served by central facilities and to all outward appearances constitute a tourist camp. However, no advertising is posted and rentals are usually made by the week or month.

"Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri, 1939, reads in part as follows:

'The State Board of Health is empowered and it is hereby made their duty through their depu-

ties to have inspected, at least annualy and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained, or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodation of guests. For this purpose the said inspectors shall have the right of entry and access thereto at any reasonable time.'

"We believe the underlined portion of the above quotation clearly indicates these establishments to come under the jurisdiction of our resort laws. Our jurisdiction over these establishments has, however, been questioned.

"It is therefore, requested that you advise me whether or not an establishment consisting of two or more cabins and catering to permanent guests, but which maintain no direct advertising, come within the jurisdiction of Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri, 1939."

Construing Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri, 1939, as set out in the request, we refer you in the first instance

to an opinion of this office written December 17, 1941, by Hon. Lawrence L. Bradley, Assistant Attorney General, in which this office set out the following interpretation and construction of the Statute aforesaid:

> " * * * * * The law relating to tourist camps or resorts contemplates that it is a place where more than one room (cabin) is furnished for the accommodation of guests not in a single building or structure. The one complements the other, so that all places furnishing more than one room (except where the number is less than ten and are in one building or structure) for the accommodation of guests are subject to regulation. * * * * * "

The law is well settled in this state that where a statute is plain and unambiguous it is only necessary to take the obvious intent of the Legislature and act in accordance therewith. In State v. Keller, reported in 137 S. W. 2d 989, l. c. 990, the Court said:

> " * * * * * In construing this statute the following well established rule should be kept in mind: Where the language of a statute is plain and unambiguous nothing comtrary to the evident intent can be implied. State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S. W. 2d 640. A statute should be so construed as to give effect to the legislative intent. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 106 S. W. 2d 898. A statute that is clear in its terms and leaves no room for

> construction must enforced as written. Dahlin v. Missouri Commission for Blind, Mo. App., 262 S. W. 420. * * * * * * "

In the case of Fichtner v. Mohr, reported in 16 S. W. 2d 739 l.c. 741, the Court said as follows:

> " * * * * * We are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the language used is plain, it must be given effect by the courts. * * * * * "

In the case of Cummins v. Kansas City Public Service Co. 66 S. W. 2d 921 l.c. 925, the court said as follows:

> " * * * * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically', is properly given consideration. See Grier and Meyering Cases; 2 Lewis, Sutherland on Stat. Const. (2d Ed.) section 303; Endlich on Interpretation of Statutes, section 329; and Maxwell on Statutes (5th Ed.) 425. * * * "

CONCLUSION

It is, therefore, the conclusion of this office that inasmuch as the places you mentioned have two or more one-room buildings for rental purposes located on the highway they are tourist camps or resorts as contemplated by the Statutes. The fact that they have no posted advertising does not have any bearing whatsoever as the Statute says kept, used, maintained or advertised; hence they are subject to regulation and inspection by the State Board of Health.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

STATE BOARD OF HEALTH: Cannot pass rules and regulations which apply to only one county.

August 26, 1942.

9 3

FILED
85

Dr. James Stewart
Commissioner of Health
Jefferson City, Missouri

Dear Dr. Stewart:

The Attorney-General wishes to acknowledge receipt of your letter of August 22d, in which you request an opinion from this department. Such request, omitting caption and signature, is as follows:

> "It is the belief of the county health department in one of our larger counties that the present State Board of Health Regulations are not adequate for that particular county and it has been requested that specific regulations be prepared which would be applicable to the larger counties in Missouri.
>
> "I would appreciate an opinion from you regarding the authority of the State Board of Health of Missouri to adopt specific regulations which would be applicable only to certain counties in the higher population groups."

In answer to your question we will first cite you to Section 9735, R. S. Mo. 1939, which provides the following:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of

> infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

The next provision touching on this matter is Section 9748, R. S. Mo. 1939. It prescribes the following:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

It is apparent from a study of Section 9735, cited above, that the State Board of Health has the power and authority to prescribe rules and regulations for the prevention of disease in the State of Missouri. It is also the rule in Missouri, that the rules and regulations of the State Board of Health are to receive liberal construction. In State v. Clark, 9 S. W. (2d) 635, 320 Mo. 1190, the court said:

> "Nevertheless it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them to effectually perform their important functions in safe-guarding the public health, should receive a liberal construction."

However, after reading Section 9748, supra, we find that the rules and regulations of the State Board of Health shall supersede as to those matters contained in Chapter 57, Article 1, which refers to the matters cited above, all local ordinances, rules and regulations. It further states that such rules and regulations of the State Board of Health "shall be observed throughout the State and enforced by all local and State health authorities." The above quotation would infer that if the rules and regulations are enforced by all local and State health authorities, such provisions would necessarily apply to all parts of the State alike.

We can readily understand that there are certain conditions which might arise in a county with a large population, which would not be present in a less populous county. However, the mere fact that a certain condition exists in only one county at the time of the passing of a regulation by the State Board of Health, would be no guarantee that at a later date such condition would not be present in a smaller county. If a regulation were passed regulating an obnoxious situation in one large county, and was meant to apply to that county alone, and at a later date such condition arose in a smaller county, then the condition in question would be regulated in one county and would not be regulated in another. In view of the fact that anyone violating any of the rules and regulations of the State Board of Health shall be guilty of a misdemeanor, as set out by Section 9750, R. S. Mo. 1939, then we would have the situation that a person violating the regulation in the large county would be subject to criminal prosecution but another person committing the same act in a smaller county would be immune.

In speaking of the constitutionality of statutes the Supreme Court of Missouri in the case of St. Louis Union Trust Co. v. State, 155 S. W. (2d) 107, the court said:

> "If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid."

If the Board of Health passes a regulation which "operates equally on all within the same class," it will be necessary that its rules and regulations apply to all counties in the State.

Furthermore, we would like to call your attention to the last sentence in Section 9748, R. S. Mo. 1939, cited above. Such sentence prescribes the following:

> "Nothing herein shall limit the rights of the local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the State Board of Health which may be necessary for the particular locality under the jurisdiction of such local authorities."

It seems to us that the Legislature in passing this article intended that the Board of Health should pass general rules and regulations which would apply to all counties, and if any unusual situation arose in any particular county, that it was then to be the duty of the local authorities to regulate such conditions.

Conclusion

Therefore, it is the opinion of this department that the State Board of Health would not have the authority to pass a special set of rules and regulations for one particular county, on the grounds that it is a large county and the general rules and regulations are insufficient due to peculiar conditions existing in such county. We think that the Board of Health may pass only rules and regulations which will apply equally to all counties under the same circumstances. If strictly local regulations are required, Section 9748, R. S. Mo. 1939, provides that the local health authorities shall regulate it provided they do not pass regulations which conflict with the general State regulations.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HEALTH, BOARD OF:)
PROSECUTING ATTORNEYS:) Prosecuting Attorneys have authority to apply for an injunction for the abatement ofpublic nuisances at their own relation.

October 24, 1942.

10-28

FILED
85

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

Your letter of October 22, 1942, asking this Department for an opinion, has been referred to me. Your request, omitting caption and signature, is as follows:

> "Our attention has recently been called to a situation involving the use of an open ditch to dispose of domestic sewage wastes in an unincorporated community located in St. Louis County. This situation has become somewhat critical and is a menace to public health as well as a nuisance to those residing in that area. On two occasions in the last few years the citizens of this community have defeated an election for the purpose of organizing a sanitary sewer district and voting bonds to finance the construction of a sewerage system to correct this condition. Since these elections to organize a sanitary sewer district have been defeated it seems obvious that it will be necessary for some agency to take legal action against the offenders if the situation is to be remedied. This particular situation is further complicated by the fact that the area involved is not incorporated.
>
> "In view of the above situation I would greatly appreciate your supplying this Board with an opinion concerning the following points:

"1. What is the duty and power of the State Board of Health in eliminating a public health hazard created by the discharging of untreated sewage wastes into streams of the state or over the grounds of the state by (a) an incorporated municipality, and (b) an unincorporated community?

"2. If it is the duty of the State Board of Health to take action in an attempt to correct such conditions what should be the correct legal procedure in either case?

"3. If it is the duty of the State Board of Health to take such legal action must the action be taken through the local county prosecuting attorney or may such action be instituted by your office as attorney for the State Board of Health?

"4. If a municipality or an unincorporated area refuses to vote bonds necessary to defray the cost of the construction of adequate sewage disposal facilities would it be possible for your office, acting as attorney for the State Board of Health, to obtain a court order compelling the abatement of the nuisance involved? If so, how would such an order be enforced?"

We note that there are four separate questions asked by you in this request, but in view of the fact that they are so closely related we will not take these questions up separately but will attempt to answer them collectively.

As to the duties and powers of the Board of Health with relation to public nuisances, we will first cite you to Section 9735, R. S. Mo. 1939, which provides as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities,

> villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

Under the provisions of the above section it is clearly within the power and duties of the Board of Health to safeguard the people of the State of Missouri and the counties, cities, villages and towns therein, to institute proceedings for the abatement of public nuisances.

In the case of State ex rel. Shartel v. Humphreys, 93 S. W. (2d) 924, there was a situation such as the present one in which an attempt was made by the Board of Health to compel Maplewood and Richmond Heights, Missouri, and their officers, to do certain things respecting sewer outlet and connection, all for the purpose of abating a public nuisance. In that case it was alleged that the relator, the State Board of Health, had endeavored to persuade officers of the aforesaid cities to come to an agreement or a plan to abate the nuisance and that several conferences were held by said officers but that nothing was done. Consequently, the action was brought at the relation of the Attorney-General and the State Board of Health as Relators, to compel the aforesaid cities to abate the nuisance. In affirming the judgment for the relators in that case, the court held that the Attorney-General could have properly proceeded with or without joining as relators with the State Board of Health. In such opinion the court called attention to the statute, set out above, giving the Board of Health the right "to safeguard the health of the people in the state, counties, cities, villages and towns."

So it would appear from the decision in the above cited case that the State Board of Health has the power to join as relator in an action to abate a public nuisance. In that

particular case the Board of Health joined with the Attorney-General in abating the nuisance aforesaid. However, it is also within the power of the Prosecuting Attorneys of this State to bring actions of this kind for the abatement of public nuisances at their own relation. As authority for this statement I will cite you to Section 12942, R. S. Mo. 1939, which provides as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

As can be seen from the above section of the statute it is the duty of the Prosecuting Attorneys to prosecute all

civil and criminal actions in their respective counties, in which the county or State may be concerned.

As can be noted from your request, the particular nuisances complained of are in St. Louis County, Missouri. In view of the fact that St. Louis County has a population of over 100,000 inhabitants, there is a special article of the statute relating to "county counselors" for such counties. Section 12990, R. S. Mo. 1939, in speaking of county counselors, provides as follows:

> "The county courts of all counties in this state containing one hundred thousand inhabitants or more, according to the last decennial census of the United States, and of all such counties as may hereafter contain one hundred thousand inhabitants or more, may, in their discretion, appoint and commission as other officers are commissioned by the county court a county counselor, who shall be a person learned in the law, at least twenty-five years of age, and who shall hold his office for two years, and until his successor is appointed, commissioned and qualified: Provided, that in all counties containing less than one hundred thousand inhabitants the office of county counselor is hereby abolished."

Section 12991, R. S. Mo. 1939, provides that the county counselor in such counties shall perform all the duties in civil matters that have heretofore been required by law of the Prosecuting Attorneys of such counties. Said section prescribes as follows:

> "The county counselor shall attend each and every sitting of the county court, and be present during the sitting of the same, and give his advice upon all legal questions that may arise, and assist the court in all such matters as may be referred to him; commence, prosecute or defend, as the case may require, all civil suits or actions

> in which the county is interested, represent the county generally in all matters of civil law, draw all contracts relating to the business of the county, examine all abstracts for the loan of school moneys, and examine all mortgages in relation to the same, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing, when demanded, to the county court or any judge thereof, and shall perform all the duties in civil matters that have heretofore been required by law of the prosecuting attorney of such counties."

Section 12992, R. S. Mo. 1939, provides that the Prosecuting Attorneys in such counties are to be relieved from all civil actions. Said section is as follows:

> "Upon and after the appointment of such county counselor, the prosecuting attorney of such counties shall not be required to represent said counties in any civil action or business, but nothing herein contained shall be construed to limit, qualify, or in any manner affect the duties of said prosecuting attorney in any criminal actions or business, and said prosecuting attorneys shall continue to discharge such duties in all criminal matters as they are now required by law to do."

Therefore, it appears that in a matter of the kind in question, that if the county is to be represented by its own attorney that the County Counselor of St. Louis County must entertain this action.

That brings us to the question of whether or not the county attorney has a right to institute suits for the abatement of public nuisances at his own relation, with or without the State Board of Health joining as relator. In answering this question I will cite you to the case of State ex rel. W. A.

Thrash et al. v. Fred Lamb, 141 S. W. 665, 237 Mo. 437, in which it was held that under a statute practically identical with Section 12942, R. S. Mo. 1939, the Prosecuting Attorney of a county is made the legal representative of the State to institute a suit in behalf of the State to abate a public nuisance such as we have under consideration in this case. The above case has been cited and approved in 131 A. L. R. 1210, Note "b."

Therefore, it would appear that the County Counselor of St. Louis County, having under the law the same duties as the Prosecuting Attorneys of the various counties with respect to civil actions, is empowered to institute actions for the abatement of public nuisances. It is further apparent that the Attorney-General of the State also has the power to file actions of this kind in a effort to protect the health of the State by the abatement of such nuisances.

You further wish to know how an order of the court in a matter of this kind could be enforced. In answer to such query we will cite you to Section 1677, R. S. Mo. 1939, which provides as follows:

> "If any person disobey or violate an injunction after it is served on him, the circuit court to which it is returned, or any judge thereof in vacation, shall issue an attachment against him for a contempt; and unless he shall disprove or purge the contempt, if in vacation, the judge may commit him to jail until the sitting of the court in which the injunction is pending, or take bail for his appearance in said court at the next term thereof, to answer for the contempt, and abide the order of the court, and in the meantime to observe and obey the injunction."

After reading such section of the statute, it is apparent that if the court issues an injunction in pursuance to an application filed therefor by the Prosecuting Attorney in circumstances of this kind, and a person or persons against whom the injunction is issued violate such injunction, that he

shall be held by the court in contempt and punished in pursuance to the statute cited above.

Conclusion

Therefore, it would appear that the proper procedure for your Board would be to make an effort through agreement, if possible, to have such public nuisance abated by the voluntary action of the parties responsible for such condition. If it is impossible to reach an agreement, as was the case in State ex rel. Shartel v. Humphreys, cited above, the State Board of Health should notify the County Counselor of St. Louis County of the conditions present with relation to this nuisance and ask that he apply for an injunction to abate such condition. The State Board of Health, being under the statute a board which is to safeguard the health of the people of the State, should join as relator in such request for injunctive relief.

The County Counselor of St. Louis County would be the logical one to join with the State Board of Health in filing this action in view of the fact that he is close to the conditions existing and would be in a better position to take care of such action. If the said County Counselor should refuse to join with the State Board of Health in the filing of such action, then the State Board of Health could request that the Attorney-General join with him as relators in such action for injunctive relief, since under the laws of the State the Attorney-General has the power to file such actions.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

HEALTH, BOARD OF: Resorts and recreational camps not subject to inspection by State Board of Health.

October 26, 1942.

10-28

FILED
85

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

The Attorney-General wishes to acknowledge receipt of your letter of October 19, 1942, in which you request the opinion of this Department. Your request, omitting caption and signature, is as follows:

> "Reference is made to our resort and tourist camp program which this year has been broadened to include organizational camps on the basis of the underlined portion of Section 9955, Article 6, Chapter 58, Revised Statutes of Missouri 1939 reading in part as follows:
>
> > "'The State Board of Health is empowered and it is hereby made their duty through their deputies to have inspected, at least annually and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodations of guests.'
>
> "This policy was adopted inasmuch as these camps, without exception, make a charge of

some type for the accommodation of each guest. Such charges however are not usually sufficient to render the establishment a profit and are used to supplement grants, charities, etc., made for the purpose of operating these camps.

"Our authority to license such camps has been questioned by certain operating agencies. One camp has submitted this question to an attorney. The attorney contends that inasmuch as the title of the tourist camp law as contained on page 415 of the Laws of 1939 reads in part as follows, 'providing for the inspection and regulation by the State Board of Health of tourist camps, cabins, or resorts maintained or advertised for public use', the law is not applicable to organizational camps inasmuch as such camps are not open to the general public. Inasmuch as this camp is open to all boy scouts of the area surrounding a large city, it is, in our opinion, a public institution.

"We wish to be advised, therefore, whether or not camps maintained by such agencies or organizations as Boy Scouts, Girl Scouts, YMCA, YWCA, YMHA, Rotary Clubs, Kiwanis Clubs, etc., are subject to Article 6, Chapter 58, Revised Statutes of Missouri 1939, in so long as such camps require payment of fee for each guest visiting these camps."

There seems to be but one question involved in your request for an opinion, and that is the definition of the term "public use."

As can be noted in the title of Senate Bill No. 7, found on page 415, of the Laws of Missouri for 1939, this act provides that it is "relating to inspection of hotels, inns, and boarding houses, by adding a new section thereto, to be known and numbered as Section 13084-A, relating to the same subject; providing for the inspection and regulation by the State

Board of Health of tourist camps, cabins or resorts maintained or advertised for public use; * * * *"

I will endeavor to cite you a few definitions which I have found of this term, "public use," and in that manner we will be able to ascertain whether or not camps which you have designated in your letter are to be governed by this provision:

> "The essential feature of a 'public use' is that it is not confined to privileged individuals but is open to the indefinite public and it is this indefiniteness or unrestricted quality that gives it its public character."
>
> --Power Company v. P. S. C., 100 Pac. (2d) 571, l. c. 573, 98 Utah 406.

> "The test whether a use is a 'public use' within Constitution of 1902, Section 1083 (Code 1904), page CCiXVii, exempting from taxation certain property devoted to a public use, is whether a public trust is imposed upon the property, whether the public has a legal right to the use which cannot be gainsaid or denied or withdrawn by the owner."
>
> --Commonwealth v. The City of Richmond, 81 S. E. 69, 74, 116 Va. 69, L. R. A. 1915A, 1118.

> "To constitute 'public use' all persons must have equal right to use utility and it must be in common and on same terms however few in number avail themselves of it."
>
> --Palmyra Telephone Co. v. The Modesto Telephone Co., 167 N. E. 860, 862, 336 Ill. 158.

> "Essential feature of 'public use' is that it is not confined to privileged individuals

but open to the indefinite public. Development Company permitting persons to whom it sold lots and others to connect with water main constructed by its assignors, did not devote it to 'public use.'"

--Development Company v. P. S. C., 158 App. 869, 872, 306 Pa. 43.

"By 'public' or 'public use' is meant the people of the whole state."

--Northwestern Elevated Ry. Co. v. City of Chicago, 1 Ill. C. C. 480.

It would be possible to cite you many other authorities but the above will give a general idea of the definition of the term "public use," which seems to be rather general.

We note from your request that the agencies or organizations set out by you are Boy Scouts, Girl Scouts, YMCA, YWCA, YMHA, Rotary Clubs and Kiwanis Clubs. It is a matter of general knowledge that in order to enjoy the recreational facilities of these various organizations, it is necessary that one either be a member thereof or that they be selected by the membership of such organizations and that such facilities and privileges are not open to the general public. Therefore, applying the rules as set out in the citations above, it can be seen that these recreational centers and resorts are not maintained or advertised for "public use."

Conclusion

Therefore, it is the opinion of this Department that the organizations as set out in the last paragraph of your request of October 19, 1942, are not subject to Article

6, Chapter 58, R. S. Mo. 1939, regardless of whether or not a fee is paid.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

SCHOOLS: LIMITATION OF TAX RATES:

Rates of taxes for school purposes in cities, towns and consolidated school districts.

March 30, 1942.

4-1

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

FILE
86

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the following statement of facts:

> "The Clerk of the Marion County Court has asked that I obtain your opinion on the following questions:
>
> "1. What is the highest rate of taxation that may be levied by the Board of Directors of a common school district, for School purposes (Teachers' wages and incidental expenses) without a vote of the people?
>
> "2. Same question as applied to the Board of Education of a Consolidated High School District?
>
> "3. Same question as applied to the Board of Education of a Town or City School District?"

Section 11 of Article X of the Constitution provides in part as follows:

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for

> State and county purposes.* * * *
> * * * * * * For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, the aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. * * * * * * * * *"

In the case of Peter v. Kaufmann 38 S. W. (2d) 1062, 1066, the court in speaking of the nature of this tax said:

> "* * * * Section 11, Art. 10, of the Constitution places limitations on the annual rates of taxation which can be levied for school purposes, which term is construed to cover all the usual and ordinary expenses of maintaining and operating schools. Hudgins v. Consolidated School District, 312 Mo. 1, 12, 278 S.W. 769.* * * * * * * * * * * * * * *"

Also in State ex rel. Marlowe v. Himmelberger-Harrison Lumber Company et al., 58 S. W. (2d) 750, 753, the court in speaking of the objections this tax covers said:

> "Defendant also refused to pay the taxes based on the levy of 50 cents on the $100 valuation 'for building fund' as being illegally assessed, and this contention must be sustained. As to what is

> meant by 'building fund,' we find that section 9312, R. S. 1929 (Mo.St. Ann. section 9312), provides for dividing school revenues into three funds, designated as teachers' fund, incidental fund, and building fund, and that 'all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the "building fund."' The incidental fund is derived wholly from taxes levied for incidental expenses, except that it is provided by said section 'that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property.' The constitutional provision limiting rates of taxation (section 11, article 10) deals with taxation 'for school purposes,' which is comprehensive and covers all moneys derived from taxation going into any and all the three funds mentioned. This rate is fixed at 40 cents on the $100 valuation, subject to be increased by a vote of the taxpayers within fixed limits, to wit, 65 cents in country school districts, and 100 cents in town and city districts.* * * * *"

From this case it will be seen that the levy authorized by said section is to be used for school purposes, namely: teachers wages and incidental purposes. This applies to the common school district, the consolidated high school district or to the town or city school district. The rates referred to in said Section 11, Article X of the Constitution are the maximum rates which the various boards are authorized to levy without the vote of the taxpayers.

However, we refer you to a copy of an opinion dated April 5, 1934, to Mr. Robert L. Murphy, Prosecuting Attorney of Unionville, Missouri, which pertains to the limitations of levies made on

account of the provisions of the 1931 school laws. We are enclosing a copy of this opinion for your information. It will be seen from this opinion that a School Board may levy the amounts prescribed by the Constitution, but in order to obtain the benefits under the 1931 school laws, it is limited by the provisions of that Act to 20 cents on the $100 valuation, unless authorized by a vote of the people to levy in excess of that rate. In other words, a board under the Constitution may levy the maximum rates prescribed in said section 11 without a vote of the taxpayers of the district. But if it levies in excess of 20 cents on the $100 valuation, it forfeits its rights to the minimum guarantee provided for in the 1931 school laws.

CONCLUSION

It is therefore the opinion of this Department, that by virtue of the provisions of the Constitution, the rate of tax for school purposes which the boards may levy in districts composed of cities which have one hundred thousand inhabitants or more, shall not exceed 60 cents on the $100 valuation and in all other districts the rates shall not exceed 40 cents on the $100 valuation.

We are further of the opinion however, that if such districts wish to receive the benefits of the minimum guarantees provided for in the 1931 school law, that they are only authorized to levy a rate not to exceed 20 cents on the $100 valuation, unless they be authorized by a majority of the voters who are taxpayers of the district, voting thereon.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

MOTOR VEHICLE FUELS: Oils and fluids sent for inspection
STATE HIGHWAY DEPARTMENT: to the State Inspector may be used by the State or its agencies.

- -

May 14, 1942

5-16

Mr. Louis V. Stigall
Chief Counsel
State Highway Department
Jefferson City, Missouri

FILE
86

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "As you of course know, we all anticipate state highway revenue will be cut very materially over what it has been for the last few years and this will grow progressively worse as tire and gasoline rationing increase so that there is a possibility of there not being sufficient funds at some time in the future to take care of highway bonds and interest and the necessary maintenance of existing state highways. The Board of Fund Commissioners met with the Highway Commission at its regular meeting this month and an effort was made to inaugurate all possible economy in the expenditure and use of state highway funds.
>
> "In pursuance of this policy, we contacted, among others, the State Oil Inspection Department, to which Department is appropriated $116,000 of highway department funds in addition to the $2,000,000 for refunds as shown on page 208 of the Laws of 1941. We discovered that the Inspection Department has a residue resulting from inspecting samples which they destroy each month approximately as follows: 200 gallons of gasoline, 10 gallons of kerosene and 10

gallons of fuel oil. While this residue probably is not suitable for ordinary use as gasoline, fuel oil, etc., it is possible for the Highway Department to use it for different purposes and thus save some costs which would otherwise be placed on the taxpayer. It also seems a shame in these war times to have to destroy any kind of usable property.

"The question, therefore, arises as to whether the Highway Department could furnish the Oil Inspection Department with containers and collect this residue for whatever use could be made of it by the Highway Department instead of having it destroyed by the Oil Inspector. Would this be legal under the provisions of Section 14,706, R. S. Mo. 1939, which provides in part that:

"'nor shall he (any inspector or deputy inspector), for the purpose of inspecting, testing or gauging the same, take away or appropriate for his own use, or for the use of others, any part or portion of said oils or fluids.'

"Of course, Section 14,688 makes it the duty of every dealer, distributor, producer or compounder of such oils

"'immediately on receipt of a consignment of the same, at his own expense, to express to the State Inspector of Oils, at his principal office, a properly identified sample of not less than eight fluid ounces of such oil so secured. * * * *.'"

Section 14688, R. S. Mo. 1939, provides in part as follows:

"* * * It is hereby made the duty of every dealer, distributor, producer, or

> compounder in such oils or fluids, immediately on receipt of a consignment of the same, at his own expense, to express to the state inspector of oils, at his principal office, a properly identified sample of not less than eight fluid ounces of such oil so secured, and said inspector shall determine whether or not such oil is subject to inspection and payment of the inspection fees: * * * *"

Under the above section it will be seen that while a sample of the oils or fluids must be sent to the State Inspector of Oils, yet there is no provision at all for the return of the same, nor is anything said as to the disposition of said fluid and oils.

Section 14706, R. S. Mo. 1939, provides as follows:

> "No inspector or deputy inspector shall, while in office, be interested, directly or indirectly, in the manufacture or sale of any of the oils or gasoline specified in this article, nor shall he, for the purpose of inspecting, testing or guaging the same, take away or appropriate for his own use, or for the use of others, any part or portion of said oils or fluids."
>
> (Underlining ours.)

The obvious purpose of the above statute was to prohibit the State Inspector of oils, or any of his deputies, from converting these oils and fluids to his own private and personal use or to give away to someone else for such use.

It is a well settled rule of statutory construction that a state and its agencies are not included in the purview of a

statute unless they are specifically made so. The general rule is stated in 59 C. J. 1103, as follows:

> "The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."

Also, in Morris v. State, 88 Okla. 189, we find the following:

> "The presumption obtains that it is the legislative intent to exclude the state from the operation of a statute for the reason that the laws are ordinarily made for the government of citizens and not the state."

This position is also sustained by Inhabitants of Whiting v. Inhabitants of Lubec, 121 Maine 121; State Highway Department v. Mitchell's Heirs, 216 S. W. 336.

It is a further rule of statutory construction that "in choosing between two meanings of not entirely unambiguous language, reason requires that to be chosen which will not render the act absurd and unenforceable in practice." Kansas City v. Public Service Commission, 210 S. W. 381, 276 Mo. 539.

We do not believe that it was the intent of the Legislature that these oils and fluids sent to the State Inspector of oils should be thrown away or destroyed. This would be an unconscionable waste and to so construe Section 14706, supra, would be to impute to the Legislature that they intended an absurd thing.

It will be further noted that the dealer or distributor, in sending in the sample, obviously intends to part with all title to such fluids and oils and does not intend or desire the return of same.

Therefore, we believe that the fluid and oils sent to the State Inspector of oils for inspection purposes may be used by the State of Missouri or its agencies.

CONCLUSION

It is therefore the opinion of this department that the oils and fluids sent by a dealer, distributor, producer, or compounder to the State Inspector of oils for the purpose of having them inspected, may be used by the State or its agencies.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K:CP

CITY COMMITTEE: A political party of the City of Independence has a right to select a (y committee to perform such duties as are given either expressly or by custom and practice.

February 24, 1942

2-25

FILE

Mr. John Francis Thice
Attorney at Law
Independence, Missouri

Dear Mr. Thice:

We acknowledge receipt of your letter of recent date requesting an opinion, which reads as follows:

> "The undersigned is Chairman of the City Central Committee of the City of Independence, and has been requested by Mayor Sermon to procure your opinion on the legality of the city committee as now constituted.
>
> "For many years back, so far back in fact that the memory of man runneth not to the contrary, the city has always formed a separate committee independent of the township committee. That practice was followed under the old convention system and is now followed in our city primary.
>
> * * * * * * * * *
>
> "It has been contended by some of the county committee that there is no provision in the state statutes for the selection of a city committee, and that primary elections held for the nomination of city officers must be called by the township committee and not the city committee.

> "We contend that the city has as much right to select a city committee as the county has to select the county committee, and that the city committee, selected at the primary election at the time the city officers are nominated, constitutes the only legal committee of the party located within the city.
>
> "Since the Mayor will be a candidate for the office of Mayor for a four-year term, he is very anxious to have the opinion of your office on the subject."

Your question, as we understand it, is whether the county committee elected under the provisions of Section 11572, R. S. Mo. 1939, should perform the duties imposed upon such a committee in connection with the city election of Independence, or whether such duties should be performed by a city committee selected within the confines of Independence.

You state that it is contended by some of the county committee that there is no provision in the state statutes for the selection of a city committee. We readily agree that this is true. It does not follow, however, that since no statutory provision is made for a city committee, that the members of a political party do not have the right to select such a committee. Neither does it follow that since the statutes provide for a county committee, that such a committee has the right to act for and as the city committee. While it is true that the legislature has the right to provide for the election and regulation of political committees, it is also true that when it has failed to do so, the party may act through such committee or committees as it chooses. 20 C. J., Sec. 158, page 136.

We think it plain from a reading of Section 11572, supra, that the committee provided for in said section is a county committee, whose duties are to a certain extent prescribed by law. The statutes do not give this committee any rights or powers in connection with a city election.

We note that the city has always formed a separate committee independent of the county committee composed of the township committeemen. In the case of State v. Becker, 237 S. W. 117, it was held that where the legislature had omitted to provide for senatorial committees in districts containing only one county, that the parties themselves may establish such committees in those districts. The court, at l. c. 121, said:

> " * * It is admitted in this case that for 14 years both parties have construed it against relator's claim, and party action for all that time has been carried on upon the theory opposed to that contended for by relator's counsel. This, according to well-known canons of construction, is of importance as pointing to the correct construction of an ambiguous statute.
>
> "Further, the serious character of the result of relator's construction, which has already been pointed out, is to be considered. In the circumstances, under the settled rules of construction, the statute is to be construed as presenting a simple case of legislative omission in so far as concerns senatorial committees in Jackson county. In that situation the party might act through such committee or committees as it chose. * * *"

Judge Graves, in a separate opinion, concurring in that portion of the opinion quoted above, at l. c. 123, said:

> "If senatorial committees have been provided for by law, this provision means these statutory committees. If such have not been provided by law, then this provision means such senatorial committee as party practice and custom have established. I understand my learned Brother to so rule."

We think it is a matter of common knowledge that the political parties in cities throughout the state are represented in city elections by a city committee independent of the county committee.

CONCLUSION

In view of all the above, it is the opinion of this department that a political party of the City of Independence has the right to select a city committee in such manner and with such authority as party practice and custom have established, and that such city committee has the right to perform all duties delegated by such party either expressly or by custom and practice.

Respectfully submitted

JOHN E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:HR

ELECTIONS:
REGISTRATIONS:
CHANGE OF RESIDENCE IN DISTRICT:

A voter who moves from one address to another in an election precinct should have his name transferred to the new address before he is entitled to vote.

July 29, 1942

7-31

FILED
88

Mr. H. Tiffin Teters
Assistant Prosecuting Attorney
346 Grant Street
Carthage, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

> "I have been requested by the Registars of the City of Carthage and the County Officials to obtain from you a ruling in regard to Section 11945 R. S. Missouri 1939 and Section 11951 R. S. Missouri 1939.
>
> "The former Statute states that persons once registered are not required to be registered until they have changed their domicile from the ward or precinct in which they are legally registered. The latter section 11951 provides that when anyone changes their residence within the precinct they shall notify the Clerk or the Board of such transfer.
>
> "The question presented for determination is whether a person may vote in the coming primaries if he is registered in the precinct although that person has moved and

changed his address within the precinct and has failed to notify the Clerk or Board of such change in address."

The statutes applicable to this question are as follows:

Section 11937.

"Every male and female citizen of the United States, and every person of foreign birth who shall have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to register, who is over the age of 21 years, who has resided in the State one year next preceding the election at which he offers to vote, and during the last 60 days of that time shall have resided in the city, and during the last ten days of that time in the ward or precinct at which he offers to vote, who has not been convicted of bribery, perjury or other infamous crimes affecting his franchise, nor directly interested in any bet or wager depending upon the result of the election, shall be entitled to vote at such election for all officers, state or municipal, made elective by the people, or at any other election or primary held in pursuance of the laws of the State; but he shall not vote elsewhere than in the election precinct where his name is registered, and whereof he is registered as a resident unless otherwise provided in this article."

Section 11945.

"Whenever any person who is qualified to vote has registered in any election district, ward or precinct, and so long as he is a qualified voter of said city, his name shall be carried on the registration books by the board of registrars and all persons who now are qualified to vote in any city under the provisions of this article shall not be again required to register until they have changed their domicile from the election district, ward or precinct in which they are legally registered."

Section 11951.

"Whenever any person who has been duly registered as a voter shall change his residence from one precinct in said city to another, or from one part of said precinct to another part thereof, shall after making such change at any time on or before the 10th day preceding any election, apply to the clerk of said board to have his name transferred from the precinct in which he is registered, or his residence changed from his former to his present residence in such precinct, the said clerk shall cause him to be sworn and examined as to the facts of such change, and his statement shall be taken down in writing and signed and sworn to by him and duly certified to the board; * * * * * * * * *"

By Section 5 of Article VIII of the Constitution of Missouri the framers of the constitution provided that the

General Assembly shall provide by law for the registration of voters in certain counties and cities. Pursuant to this direction the General Assembly has enacted the foregoing sections which pertain to cities of a population from 10,000 to 30,000.

A rule to apply in the construction of election laws is well stated by the St. Louis Court of Appeals in State ex rel. v. Jones, 79 Mo. App. 370, as follows:

> "* * * * The right to exercise the elective franchise is a constitutional one, the highest and most sacred political right that can be conferred upon the citizen, and all laws which abridge the right should be most strictly construed, and laws which impose upon the voter the performance of acts in the least burdensome or inconvenient, such as registration acts, as a prerequisite to the exercise of his constitutional right to vote, should also be strictly construed, and naught should be required that is not plainly and clearly written in the act. * * * *"

In the Jones case, supra, a question similar to the one which is here under consideration was before the court. The opinion in that case was written in 1899 and it passed upon the registration laws as they then applied to the city of St. Louis. That act contained similar provisions in relation to qualifications of voters and duties as to registration as does the act here under consideration, with the exception of the provisions of Section 11951, supra, applying to the duties of the registrant in case he changes his address from one place to another in a precinct to have his name transferred on the registration books. In the Jones case the court held that where the voter is once registered he is not required to again register until the next general registration, unless he has,

since registering, removed to another precinct; but not because he has moved to another house in the same precinct.

At l. c. 375 in the Jones case, the court, in speaking of what the Legislature might have done to clarify such a situation, said:

> "* * * It might have served to prevent confusion had the General Assembly required the voter in such cases to appear before the board of registration and give notice of his removal and have the fact of his change of residence noted in the registration book, but no such requirement is found in the act, and the courts can not write it into it by construction. * * * * * * * * * * * * *"

Following the suggestion made in the Jones case, the lawmakers apparently have included in registration acts provisions such as are in said Section 11951, supra, providing that where a voter changes his residence from one part of a precinct to another part thereof to apply to the Clerk of the Board to have his name transferred. Since the court in the Jones case suggested such a provision, and since the lawmakers have apparently followed this suggestion, we think this is a reasonable requirement and does not violate the provisions of Section 2 and Section 5 of Article VIII of the Constitution or of the Fourteenth Amendment of the Federal Constitution.

In the case of State ex rel. Meyer v. Woodbury, 321 Mo. 275, 10 S. W. (2d) 524, the registration act which applies to Kansas City was before the court and the reasonableness of this act was under consideration and, since the act contains many provisions similar to the act here under consideration, and since the court in that case held that the provisions of that act were reasonable, we think the court would hold the same if applied to the part of this act which requires the

voter in case he changes his residence in his precinct to request that his name be transferred.

CONCLUSION

It is, therefore, the opinion of this department that a person who has changed his address within the precinct in which he has registered and has failed to notify the Clerk or Board of such change may not vote in the coming primary.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

ELECTIONS: WAR BALLOTS and ABSENTEE BALLOTS: Public Act 712 of Congress does not relieve Election officials of duty to furnish absentee ballots to persons in military service.

- -

October 9, 1942

10-9

FILED
88

Mr. William H. Tellman
Clerk of the County Court
Cole County
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date which is as follows:

> "We are faced with a legal question upon which we are asking you to rule.
>
> "We are in receipt of a request from a citizen of Cole County, who is now in the military service, asking us to forward an absentee military ballot to him. We find that the Secretary of State of Missouri has reported to us that this voter has applied for the Official War Ballot, provided under Public Law 712, Seventy-seventh Congress, Second Session, and that that ballot has been forwarded. We are in doubt as to our right to forward the Missouri absentee military ballot. We have communicated with the Secretary of State concerning the matter. He explains that his office has no authority for giving legal advice, that being the function of the Attorney General, and he suggests that we ask you for an opinion in which request he joins."

Public Law 712, which is an act of the 77th Congress, provides for a war ballot for absentee voters in military

service. Such voters by this ballot may vote for electors for President and Vice President, or for Senator or Member of the House of Representatives. Request for the War Ballot is made to the Secretary of State.

Sec. 5. (a) of said Public Law 712 provides as follows:

> "The secretary of state of each State shall cause to be prepared and printed, for use in voting under this Act, an appropriate number of official war ballots. Such ballots shall provide for voting for electors of President and Vice President of the United States, United States Senators and Representatives in Congress, and may, in case the State legislature of his State shall have authorized it, also provide for voting for candidates for State, county, and other local offices, and with respect to any proposed amendment to the State constitution or any other proposition or question which is to be submitted to a vote in the State. Such ballots shall be uniform in size and in style of type, and the type and paper shall conform generally to that used for the regular official ballots of the State. Such ballots shall be printed in such form as may be appropriate for carrying out the provisions of this Act."

Since our legislature has made no provision for such voters to use the "war ballot" to vote for any officers then we look to the Constitution and statutes for further consideration of the question.

Section 4 of Article I of the Constitution of the United States is as follows:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the

> Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day."

Section 1 of Article II of said Constitution provides in part as follows:

> "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same time, be elected as follows:
>
> "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.
>
> "Time of choosing electors. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

By these provisions it will be seen that the time and manner for electing the President, Vice President, Senators and Congressmen has been left to Congress. Public Law 712 was enacted by virtue of this authority.

In Ex Parte Siebold, 100 U. S. 371-399; 404-422; 25 L. ed. 717, the Supreme Court of the United States had before it for consideration the question of whether or not both Congress and a Legislature could legislate on the subject of the mode and manner of electing Presidents, Vice Presidents and Members of Congress, and the court said, l. c. 722:

> "So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such."

Since, therefore, Congress has, by Public Law 712, made regulations as to the method by which soldiers and sailors may vote absentee ballots for members of Congress, such regulations must be followed by the Secretary of State. It is, therefore, that official's duty to furnish soldiers and sailors, upon request, absentee ballots by which they can cast their vote for members of Congress.

However, nothing in Public Law 712 in any way undertakes to regulate the method by which soldiers and sailors can vote for State, county, and local officers. Therefore, the State statutes on such absentee voting will prevail as to voting for such officers. It would, therefore, be the duty of the County Clerk to furnish, upon request, to soldiers and sailors absentee ballots in accordance with the State regulations.

The absentee ballots which the County Clerk has, will, no doubt, include the candidates for members of Congress. In this connection attention is directed to Sec. 9 of Public Law 712, which reads as follows:

> "The votes cast as provided in this Act shall be canvassed, counted, and certified in each State by its proper canvassing boards in the same manner, as nearly as may be practicable, as the votes that were cast within its borders were canvassed, counted, and certified,

> but no official war ballot shall be valid if the voter has voted in person or by absentee ballot in accordance with the procedure provided by the laws of the State, or if it is received by the appropriate election officials of the district or precinct or county of the voter's residence after the hour of the closing of the polls on the date of the holding of the election."

It will be observed from the foregoing section that the official war ballot, which is the one issued by the Secretary of State, shall not be valid nor counted for candidates for Federal offices if such voter has either voted in person or by absentee ballot in accordance with the provisions of the State laws. Therefore, should a soldier or sailor by oversight vote both the official war ballot and the absentee ballot furnished by the County Clerk for a candidate for Congress, the vote for such candidate for Congress, as shown by the absentee ballot furnished by the County Clerk, would be the one to be counted.

CONCLUSION

It is, therefore, the opinion of this department that the County Clerk should furnish to absentee soldiers and sailors, upon request, absentee ballots in accordance with the State law, notwithstanding the provisions of Public Law 712 of the 77th Congress.

Respectfully submitted,

TYRE W. BURTON

HARRY H. KAY
Assistants Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri.

TWB/HHK:CP

TOWNSHIP ORGANIZATION: Governor may order audit of township under Section 13105 R. S. Missouri, 1939.

March 4, 1942

3514

Hon. William S. Thompson
Prosecuting Attorney
Mercer County
Princeton, Missouri

FILE
89

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Will you please give me your opinion on the following: Section 13105 R. S. M. for 1939 provides as follows: 'The Governor may at any time, when in his judgment the public interest of the state will be conserved, select competent auditors or accountants to audit the accounts of any department, office, commission, board, bureau, institution, or any subdivision of the state; also road districts, school districts, townships, municipalities and counties receiving for or from the state any money.'
>
> "The township board and other residents of Lindley Township, Mercer County, Missouri, are of the opinion that the township books should be audited as they believe the township funds are not being properly handled and accounted for.
>
> "Lindley Township receives private car tax from the state and hence it appears to me that the township would be entitled to an audit under this Section of the statutes.

> "It was my opinion that the appointment of an auditor under this Section would properly be in the hands of the Governor, but I must have been in error as I have written the Governor and have received no response to my letter.
>
> "Will you kindly give me your opinion as to whether or not Lindley Township is entitled to an audit of the township books under Section 13105 and if so what procedure to take in order to have an auditor appointed."

Section 13105 R. S. Missouri, 1939, reads as follows:

> "The Governor may at any time, when in his judgment the public interest of the state will be conserved, select competent auditors or accountants to audit the accounts of any department, office, commission, board, bureau, institution, or any subdivision of the state; also road districts, school districts, townships, municipalities and counties receiving for or from the state any money."

Under the above Section it is specifically stated:

> " * * * <u>may</u> at any time, when in his judgment * * * ."

Under the above section it is discretionary with the Governor and not mandatory to order an audit of any of the departments set out in this section. Generally, in statutes

the word "may" is permissive only, and the word "shall" is mandatory. (State ex rel McKittrick v. Wymore, 119 S. W. (2d) 941.)

Section 11291 R. S. Missouri, 1939, provides that county courts shall apportion the private car tax to the townships for the use of said township in the permanent construction of roads.

Since Section 13105, supra, includes townships receiving any money from the State an audit may be ordered by the Governor.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the township books of Lindley Township may be audited by an auditor appointed by the Governor, under Section 13105 R. S. Missouri, 1939, but it is discretionary with the Governor as to whether or not he should order the audit.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CIRCUIT CLERKS: May give cause for ouster by failing to personally
COUNTY CLERKS: devote time to duties of office.

CONTRACTS: For purchase of supplies for office are void where clerk represents seller.

- -

April 18, 1942

4-23

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

FILE
89

Dear Sir:

Under date of April 11, 1942, you wrote this office requesting an opinion, as follows:

> "I respectfully request an opinion upon the following:
>
> "1. Does an elective official, such as a County Clerk, Circuit Clerk, etc., subject himself to ouster if he takes private employment, which necessitates absence from his office several days each week?
>
> "2. Can such official sell to himself stationery, books and other supplies of his office and render the County liable therefor, assuming that such purchases are necessary and are within the official's budget?
>
> "The facts upon which the above questions are propounded are as follows: a county official is employed by a stationery company. He is away from his office about three days a week, leaving deputies in charge. When stationery, books and other supplies

> are needed for his office, he orders such supplies from the firm with which he is connected and the County is billed. The supplies purchased are within his budget."

Section 18 of Article II of the Constitution requires an officer to personally devote his time to the performance of his duties, as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Further, Section 12828, R. S. Mo. 1939, provides for the forfeiture of office and removal of an officer for certain things, including failure to personally devote his time to the performance of his duties, as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with

> respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In the early case of State ex rel. Tilley v. Slover, 113 Mo. 302, the Supreme Court upheld the ouster of a court stenographer of Jackson County who appointed a deputy, left the duties of the office to be performed by the deputy, went to Buchanan County and there acted as court stenographer. The ouster was upheld because the officer was not personally devoting his time to the performance of his duties. And, in the case of State v. Yager, 250 Mo. 388, an ouster action against a sheriff, where one of the alleged causes of ouster was a wilful failure to attend circuit court when it was in session, the court said absence, except upon pressing official duty or because of other lawful excuse, was neglect of office.

In the Constitutional Convention, which prepared the Constitution of 1875, when Section 18, Article II was under discussion, it was stated the purpose of the section was to prevent the farming out of offices by persons chosen to fill them, that is, the acceptance, and appointment of a deputy, drawing the salary and permitting the work to be performed by the deputy.

Attention is called to the fact that neither the section of the Constitution above cited, nor Section 12828, R. S. Mo. 1939, requires that the officer devote <u>all</u> of his time to the performance of his duties or that he perform <u>all</u> of the duties in person. It would seem an officer is not precluded from accepting private employment or having other interests if he personally devotes as much time to the performance of his official duties as is required by the nature of the office and the amount of business to be transacted. However, if, while in the performance of private employment he wilfully neglects to devote so much of his time to the performance of his duties as is required by circumstances there would unquestionably be grounds for bringing an action to oust the officer.

The brief statement of facts contained in your letter fails to state whether the duties of the office are being fully performed or whether the business of the public is suffering by reason of the private employment of the officer. If, after a further investigation, you find the officer is not personally devoting as much of his time to the performance of his duties as is required by the nature of the office, the amount of business in the office, and the nature of the duties, for the office to be efficiently administered under the personal supervision of the officer, or that the business of the office is being permitted to suffer by reason of the private employment of the officer, beyond any question the officer would be subject to have an ouster suit filed against him.

In regard to your second question, no statutory provision prohibiting such practices has been found. The situation as explained by your letter is a strange one. Stated briefly the question is, may a county officer in his official capacity as an officer purchase from himself, as agent of a private business concern, supplies to be used in his official capacity.

Inasmuch as your letter states the purchases are within the budget estimate and seems to assume the right of the individual officer to purchase the supplies for his office these matters will not be discussed herein. But the opinion will be limited to a discussion of the question as set out in the preceding paragraph.

In this state there seems to be a well defined public policy as regards financial transactions had by officers with the municipal corporation in which they hold office. The members of the county court, the business managers of the county, are forbidden to become a party, either directly or indirectly, to any contract to which the county is a party. Section 2491, R. S. Mo. 1939. And, by statute, officers of cities are not permitted to have an interest in city contracts. Sections 6276, 6676, and 6896, R. S. Mo. 1939, relating to cities of the first, second and third class respectively. These are but a few of the many statutes which forbid officers to be interested in contracts with the municipal corporation of which they are officers.

It would seem a contract in which a county clerk or a circuit clerk in his official capacity would purchase from himself as agent for a private concern supplies for the county would be a contract in which the clerk had an interest, for his compensation would, in all probability, depend at least in part upon his sales. This being true the transaction would appear to be contrary to the public policy of the state.

"Public policy" is hard to define. In regard to this it is desired to call to your attention the following discussion of public policy from the case of Montgomery v. Montgomery et al., 142 Mo. App. 481, l. c. 486:

> "The court must have sustained this demurrer for the reason that he thought the contract sued upon was against public policy, and it is to this ground of the demurrer that we shall direct our attention. Just what contracts shall be considered void as against public policy cannot, in every case, be readily determined because the circumstances under which they may be made and the conditions of the parties which may induce the execution of a contract vary so much that a general rule that will apply to all cases cannot be laid down. It has been said that, 'Precisely what public policy is in any given case may frequently be a matter of contention, and its application made a subject of dispute. The strict meaning of the expression has never been defined by the courts, but has been left loose and free of definition in the same manner as "fraud." This rule, however, may be safely laid down that whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy.' (Pueblo & A. V. R. Co. v. Taylor, 45 Am. Rep. 512 (citing

Story on Cont., par. 546); McNamara v. Gargett, 36 N. W. 218.)

"Our own Supreme Court in Kitchens v. Greenabaum, 61 Mo. 110, said, 'Courts have yet never ventured to define in specific terms the meaning of the phrase "public policy," but the general rule has been laid down that whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy.' (Citing Story on Cont., par. 675.)

"The Supreme Court of Georgia makes the following very appropriate observation:

"'Judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before the court would be warranted in pronouncing a transaction void on this account. It is said that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' (Smith v. Du Bose, 78 Ga. 413, 3 S. E. 309-314.)

"While no general rule applicable to all cases can be laid down, yet it is universally agreed that the promotion of public and private morals is one of the chief purposes of the law, and no agreement which tends to defeat that purpose will be tolerated. * * * * * *"

In the early case of Peltz v. Long, 40 Mo. 532, l. c. 537-538, is found the following discussion of contracts contrary to public policy:

> "That all contracts which are immoral in their nature, or contrary to public policy, or contravene any established interest of society, are void and incapable of enforcement, must be considered as settled propositions of law. It is not necessary that the contract should be expressly illegal; but whenever it is opposed to public policy, or founded on an immoral consideration, no action can spring out of it, the maxim being ex turpi causa non oritur actio. In such cases the law will not intervene in behalf of parties who present themselves in the attitude of wrongdoers; it will not listen to their prayers for relief, but will leave them just where their conduct has placed them. Therefore Ld. Mansfield, in Smith v. Bromley, Doug. 695, says: 'If the act is immoral in itself, a violation of the general laws of public policy, then the party paying shall not have his action (to recover back the money); for where both parties are equally criminal against such general laws, the rule is potior est conditis defendentis.' Chancellor Kent, in Griswold v. Waddington, 16 Johns. 486, in one of the ablest opinions that ever emanated from his luminous mind, remarks: 'The plaintiff must recover upon his own merits, and if he has none, or if he discloses a case founded upon illegal dealing and founded on an intercourse prohibited by law, he ought not to be heard whatever the demerits of the defendant

> may be. There is to my mind something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books.' Ld. Alvanley, in Monk v. Abel, 3 Bos. & P. 35, declares that 'the principle to be extracted from the cases on this subject is, that no man can come into a British court of justice to seek the assistance of the law, who founds his claims upon a contravention of the British laws.' Such contracts have a tendency to familiarize the mind with fraud, to weaken and destroy the force of just and lawful restraint, and induce a defiance of legal obligations, and ought therefore to be rejected. They are, in the expressive and characteristic language of Ld. Ch. Justice Wilmot, contracts 'to do that which is injurious to the community; and the reason why the common law says that such contracts are void, is the public good. You shall not stipulate for iniquity.'"

In the matter here under consideration there is not even a hint of irregularity in connection with the contract, but to permit an officer to contract with the body of which he is an officer would be furnishing an excellent opportunity for a dishonest person to perpetrate innumerable frauds.

At this point it is desired to quote briefly from the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 861:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N. C. 578, 194 S. E. 309; 46 C. J. 1037 Sec. 308."

CONCLUSION

From the foregoing the conclusion is reached that a contract made by a county officer, in his official capacity, with himself, as agent for a private concern, for supplies to be furnished the county is void.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

SEEDSMAN'S LICENSES: Manager of a "Community Sale" who sells for a farmer seeds grown by the farmer is not required to have a seedsman's license.

April 27, 1942

513

FILE
89

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

We have for answer your opinion request of April 15, 1942, which is as follows:

"Request is respectfully made for your opinion upon the following:

"Is the manager of a 'community sale', who auctions agricultural seeds for a farmer and who receives a commission for such sale and who does not have a permit violating Section 14,267 of the Revised Statutes for 1939?

"The facts upon which this question is asked are as follows: A, who is a farmer, producing agricultural seeds, but not primarily engaged in such production takes the seeds to the community sale. He retains the right to withdraw the seeds from the sale at any time. The auctioneer, after the sale is made deducts his commission or selling charge and the balance goes to the farmer.

"Under the statute the farmer may sell the seeds without first securing a permit. Is there such a distinction between that method of sale and having the auctioneer sell it, as to require the auctioneer to have a permit?"

Section 14267, R. S. Mo., 1939, provides that anyone selling seeds as defined in the law shall obtain a license therefor. That section is as follows:

> "It shall be unlawful for any seedsman to sell, distribute, offer or expose for sale or distribution in this state, any agricultural seed or mixture thereof, or vegetable seed as defined in this law, without first securing a permit approved by the department of agriculture, which permit shall be issued annually by the department of agriculture upon the payment of an annual fee of one dollar. Such permit shall expire December 31st of each year. All permit fees paid to the department under this law, shall be deposited in the state treasury to the credit of the agricultural fees fund, subject to appropriation by the general assembly: Provided, however, that the term seedsman as used in this section shall be defined as a person, firm or corporation engaged in the buying, selling, exchange, offering or exposing for sale of agricultural seeds or mixture thereof, or vegetable seeds as defined in this law; and the said term seedsman shall not apply to a farmer selling agricultrual seeds of his own production, the production of which agricultrual seeds is not a primary endeavor, and primary source of income to said farmer; nor shall the term seedsman apply to a person, firm or corporation,

> or cooperative association doing a local or retail business in the state of Missouri, provided said seed bears the label and permit number of a seedsman." (Underscoring ours)

The law is well settled in this state that where a statute is plain and unambiguous it is not necessary to place a construction upon it. It is only necessary to take the obvious intent of the Legislature and act in accordance therewith. In State v. Keller, reported in 137 S. W. (2d) 989, l.c. 990, the court said:

> " * * * * In construing this statute the following well established rule should be kept in mind: Where the language of a statute is plain and unambiguous nothing contrary to the evident intent can be implied. State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S. W. 2d 640. A statute should be so construed as to give effect to the legislative intent. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 106 S. W. 2d 898. A statute that is clear in its terms and leaves no room for construction must be enforced as written. Dahlin v. Missouri Commission for Blind, Mo. App., 262 S. W. 420.* * * * "

In the case of Fichtner v. Mohr, reported in 16 S. W. (2d) 739 l.c. 741, the court said as follows:

> " * * * * * We are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the language used is plain, it must be given effect by the courts. * * * "

In the case of Cummins v. Kansas City Public Service Co. 66 S. W. (2d) 921 l. c. 925, the court said as follows:

> " * * * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically', is properly given consideration. See Grier and Meyering Cases; 2 Lewis, Sutherland on Stat. Const. (2d Ed.) section 363; Endlich on Interpretation of Statutes, section 329; and Maxwell on Statutes (5th Ed.) 425. * * * * "

In 36 Cyc. 1106, it is said as follows:

> " * * * * The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. * * "

In the primary analysis we must accept the definition of a seedsman as set out in the statute. The statute makes two exceptions in the definition of a seedsman: one of which is that the term "seedsman" shall not apply to a farmer selling agricultural seeds

of his own production, the production of which agricultural seeds is not a primary endeavor and primary source of income to said farmer; and the second exception is that the term "seedsman" shall not apply to a person, firm, or corporation or cooperative association doing a local or retail business in the State of Missouri if the seeds sold at such sale bear the label and permit number of the seedsman. This section is not ambiguous, and very plain in its meaning.

Our understanding of a "Community Sale" is a sale where a person brings anything he wishes to sell and the auctioneer asks for bids. The merchandize brought to the sale is sold to the highest bidder. The person bringing the merchandize for sale has a right to accept or refuse the bid offered. It then becomes a question of agency. The law has been long settled that an auctioneer is both the agent of the seller and the buyer. He is the agent of the seller when he makes the sale, and when the bid is accepted he then becomes the agent of the buyer.

A manager of a "Community Sale" as we understand it provides the place or barn where the sale is conducted. He hires an auctioneer who conducts the sale and is paid by the manager for his services. In other words the farmer designates the manager of the "Community Sale" as his agent and the auctioneer who sells the merchandize is the sub-agent of the manager of the sale.

A further reading of the statute shows that irregardless of the fact that the manager of the "Community Sale" might be selling products of a "seedsman", the seeds so sold would have to be labeled and the manager of the

"Community Sale" would then become the agent of the "seedsman" and would not have to purchase a license as provided in the statute.

CONCLUSION

It is, therefore, the opinion of this office that a manager of a "Community Sale", who sells seed either at a local sale or at retail for a farmer whose primary endeavor and primary source of income is not the production of agricultural seeds, does not have to purchase a license as provided for in Section 14237, R. S. Mo., 1939.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

HOME GUARD:
MISSOURI RESERVE FORCE: Called to active duty does not furnish grounds for forfeiture of county office.

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May 6, 1942

5-13

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carrollton, Missouri

FILE
89

Dear Sir:

Under date of April 29, 1942, you wrote this office requesting an opinion, as follows:

> "May I ask your opinion on the proposition of whether or not a County official, who, as a member of the Home Guard, and who is called for active service either within or without the State, forfeits his office, as a result of such membership and service?"

The Home Guard, or Missouri Reserve Force, is organized under authority of Sections 15019 and 15020, R. S. Mo. 1939, and Article XIII of the Constitution of Missouri.

Inasmuch as the Home Guard is an authorized force of the State and there is no prohibition against a county official being a member of the force, that would constitute no ground for forfeiture of the county office.

The grounds for forfeiture of office are set out in Section 12828, Article 3, Chapter 83, R. S. Mo. 1939, which reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such

> officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Also, in this connection, it is desired to call to your attention Section 18, Article II of the Constitution, which reads as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Your letter does not state facts sufficient to constitute a case upon which a forfeiture of office could be adjudged under the above statutory and constitutional provisions.

CONCLUSION

A situation might arise where a county officer who was a member of the Home Guard and called to active duty would

forfeit his office. But it is the conclusion of the writer that a county officer, who is a member of the Home Guard or Reserve Force, does not automatically forfeit his county office solely by reason of a call to active duty as a member of the State's authorized military force.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General

OFFICERS: Prosecuting Attorney relinquishes right to compensation by accepting Commission in the Navy and reporting for duty.

- -

May 9, 1942

6-20

FILED
89

Hon. Arthur Thomason
Clerk of the County Court
Clay County
Liberty, Missouri

Dear Sir:

Under date of April 28, 1942, you wrote this office requesting an opinion as follows:

> "No doubt you are acquainted with the situation here in Clay County as to our Prosecuting Attorney. About three weeks ago he enlisted in the Naval Reserve for the duration of the war and he has an assistant attending to his duties.
>
> "What we would like to know is: Will it be permissible or lawful for the County Court to issue a warrant in favor of Conn Withers for his duties performed in his office.
>
> "We will appreciate your immediate consideration of this letter and a prompt answer."

Later, in response to an inquiry from this office, you furnished the additional information that Conn Withers had reported for active duty and was a commissioned officer.

The right of a public officer to the salary of the office is a right created by law and is an incident to the office. State ex rel. v. Walbridge, 153 Mo. 194, l. c. 203, C. J. Vol. 46, p. 1015 and State ex rel. Gordon, 245 Mo. 12, l. c. 28

from which case the following quotation is taken.

> "It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. As to the right of the de facto officer to draw the salary during his incumbency, the authorities are not harmonious. Both Throop and Mechem lay down the rule, based upon New York decisions, that the de facto officer has no right to the salary, and this because a claim for salary must be based upon title. (Throop on Public Officers, Sec. 517; Mechem's Public Offices and Officers, Sec. 331.) And such is the holding in many jurisdictions. Our court, in several cases, adheres to the contrary doctrine. (State v. Draper, 48 Mo. 213; State v. Clark, 52 Mo. 508; State v. John, 81 Mo. 13; Dickerson v. Butler, 27 Mo. App. 9; State ex rel. v. Walbridge, 153 Mo. l. c. 202.) All the authorities, however, agree that the de jure officer, on establishing his title, may recover from the de facto officer the compensation which the latter has received."

Also in the case of Luth v. Kansas City, 203 M. A., page 110 these two cases were followed at l. c. 113:

> "In this State it is held that a salary is attached to and depends upon the legal title to the office and that the de jure claimant is entitled to the salary even though he has not occupied the office or performed the duties thereof. (State ex rel. v. Walbridge, 153 Mo. 194, 203; State ex rel. v. Gordon, 245 Mo. 12, 28,

> 29.) And following the logical result of the rule stated in those cases it was held in Sheridan v. St. Louis, 183 Mo. 25, 38-40, that a de facto officer who has performed the functions of the office cannot recover the salary attached to such office. Throop on Public Offices and Mechem on Public Office and Officers cited in those decisions sustain them."

From your letter it seems the sole question is whether or not a warrant should be issued to the person who was duly elected and qualified as prosecuting attorney of the county and no question has arisen as to payment to some other person or as to the title to the office.

It is apparent from the foregoing that title to the office carries with it the compensation provided by law for the officer so long as title to the office remains in the officer.

Section 5 of Article XIV of the Constitution provides that all officers elected or appointed shall hold office during their official terms, subject to the right of resignation, and until their successors are chosen and qualified, subject to the right of resignation. The Constitution and Statutes also authorize and make provision for the ousting of officers for certain causes. Your letter makes no mention of the expiration of the term for which Mr. Withers was elected, or of an ouster or a resignation. Mr. Withers would then be entitled to receive the compensation attached to the office, unless his acceptance of a Commission in the Navy or Navy Reserve and going on active duty would deprive him of his right to receive the compensation of the office.

In considering this question it is desired to call attention to Section 4 of Article XIV of the Constitution of Missouri, as follows:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

A person in civil life becomes an officer of the Navy by becoming an applicant for a commission recommended for appointment and being appointed by the President in accordance with Section 851, Title 34, U. S. C. A. Taking the oath of office, required by Section 16, Title 5, U. S. C. A. And the pay of such person as an officer of the Navy commences upon the date of his acceptance of the Commission. Section 862, Title 3, U. S. C. A.

From your brief statement of facts under the Sections of the statutes it would seem that Mr. Withers has accepted an office of profit under the United States. For an office of profit is an office to which there is attached compensation and the amount of the compensation is not material. Baker v. Board of County Commissioners, 59 Pac. 797.

Mr. Withers has accepted an office of profit under the United States, which is contrary to the provisions of Section 5, Article XIV of the Constitution of Missouri, supra. By so doing he has impliedly resigned his office under the State of Missouri. A resignation may be written, oral or by implication. 46 C. J. p. 979, paragraph 132, provides:

> "A resignation of a public office, to be effective, must be made with the intention of relinquishing the office, accompanied by the act of relinquishment. It is not necessary that a resignation from a public office be couched in any particular words, it being only necessary that the incumbent evince a purpose to relinquish the office. Where no particular mode of resigning an office is provided by constitutional or statutory requirements, no formal method is necessary; it may be by parol, or it may be implied."

The Governor did not immediately name a successor to Mr. Withers and the duties of the office were performed by a deputy under the supervision and direction of Mr. Withers. There is authority for the appointment of a deputy prosecuting attorney. Section 12962, R. S. Mo. 1939.

Mr. Withers had evidence of title, his certificate of election and commission, although he had resigned the office he still continued to function, and there was no other claimant for the office or the salary. Discharging the duties of the office and having color of title would constitute him a de facto officer.

A de facto officer is one who holds an office by some color, right or title and assumes to perform the duties of the office. City of Republic v. Smith, 139 S. W. (2d) 929. In the case here under consideration, Mr. Withers, while having impliedly resigned, had evidence of title and no successor had been appointed and he was discharging some duties and supervising and directing others.

A de facto officer without color of title cannot claim the compensation attached to an office. Sheridan v. St. Louis, 183 Mo. 25. Yet there is a long line of cases holding that a de facto officer in possession of the office and performing the duties may recover the compensation. Dickerson v. City of Butler, 27 Mo. App. 9; State ex rel. v. Gordon, 236 Mo. 142; State ex rel. v. John, 81 Mo. 13; Hunter v. Chandler, 45 Mo. 457.

CONCLUSION

From the foregoing it is believed there is authority for paying the salary of the office of prosecuting attorney to Mr. Withers, until his successor is chosen or, until he abandons the performance of duties in connection with the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General

PENAL INSTITUTIONS: Procedure necessary to transfer delinquents from State Industrial Home for Girls to the Missouri State School for Feeble-minded and Epileptic at Marshall.

May 27, 1942

Miss Stella Thompson
Superintendent
Industrial Home for Girls
Chillicothe, Missouri

FILE
89

Dear Miss Thompson:

We have your request of February 18, 1942, together with supplemental data furnished by you, and which request is, in substance, this:

> "I will appreciate your advice as how to best proceed in attempting to get the transfers made (i. e., the girls which you think are incorrigible or feeble-minded) from the Industrial Home For Girls at Chillicothe to the Missouri State School for Feeble-minded and Epileptic."

The statutes of this state very clearly set out the method and procedure necessary to make such a transfer. Section 9014, R. S. Missouri, 1939, is as follows:

> "No court or magistrate shall sentence any neglected or dependent girl to said institution, or any girl who is insane or idiotic, or afflicted with an incurable disease or enceinte, or who is so incorrigible that, in the opinion of the officer sentencing her, there is not a fair possibility of her reformation."

The statute here sets out the type of girl who may be sentenced to the State Industrial Home for Girls. It also sets out the type of girls who may not be sentenced to the said institution.

Section 9015, R. S. Missouri, 1939, is as follows:

> "The officer in charge of the institution, by and with the written consent of the director of penal institutions, shall be authorized and empowered to return whence she came any girl who shall be found to be incorrigible or an improper subject for admission; and thereupon the court or magistrate by whom the said girl was committed, or his successor in office, shall have power to pass such sentence as would have been legal in the first instance if said girl had not been sent to said industrial home."

This section provides that if a girl has been sentenced to the State Industrial Home for Girls, and after the comitment she is found to be the wrong type of person to be in the said institution, she shall be returned to the place from whence she came and the court shall then act de novo and place her in the institution to which she properly belongs.

Section 9392, R. S. Missouri, 1939, sets out the procedure necessary to place a person in the Missouri State School for Feeble-minded and Epileptic, and also, what type of person shall be admitted. This section is as follows:

> "There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose

parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accomodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, christian and surname, the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part, and if in part only, stating what part; and stating also the degree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court, or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper candidate for admission to the colony. State patients, whether of age or under age, may also be received

into the colony upon the official application of any judge of a court of record: Provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients hereinafter admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of five dollars per month for each of such state patients." (Underscoring ours.).

CONCLUSION

It is, therefore, the opinion of this Department that in order to transfer a person from the State Industrial Home for Girls to the Missouri State School for the Feeble-minded and Epileptic, at Marshall, Missouri, the only thing necessary is for the officer in charge of the State Industrial Home for Girls, with the written consent of the director of penal institutions, to return the person to the place from which she came and the Judge of the court, or his successor in office, shall then have the power to sentence the person to the place where she should properly be confined.

Respectfully submitted

APPROVED:

ERNEST HUBBELL
Assistant Attorney-General

ROY McKITTRICK
Attorney General of Missouri

GW
ER/rw

COUNTY OFFICERS: Entitled to collect full salary for each year although amount not fully included in budget.

June 2, 1942

v/12

6-5

Hon. Arthur Thomason
Clerk of the County Court
Liberty, Missouri

FILE
89

Dear Sir:

This will acknowledge receipt of your letter of May 27, 1942, in which you request an opinion as follows:

"By instruction from the county court of Clay County, Missouri, I am writing to you for an opinion in the matter of a bill presented to the county court by Conn Withers, Prosecuting Attorney of Clay County, Missouri, for the year 1941.

"Mr. Withers made his budget for 1941 and was passed by the County Clerk and County Court for the sum of $3125.00 and Mr. Withers made his monthly bills to the County Court which were paid.

"Now being as the year 1941 has passed and Mr. Withers has resigned in the month of April, 1942, he presents to the Court a bill in the amount of $625.00. It seems by the last census the population of Clay County exceeded 30,000, therefore the salary of said Prosecutor was increased according to law.

"The Court desires to know if under the circumstances is it mandatory that they issue a warrant in the sum of $625.00 for salary due according to the statutes.

"We further request that you give to us an opinion in the matter of salary of the Prosecuting Attorney after he entered the military service.

> "It is understood that he entered such service on or about April 5th, 1942.
>
> "He has presented to this court a bill for his services as Prosecuting Attorney for the month of April and 20 days for the month of May, 1942.
>
> "If he is authorized to employ an assistant and draw his salary as such Prosecutor, we will be glad to pay same, but do not want to issue warrants that are contrary to law."

In this request you ask for opinions on two questions concerning the payment of salary to Conn Withers, former Prosecuting Attorney. Your first question, is it mandatory upon the County Court to issue to Mr. Withers at this time a warrant for a portion of the salary due him for the year 1941 which was unpaid at that time, will be answered by this communication. Your second question, relating to the payment of salary from the time Mr. Withers entered the Naval service in April until the 20th day of May, you had previously asked and a separate opinion is being prepared on that question.

In regard to the first question, the failure to include in the budget for 1941 the proper amount for the Prosecuting Attorney's salary does not preclude the Prosecuting Attorney from collecting the balance remaining. It is stated in Gill v. Buchanan County, 142 S. W. (2d) 665, l. c. 668:

> "Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of $4,500 each. (Only $840 more than the total of salaries figured at $3,000 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The

action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S. W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law,

> which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."
>
> (Underscoring ours.)

If the former Prosecuting Attorney has a valid claim, as he would have under the statement of facts contained in your letter, and the rule in the case of Buchanan County, supra, it remains to be determined whether or not there is a mandatory duty upon the County Court to issue to Mr. Withers a warrant for the unpaid balance at this time. This question cannot be definitely answered by this office for the reason that we have no information concerning the budget of Clay County for the year 1942, or the financial condition of the County. However, it is possible to make some suggestions from which you will be able to determine whether or not a warrant should be issued at this time for the unpaid balance of salary due in the year 1941.

The revenue anticipated for the year 1942, and upon which anticipated revenue the budget for 1942 is based, is first chargeable with obligations falling due in 1942. And no debts for prior years may be paid from the 1942 revenue unless there is a surplus remaining after paying the necessary charges for the year 1942. Absent a surplus which is free from charges for budgeted items, there would be no authority for issuing a warrant at this time.

CONCLUSION

It is the conclusion of the writer that under the statement of facts contained in your letter Mr. Withers has a valid and enforceable demand for an unpaid balance of salary. If

there is a surplus in the anticipated revenue for the year 1942, over and above all necessary charges, a warrant for such unpaid salary balance for the year 1941 could be issued.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General

ELECTIONS: Failure to file declaration in statutory time.

June 11, 1942

6-16

FILE 89

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County, Missouri

Dear Mr. Thomas:

This is in reply to your letter of recent date wherein you submit the question of a case in which a candidate for nomination does not file his declaration within the time prescribed by statute.

Section 11550 R.S. Mo., 1939 provides as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:
>
> * "

By an opinion of this Department, under date of March 3, 1942, to Honorable Dwight H. Brown, it was held that June 5, 1942 is the last day to file declaration of candidacy.

In your letter you indicate that the candidate therein concerned filed his declaration on June 6, 1942. In our research for Missouri decision on the construction of the

foregoing statute, we fail to find any case involving this question, however, we find the rule announced in Vol. 20 C. J. page 115, Section 113, wherein it is stated:

> "The primary election laws of the various states impose certain requirements on a candidate at a primary election, such as filing with a designated official, a certain number of days before the primary, a paper in some prescribed form announcing his candidacy, swearing that he is qualified, making a statement of his membership in, and support of, the party whose nomination he seeks, causing his name to be printed on the official ballot as a candidate for the nomination, and filing the names of persons selected as his campaign committee. Such requirements are mandatory, and compliance with them is essential to enable the candidate to be voted for at the primary election and to have his name printed on the official ballot at the general election as the nominee of one of the principal political parties. * * * *"

This text cites a number of outstate authorities which support it.

CONCLUSION

From the foregoing, it is therefore, the opinion of this Department that the declaration filed on June 6, 1942, by a candidate for nomination at the August primary, comes too late to authorize the county clerk to place such candidate's name upon the primary ballot.

Respectfully submitted

APPROVED:

TYRE W. BURTON
ASSISTANT ATTORNEY GENERAL

ROY McKITTRICK
Attorney General

TWB:AW

INSURANCE: (1) Missouri State School for Blind cannot purchase insurance covering damage or loss on property in its department; (2) State of Missouri is not liable in damages for the torts of its officers or agents while in the performance of their duty.

July 27, 1942.

FILED
89

Mr. Robert H. Thompson
Acting Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Mr. Thompson:

The Attorney-General wishes to acknowledge receipt of your letter of July 24, 1942, in which you requested an opinion from this Department. Omitting caption and signature, your letter requesting such opinion is as follows:

> "We received a letter from Mr. Ferguson, state purchasing agent, advising us that your office had issued a ruling that the state was not liable for personal or property damage. Consequently, it would be impossible for him to purchase or approve an order for insurance.
>
> "Insurance was carried on the bus and passenger car covering personal and property liability as well as loss or damage by fire, theft, hail, etc.
>
> "We would like to have your opinion on the following questions:
>
> "(1) Is there any way we can legally protect the school against loss of either of these two vehicles by fire, collision, theft, etc.?
>
> "(2) Are any of the authorized operators of either of these vehicles, as employees of the state, legally liable for personal or property damage resulting from an

accident while driving either of these state owned vehicles on a mission connected with the work of the school?

"Thanking you for your earliest possible reply on these question, I remain"

Answering your first question, I will cite you to Article IV, Section 48, of the Constitution of Missouri, which provides as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

I also wish to cite Article X, Section 19, of the Constitution of Missouri, which is as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other

> law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

After examining these constitutional provisions it would appear that in order for any State money to be paid out there must be a specific appropriation authorizing the payment of such sum for the particular matter in question and such appropriation must state to what object it is to be applied.

I will also cite you to Section 13043, R. S. Mo. 1939, which provides as follows:

> "No warrant to be drawn or paid unless money appropriated for payment. No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

There is no general statute in the State of Missouri which provides that the State shall carry or have the right to carry or purchase insurance on any of its property. Therefore, it becomes necessary to examine the appropriation for the department wishing to purchase such insurance. Accordingly, we have examined the appropriation act of 1941, referring to the Missouri State School for the Blind, and we do not find that any amount was appropriated for the payment of insurance premiums of any kind on any of the property under the control of your department which is required under the constitutional provisions cited above.

As to your second question, we will first cite you to 59 C. J., 194, where we find the following:

> " A State is not liable for the torts of its officers, or agents, in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable."

In Bush v. State Highway Commission of Missouri, cited in 46 S. W. (2d), at page 854, 329 Mo. 843, the court stated:

> "The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities."

In this case an individual sought to bring an action against the State of Missouri for damages caused by a collision with a truck operated by the State Highway Commission in Pulaski County, Missouri. There was a judgment in favor of the defendant sustaining a demurrer to the petition, and the plaintiff appealed and the Supreme Court of Missouri affirmed the judgment of the circuit court and held that an action such as this could not be sustained.

In support of this proposition we will also cite you to Broyles v. State Highway Commission of Missouri (Mo. Sup.), 48 S. W. (2d) 78.

Following these authorities we find that the State of Missouri cannot be sued in tort for actions of its officers or agents without its consent. If any damage would result from an accident in which an automobile of your Department is involved, the driver of such motor vehicle might be personally liable, according to whether or not he was negligent in the operation of such automobile, but no action could be brought against the State itself under such circumstances.

Conclusion

(1) It is the opinion of this Department that your department cannot purchase insurance to protect the state against loss or damage to vehicles, under the control of your department, by fire, collision or theft, in view of the fact that no appropriation was made contemplating the purchase or payment for insurance. (2) It is also the opinion of this Department that the State of Missouri cannot be held liable in damages for the torts of its officers or agents while in the performance of their

duties as such officers or agents, without the consent of the State itself. The driver of such motor vehicle might be personally liable according to whether or not he was negligent in the operation of such motor vehicle, but the State itself cannot be so held.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

JSP:EG

OFFICERS: Township officer cannot hold office under the United States.

- -

September 16, 1942

9-25

FILED
89

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

Under date of September 14th, 1942, you wrote this office requesting an opinion, as follows:

> "The duly elected, qualified and acting Collector of a Township receives an appointment as Assistant Postmaster. The collector enters upon the duties of Assistant Postmaster and receives compensation from the United States. Is such person entitled to continue in office as collector?
>
> "Your early opinion on the above proposition will be greatly appreciated."

Your attention is called to Section 4, Article XIV, of the Constitution of Missouri, which reads as follows:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

No case has been found where this section of the Constitution has been construed by an appellate court of the State. But, in the case of State ex rel. Walker v. Bus, 135 Mo. 325, in discussing Section 12, Article IV of the Constitution, which prohibits the appointment of any senator to any office under the State, or any municipality thereof, it is stated at l. c. 335, that a justice of the peace under this section would be an officer under the State, and that county officers would also be included. The justice of the peace is a township officer, as is the township collector. If, under Section 12 of Article IV, a township officer is an officer under the State, it would seem the same meaning should be given to the words "under the State" when used in Section 4, Article XIV.

In the Arkansas case of Wood v. Miller, 242 S. W. 573, the words "under this state" were construed. The following brief quotation is taken from this case at l. c. 575:

> "The words 'under this state,' as used in the Constitution, mean under the laws of this state, or by virtue of or in conformity with the authority conferred by the state as sovereign. It embraces all offices created by the laws of the state as contradistinguished from other authority. Municipal offices are created by the statutes of the state and are therefore civil offices 'under this state.'"

It may be safely stated without citation of authority that the office of Assistant Postmaster is an office of profit under the United States.

CONCLUSION

The office of Assistant Postmaster, an office of profit under the United States, and the office of Township Collector,

an office under this State, cannot both be held by the same person at the same time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri

WOJ:CP

ELECTIONS: In regard to color of ballots, number and kind of ballot boxes, and depositing of various ballots in the ballot box.
BALLOTS:
BALLOT BOXES:
CONDUCT OF ELECTIONS:

September 17, 1942

10-5

FILED
89

Mr. Harry L. Thomas, Chairman
Board of Election Commissioners
County Court House
Kansas City, Missouri

Dear Mr. Thomas:

This is in reply to yours of recent date wherein you submitted to this department the following questions for an official opinion:

"1. May paper of color other than white be used for ballots other than the political ballots, and if so, upon all others or upon what others?

2. Under the prevailing conditions would the use of a single ballot box for all except the constitutional ballots invalidate any part of the election?

3. Would the use of a substantial cardboard box, sealed with a paper seal, be permissible for the deposit of any of the ballots voted in the election?

4. In view of the provisions of Section 3 of the judicial amendment of 1940 to the constitution, should the judicial ballots be deposited in the same box with the constitutional ballots?"

In considering these questions the follow-

ing principles of law which have been applied by the Missouri courts should be applied. In State ex rel. v. Hackman, 273 Mo. 670, 699, the court said:

> " * * * * * The general rule on this subject is that where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where it merely provides that certain ballots shall be used and does not prescribe what results shall follow if they are not used, the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express and that they did fairly express their will. (Sanders v. Lacks, 142 Mo. l.c. 263; Horsefall v. School Dist., 143 Mo. App. 541.) Here the statute simply prescribes a certain form of ballot, but does not declare what results will follow if it is not used. The statute, therefore, may be a reasonably held to be directory. * * * * * "

And the court in speaking of minor complaints in the conduct of an election further said at local citation 701:

> " * * * * * As we have said in regard to other complaints of this character of which there are many, the spirit of the modern rulings is to disregard irregularities that have worked no injury, when it is shown that everything has been done that could be done to afford the voters a fair election and no mandatory statute has been

violated. * * * * * *"

These are general principles which have been announced and followed by both the Supreme Court and the appellate courts.

However, the above principles have been applied in cases of election contests. The main reason for applying them after the ballot has been cast was that the voter should not be deprived of his right of franchise because some official has failed to strictly follow the statute pertaining to elections. In your case the question is raised before election.

Election officials are creatures of the statutes;and, as to their duties, we think the principle announced in Lamar Township v. City of Lamar, 261 Mo. 171, would be applicable here. That principle at l.c. 189 is as follows:

> " * * * * * Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power

> of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. * * * * * "

Applying this rule to your inquiry as to the duties of the election officials in the preparation and obtaining of election supplies we think that the election officials would be required to follow the statutes applicable thereto.

Then referring to your first question which relates to the color of the political ballot we find the following statute, Section 11595 R. S. Mo., 1939, provides in part as follows:

> " * * * * * The ballot shall be plain white paper, through which the printing or writing cannot be read. * * * * * "

This section pertains to the ballots for the general election.

You inquire particularly to ballots used for voting on constitutional amendments. The law pertaining to elections on constitutional amendments is contained in Article 9, Chapter 76, R. S. Mo., 1939; the portion of that article which relates to ballots and forms of ballots is in Section 11680. The last sentence of that section provides as follows:

> " * * * * * In all other respects the law governing the printing, distribution of ballots, the number to be distributed,

> and the manner of voting ballots at a general election shall apply to 'constitutional ballots' where not in conflict with this article."

From this provision it will be seen that the general law pertaining to printing, distribution of ballots, etc. shall apply to constitutional ballots.

We are, therefore, of the opinion that paper of a color other than white may not be used for ballots other than political ballots.

On your second question relating to the use of a ballot box for all ballots except constitutional amendments we find that the provisions for ballot boxes in elections in cities of three hundred thousand to six hundred thousand are set out in Article 23 of Chapter 76, R. S. Mo., 1939. Section 12123 of this article provides for one ballot box for each precinct with a sealed package of ballots. The ballot box with the sealed ballots, poll books, blank stationery for the election is delivered to one of the election judges and the key or keys to such ballot box is delivered to a judge of the election of the opposite political party.

Section 12136 of this article requires that the ballot box, before any ballots are placed in it, shall be opened and shown to t ose present and it must be empty before the voting begins. Then the box must be closed and locked and not opened until the polls close. This section also requires the ballot box to be kept in public view during the time the polls are open.

Section 12139 of this article makes provisions for depositing of the ballot in the ballot box after it has been voted and properly marked and identified by the election officials.

After the result of the election has been proclaimed then under Section 12148 the following procedure is prescribed:

> " * * * * * One of the judges of election shall take charge of said ballot box and place therein the poll books, the tally sheets and all certificates or statements of votes cast not otherwise provided for, and one of the judges, who shall represent the opposite political party from the one taking the ballot box, shall receive and hold the key thereto. * * * * * "

Said Article 23 of Chapter 76 is a special election act applicable to cities of 300,000 to 700,000. The general election statute, Section 11499, pertaining to ballot boxes does not apply here. However, we think Section 11680 pertaining to ballots and ballot boxes for voting on constitutional amendments does apply. It provides that the clerk of the county court shall supply the proper election officials with separate ballot boxes for the deposit and reception of constitutional amendments. This section also provides that the manner of voting ballots at the general election shall apply to "constitutional ballots" where not in conflict with this article.

Considering the statutes relating to

elections in cities of 300,000 to 700,000 and the general election provisions and the constitutional amendment provisions it is the opinion of this department that they would authorize the use of a single ballot box for all ballots cast at the election except those cast on constitutional amendments which should be deposited in a special ballot box.

On the question of the kind of ballot box which may be used we find that the statute, general or special, makes no designation to this. The general election law requires that the ballot boxes be provided and that during the process of an election they shall be securely closed. Section 11499 R. S. Mo., 1939. Article 23, Chapter 76, pertaining to cities of three hundred thousand to seven hundred thousand requires the ballot box to be locked with a key. Since the election law is silent on the question of the material out of which a ballot box is to be made we think this is a matter which would then be left to the discretion of the election officials and if they comply with the spirit and intent of the law their acts would be legal. However, we do not think that the law would authorize the ballot box in cities of three hundred thousand to seven hundred thousand to be sealed with a paper seal. From a reading of said Article 23 we think that the law-makers undoubtedly intended that the ballot box should be locked with a key.

On your fourth question as to whether or not judicial ballots shall be deposited in the same box with constitutional ballots, by Amendment No. 3 to the Constitution, adopted in 1940, a new plan for the election of judges to the Supreme Court was provided. By Section 3 of this amendment the name

of the incumbent judge shall be placed on the judicial ballot if such judge files his declaration. Then the question of the retention of such judge is submitted at the general election. This ballot is designated as a separate judicial ballot without party designation. From the language of this section we think that this election comes within the same class as elections of other officials, and since this would not come within the class of constitutional amendments it is the opinion of this department that ballots for "judicial candidates" should be delivered by election officials as other political candidates and should not be deposited in the box with the constitutional ballots.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:FS

COUNTIES:
COUNTY BUSINESS: County courts should transact all "county business," which includes purchase of material and supplies for county highway system.

- -

December 22, 1942

12-320 FILED 89

Hon. John H. Thompson
Highway Engineer
Highway Department
Jackson County
Kansas City, Missouri

Attention: Mr. D. W. Leonard
Chief Deputy

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of the authority of the County Highway Department to do its own purchasing.

From your letter it seems that the County Court is insisting that such purchases be made through the County Court by its purchasing agent.

Section 36, Art. VI, of the Constitution of Missouri, is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2480, R. S. Mo. 1939, provides as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In the case of State ex rel. Bucker et al. v. McElroy, 274 S. W. 749, the question of the validity of a statute which authorized the board of paroles to contract for expenditures for government, management and maintenance of certain eleemosynary institutions in that county was raised. In the opinion the court quoted the order of the county court providing for a purchasing agent. The order reads as follows, l. c. 750:

> "The court orders that all supplies of whatever nature for every department, court, board, officer, or employee of this county shall hereafter be purchased only by requisition submitted to and approved by the county court before any such purchase shall be made, and that said purchase shall thereupon be made in due course by the lawfully constituted purchasing agent of this county, and that any purchase made otherwise than as hereinbefore set out is illegal and void and constitutes no valid claim or legal or binding charge against this county therefor.
>
> "And the court orders that due public notice hereof be made by publication in two newspapers published in Independence, Mo., and in two newspapers published

> daily in Kansas City, Mo., and also in the Daily Record of Kansas City, Mo., once a week for four consecutive weeks. Approved unanimously; Judge Hayes giving as his reason for voting for said motion that he desired a clear and distinct understanding as to whether or not the county purchasing agent was the legally authorized person to make all purchases for the county."

The constitutionality of the act was raised because it was contended by the county that under Section 36, Art. VI, supra, the legislature could not take away from the county court the authority to control and regulate the expenditure for the eleemosynary institutions.

In treating the question the court said, l. c. 751, 752:

> "By law these courts have been established so as to consist of a presiding judge (to be elected by the whole county) and two associate or district judges to be chosen by the electorate of their respective districts. But what we want to emphasize is the fact that the court is of constitutional origin, and its jurisdiction fixed by the Constitution. In the language of the organic law, such court 'shall have jurisdiction to transact <u>all</u> county * * * business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i.e., that it shall transact all county business. By section 2574, R. S. 1919, such court is given control of all county property, both real and personal, and with it the added authority to purchase, lease, and deceive by donation any property, real or personal, for the county. Likewise we find the power to sell property belonging to the county, and to audit and settle <u>all</u> demands against the county. Much of this

> section has stood for many years, and is and was a legislative construction of the Constitution when it speaks of transacting county business. The lawmakers understood that the transacting of county business meant the control of all county property, whether such property was in the nature of either penal or eleemosynary institutions. The lawmakers would have just as much power to place the county jail, or the poor farm, under the control of a parole board, as they would have to place the three institutions mentioned in the pleadings herein, or, to broaden the field, the divers state eleemosynary and penal institutions of the state could as well be placed in a board of supreme or circuit judges. The management of county and state property, having no direct connection with the work of the judges, should not be placed in the hands of judges. It has been ruled that courts can appoint agents and officers connected with the court, and look after the property wherein the courts are held, and many things incidental to the workings of courts, but such is not the case here. For that reason we do not discuss or pass upon such matters. Here the power is conferred, by the Constitution, upon the county court of Jackson County to manage and control these institutions and no mere legislative act can thwart the Constitution. Because a juvenile judge sends a boy or a girl to some kind of a county institution does not authorize the control of such institutions by such judges. The management, control, and upkeep of such institutions have been lodged by the organic law in another forum."

The rule of construction that "It is the duty of courts in construing two or more statutes relating to the same subject, to read them together and to harmonize them, if possible, and to give force and effect to each" in the case of Little River Drainage Dist. v. Lassater, 29 S. W. (2d) 71, may be applied here.

Referring to the County Highway Engineer Act, Art. 9, Chap. 46, R. S. Mo. 1939, we find that the following portion of Sec. 8660 has been held in the case of State ex rel. v. Southern, 265 Mo. 275, to apply to Jackson County, Missouri:

> "* * * Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund: Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: * * * * *"

Section 8659, R. S. Mo. 1939, provides that the county highway engineer shall maintain an office at the county seat of the county of which he is an officer, at the expense of the county and that it shall be his duty to keep and carefully preserve all books, plats and papers pertaining to his office in the room so provided.

Section 8661, R. S. Mo. 1939, provides that the county highway engineer shall be the custodian of all tools, material and machinery belonging to the road districts and the county, except as otherwise provided by law.

Section 8662, R. S. Mo. 1939, provides that the county highway engineer shall have direct supervision over all public roads of the county and over the road overseers and of the expenditure of the county and district funds made by the county road overseers; that he shall have supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed unless approved by the county highway engineer, and no county court shall issue warrants in payment for road work or for any other expenditure by road overseers until the claim therefor shall have been examined and approved by the county highway engineer.

Section 8663, R. S. Mo. 1939, provides that the county highway engineer shall make personal inspection of the condition of the roads, culverts and bridges of each district as often as practicable and upon complaint in any district it shall be the duty of the county highway engineer to at once visit said road and investigate the complaint, if written and made by three freeholders, and if necessary to cause such road to be placed in good condition.

We do not find any case in which the constitutionality of the Highway Engineer Act has been raised. The presumption is that it is constitutional and it should be given such a construction. If the Highway Engineer Act deprives the county court of any of its constitutional authority as given by Sec. 36, Art. VI, supra, then, under the authority of the case of State, ex rel. v. McElroy, supra, the Highway Engineer Act, or such portions thereof that do so, would be invalid.

While the County Highway Engineer Act does prescribe certain duties to the Engineer, yet we do not find where it delegates to this official the duty of purchasing materials, supplies and equipment for highways.

The Budget Act, which makes the presiding judge of the county court, in counties containing a population of over 80,000, the budget officer, provides that the various departments and officers shall submit to the budget officer estimates of their needs for the ensuing year. Secs. 10922, 10923, and 10924, R. S. Mo. 1939.

Section 10931, R. S. Mo. 1939, provides in part as follows:

> "Except as in this section otherwise specified, all offices, departments, courts, institutions, commissions, or

> other agency spending moneys of the county, shall perform the duties and observe the restrictions set forth in the preceding sections relating to budget procedure and appropriations. *"

Section 10932, R. S. Mo. 1939, provides in part as follows:

> "All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer. * * * * * * * * * *"

Section 10933, R. S. Mo. 1939, provides in part as follows:

> "* * * Any officer purchasing any supplies, materials or equipment shall be liable personally and on his bond for the amount of any obligation he may incur against the county without first securing the proper certificate from the accounting officer. Such other officers as the county court may require shall each give surety bond in such amount as may be fixed by order of the county court for the faithful performance of his duties and for a correct accounting for all moneys and other property in his custody. *"

By these sections it would seem that the lawmakers have intended for the purchase of supplies, materials or equipment by the officer who is at the head of a department or office. Such officer being made liable on his bond in case he makes

such purchases without first securing proper certification from the accounting officer.

In speaking of the question of whether the County Budget Act deprives the county court of its constitutional power the court, in Traub v. Buchanan County, 108 S. W. (2d) 340, 342, said:

> "The first contention, that the budget law is invalid, because by it the legislature deprived the county court of its constitutional power to transact the business of the county and vested this power in the auditor, is without merit. The effect and intent of the budget law, as we understand it, is to compel, or at least to make it more expedient for the county courts to comply with the constitutional provision, section 12, art. 10, Mo. Constitution, which provides that a county shall not contract obligations in any one year in excess of the revenue provided for that year. The budget law leaves the transaction of business to the county courts. But the law provides (section 19, p. 350, 1933 Laws (Mo. St. Ann. Sec. 12126s, p. 6434):
>
> "'No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating.'
>
> "No power possessed by the county court was thereby curtailed. The budget officer simply determines whether sufficient money

> is provided with which to pay the obligation intended to be incurred by any contract or order presented to him for indorsement. This is a mere matter of bookkeeping. If the cash is on hand or has been provided for, it is the duty of the auditor or budget officer to make such indorsement upon the order or contract. If not, he merely refuses to make the endorsement. Prior to the enactment of the budget law, a county court had no right to incur obligations in any one year in excess of the revenue provided for that year. By the enactment of the budget law, the Legislature has merely provided ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income. The power of the county court not having been curtailed by the enactment of the budget law, the point made by respondent is without merit and is ruled against him."

The court, in this case, took the view that the constitutional powers of the county court are not curtailed by the Budget Act.

In the Buchanan County case, supra, the suit was based on a contract entered into by the County Engineer of that county for services with private individuals to work for the county. The court in that case held that the contracts were not binding on the county because the county budget act had not been complied with.

In Carter-Waters Corporation v. Buchanan Co., 108 S. W. (2d) 914, an action was involved in which the purchase of road materials was in controversy. In that case it will be noted that the purchase was made with the approval of two judges of the county court. The portion of that opinion pertnent to the question here, is as follows:

> "* * * Here, instead of the evidence making a conclusive case for recovery, it wholly fails to show any cause of

action against the county because it appears that there was no order of the county court made of record authorizing the purchase; * * * *"

Here, it will be seen that the court took the view that purchases for road materials in counties such as Buchanan County should be made by order of the county court. Since Buchanan County and Jackson County are within the same class so far as the County Highway Engineer Act is concerned, then the same rule would apply to Jackson County that the court applied to Buchanan County in the Carter-Waters case, supra.

Since the County Highway Engineer Act does not provide for the purchase of supplies and materials for Highway purposes, by the County Engineer, and since the courts have construed the Budge Act to the effect that it was not intended to deprive the county courts of their constitutional powers, then applying the principle announced by the court in the McElroy case, supra, the county court under its constitutional authority to "transact all county business" would be the body which should make the purchase of materials and supplies for the county highways.

CONCLUSION

It is, therefore, the opinion of this department that the the purchase of materials and supplies for the highway department of Jackson County, Missouri, should be authorized and approved by order of the County Court of Jackson County, Missouri.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

LABOR: Boys of 14 and 15 may be employed as telegraph messengers if they procure proper work permits, but such permits would not protect the employer of such boys if such employment turns out to be an employment in interstate commerce.

August 25, 1942.

67 8

FILED
90

Honorable Orville S. Traylor,
Commissioner of Labor and
Industrial Inspection,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you submit a request for an opinion in the following form:

> "A question has arisen concerning the authority of this Department, and other authorities interested, to allow boys of 14 and 15 years of age to be gainfully employed as telegraph messengers in this state.
>
> "We would appreciate receiving your opinion in this matter, advising us as to our duty."

Section 9621, R. S. Mo. 1939, provides that no child under the age of sixteen years shall be employed, permitted or suffered to work at any gainful occupation for more than eight hours in any day, nor have more than forty-eight hours or six days in any one week, nor before the hour of seven o'clock in the forenoon nor after the hour of seven o'clock in the afternoon of any one day. Certain exceptions are made in that section, but the employments excepted from its operation do not include the employment as telegraph messengers. Therefore this section would apply to boys of fourteen and fifteen years of age who are employed as telegraph messengers.

Section 9622, R. S. Mo. 1939, forbids the employment of children under the age of sixteen years in certain designated lines of work, none of which would include the work of delivering telegraph messages, except in certain cases with

the approval of the school authorities. There is also a general provision in that section against employment of children under sixteen years of age in any occupation dangerous to the life, health or limb, or injurious to the health or morals of children under the age of sixteen. We do not believe that it can be said that the delivering of telegraph messages is so dangerous to life, health or limb or to the health or morals of children under sixteen as to come under the ban of said section.

Section 9623, R. S. Mo. 1939, provides in part as follows:

> "Work permits shall be issued only by the superintendent or principal of the public school of the districts wherein such child resides, or by some person appointed by an order of the board of directors, board of education or body having local supervision of public schools. The work permit shall show the name, age, sex, place of birth, date of birth and place of residence of the child together with the name and place of residence of his parent, guardian or custodian and also the name and address of the employer and the nature of the employment for which the work permit was issued. * *"

Said latter section also places certain restrictions upon the issuance of such work permits and specifies what things must be done and what must be furnished before such permits shall be granted.

Section 9625, R. S. Mo. 1939, provides as follows:

> "No fee shall be charged for a work permit issued under the provisions of this article. The forms for all work permits shall be prepared by the state superintendent of public schools in accordance with the provisions of section 9623 of this article. Such blank work permits as may be necessary to carry out the provisions of this article shall be furnished to the board of directors, board of education or body having local supervision of public schools of each school district by

> the state superintendent of public schools."

From the foregoing sections of the statutes it will be seen that boys of the ages of fourteen and fifteen years may be employed as telegraph messengers provided they secure the work permits provided for in Section 9623. Such permits are issued by those in charge of the public school of the district wherein such boys reside.

Section 9626, R. S. Mo. 1939, provides as follows:

> "The commissioner of labor and industrial inspection is hereby charged with the enforcement of the provisions of this article and all other laws regulating the employment of children and the commissioner of labor and industrial inspection is hereby vested with the power and jurisdiction to exercise such supervision over every employment as may be necessary adequately to enforce and administer this article, including the right to enter any place where children are employed and to inspect the premises and to call for and inspect work permits. The issuing officer is hereby authorized to cancel any work permit when it appears that it has been improperly granted or that the child is being injured, or is likely to be injured by the employment. Notice of such cancellation, with reasons therefor, shall be given immediately to the person, firm or corporation employing the child and thereafter it shall be unlawful for any such person, firm or corporation to continue to employ such child."

By the latter section it is the duty of the Commissioner of Labor and Industrial Inspection to have charge of the enforcement of the provisions of the statutes above quoted with regard to the employment of children and the issuing of work permits. Said section clearly implies that if such Commissioner upon inspection of places where children are employed finds that the child is being injured by such employment or is likely to be injured by such employment, it would be the duty of the school authorities who issued the work permit to cancel the same.

Section 9629, R. S. Mo. 1939, provides as follows:

> "Any person violating the provisions of this article shall be deemed guilty of a misdemeanor."

From the foregoing we conclude that boys of the ages of fourteen and fifteen may, under the laws of Missouri, be permitted to be gainfully employed as telegraph messengers provided they secure proper work permits in accordance with the statutes above set out. A question will likely arise as to whether boys of said ages could be so employed as telegraph messengers because of the fact that they might be engaged in interstate commerce. It is quite possible that some telegraph messenger boys would be engaged in interstate commerce, although they might not necessarily be so engaged. Of course, interstate commerce is beyond the power of the State of Missouri to regulate. (See Article 1, Section 8, Clause 3, Constitution of the United States; Manning v. Fieldelson, 136 S. W. (2d) 510, 175 Tenn. 576.) By the Fair Labor Standards Act of 1938, 29 U.S.C.A., Chapter 8, it is unlawful to employ children under sixteen years of age in interstate commerce. However, we do not believe that the Commissioner of Labor and Industrial Inspection of Missouri must make a determination as to whether or not the proposed employment of boys of fourteen and fifteen years of age will be in interstate commerce. Such commissioner, and the school authorities acting under him, are authorized to issue work permits for boys of such ages when certain things have been done and certain evidence furnished. When those things have been done and all conditions of the state laws met, the Commissioner of Labor and Industrial Inspection and the school authorities acting under his supervision should issue the work permits in order to carry out the laws of the state which they are sworn to obey and enforce.

Such work permits would not protect the said minors in the event that they undertook to engage in interstate commerce since that field would be regulated entirely by Federal statutes. In order that those who might act upon the work permits provided for by the state law may not be misled into believing that the state laws were all that had to be complied with, it is suggested that it might be advisable to write or print on the form of permit some statement similar to the following: "This work permit does not supersede but is subject to the Fair Labor Standards Act of 1938." We do not think

that such a precautionary statement is absolutely necessary, but it is merely suggested since those receiving the permits might eventually be employed in interstate commerce and hence such work permits would not protect their employers against the provisions of the Federal law.

Conclusion

It is therefore the opinion of this Department that the superintendent or principal of the public schools or the person appointed by an order of the board of directors or board of education may, under the supervision of the Commissioner of Labor and Industrial Inspection, issue work permits allowing the gainful employment of boys of fourteen and fifteen years of age as telegraph messengers in this State, but if such employment turns out to be employment in interstate commerce so that said boys are not permitted to work by reason of the Fair Labor Standards Act of 1938 (U.S.C.A., Chap. 8), then such permits would be of no legal force and effect. We believe that it is the duty of the proper authorities of this State to issue the work permits when the laws of Missouri have been complied with, leaving to the employer of such minors the determination of the question of whether they can lawfully employ such minors under Federal law.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:EG

CHILD LABOR: ~~Children~~ Boys from fourteen to sixteen years of age may be employed as telegraph messengers if they have completed the common school

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September 24, 1942

9-28 FILED 90

Hon. Orville S. Traylor
Commissioner of Labor
and Industrial Inspection
Jefferson City, Missouri

Dear Sir:

We have your letter of the 23rd in which you submit for our opinion the following:

> "Upon demand, is it legal for the school authorities in the State of Missouri to issue an employment certificate for a child between the ages of 14 and 16 years to be engaged as a telegraph messenger for full-time employment between the hours of 7 A.M. and 7 P.M., not more than eight hours per day or forty-eight hours in any one week, or for more than six days per week, without compulsion of his attending school, part-time or otherwise, and providing this child has completed the common school course as prescribed by the constituted authorities, or its equivalent?
>
> "We should also like to have your definition as to the grade necessary to have been completed in school by a child in order to be so classified as a graduate of the common school course."

Section 9620, Art. 3, Chap. 56, R. S. Mo. 1939, provides as follows:

> "It shall be unlawful for any child in this state under the age of 16 years to be employed, permitted or suffered to work at any gainful occupation unless such employment is authorized as in this article, or otherwise by law provided: * * * * * * * * *"

Section 9621 of the same article provides as follows:

> "No child under the age of sixteen years shall be employed, permitted or suffered to work at any gainful occupation for more than eight hours in any day, nor for more than forty-eight hours or six days in any one week, nor before the hour of seven o'clock in the forenoon nor after the hour of seven o'clock in the afternoon of any one day: * * * * * * * * * * * *"

From a reading of the foregoing sections it will be seen that the hours which are proposed for the telegraph messengers mentioned in your request meet the requirements of Article 3, Chapter 56, R. S. Mo. 1939.

We next turn to the school laws to see whether they prevent the proposed employment of such children. Section 10587 R. S. Mo. 1939, after providing that children between the ages of seven and fourteen years shall attend school regularly, reads as follows:

> "Provided, that a child between the ages aforesaid may be excused temporarily from complying with the provisions of this section, in whole or in part, if it be shown to the satisfaction of the attendance officer, or if he declines to excuse, to the satisfaction of a court of competent jur-

> isdiction, that said child is mentally or physically incapacitated to attend school for the whole period required, or any part thereof, or that said child has completed the common school course as prescribed by constituted authority, or its equivalent, and has received a certificate of graduation therefrom."

It will be seen that Section 10587, supra, permits excusing children from fourteen to sixteen years of age from attending school if they have completed the "common school course" and have a certificate of graduation therefrom. By "common school course" is meant the course of study prescribed for the first eight grades of the public schools. This expression has well defined meaning and is understood by the State Department of Education, and others, to refer to the instruction offered in the first eight grades.

Of course, under Section 4666, R. S. Mo. 1939, it is unlawful to employ girls under eighteen years of age to deliver telegraphic messages.

CONCLUSION

It is, therefore, the opinion of this office that it would be lawful for the school authorities in Missouri to issue employment certificates for boys between the ages of fourteen and sixteen years to be engaged as telegraph messengers for full time employment between the hours of seven a.m. and seven p.m. and for not more than eight hours per day or forty-eight hours in any one week, and for not more than six days per week, provided such boys have completed the course of study prescribed for the first eight grades of the public schools and have a certificate of graduation therefrom, or have completed work in other schools than the public schools, which work is equivalent to that required for the first eight grades of the public schools.

Respectfully submitted,

APPROVED:

HARRY H. KAY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General of Missouri.

CIRCUIT CLERKS: Section 13408, R. S. Mo. 1939, does not
SALARIES: extend the compensation in term commencing January 1, 1939, that ended December 31, 1938.

- - - - - - - - - - - February 3, 1942 - - - - - - - - - - - - -

2-6

Hon. Alvin B. Walker
Prosecuting Attorney
Sullivan County
Milan, Missouri

FILE
93

Dear Sir:

Under date of February 2, 1942, you wrote this office requesting an opinion, as follows:

> "I desire to have an opinion from your office as to whether or no the last census would affect the salary of the Circuit Clerk of Sullivan County, Missouri, Sections 13408 and 13430 R. S. 1939.
>
> "The population of Sullivan County as shown by the 1930 census is 15212 and the 1940 census shows a population of 13701, which you will note drops the salary in Sullivan County into the 10,000 to less than 15,000 class, if the last census applies.
>
> "The present Circuit Clerk and Recorder was elected at the general election in 1938 and he took office on the 1st day of January 1939, for his second term.
>
> "The Circuit Clerk is contending that the last census does not apply to him by reason of the language of Section 13408 R. S. 1939, by reason of the wording of the last paragraph."

Section 13408, R. S. Mo. 1939, is as follows:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons, the sum of twelve hundred ($1200) dollars; in counties having a population of seven thousand five hundred persons and less than ten thousand persons, the sum of fifteen hundred ($1500) dollars; in counties having a population of ten thousand persons and less than fifteen thousand persons, the sum of seventeen hundred ($1700) dollars; in counties having a population of fifteen thousand persons and less than seventeen thousand five hundred persons, the sum of nineteen hundred ($1900) dollars; in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred ($2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred ($2300) dollars; in counties having a population of twenty-five thousand persons and less than fifty thousand persons, the sum of twenty-five hundred ($2500) dollars; in counties having a population of fifty thousand persons and less than seventy-five thousand persons, the sum of thirty-six hundred ($3600) dollars; in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand ($4000) dollars; in counties having a population of one hundred fifty thousand persons and less than four hundred thousand persons, the sum of five thousand ($5000) dollars; Provided, that in any county wherein the clerk of the circuit court is ex officio

recorder of deeds, said offices shall be considered as one for the purpose of this section: Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties: Provided, further, that until the expiration of their present term of office, the persons holding the office of circuit clerk shall be paid the maximum amount as now provided by law, in the manner provided by this chapter."

(Underscoring ours.)

Inasmuch as this section is not divided into paragraphs, and your letter fails to indicate with particularity the language upon which the Circuit Clerk bases his contention, we are assuming that it is the last clause of the section, which we have underscored above.

Prior to the enactment of this law in 1937, by the Fifty-ninth General Assembly, the compensation of circuit clerks was governed by Section 11786 R. S. Mo. 1929 as re-enacted Laws of 1933, page 369, which reads as follows:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of $1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of $1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of $1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of $1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of $1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of $1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of $2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of $2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of $2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of $3000.00; <u>provided</u>, that in any county wherein the clerk of the Circuit Court

> is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

It will be noted that by the Laws of 1933 the Circuit Clerk was permitted to retain fees collected up to the maximum amount prescribed by statute; that the 1937 law, which is now Section 13408, R. S. Mo. 1939, abolished this method of payment and fixed a stipulated annual salary.

The clause of Section 13408, supra, had the effect of postponing the application of the amounts fixed in the section until the expiration of the respective terms of the circuit clerks who were in office at the time the law was enacted and authorizing the payment of the fixed salary for the same period. At the beginning of the next term of office following the enactment of Section 13408 it became applicable in all of its terms and provisions. The word "term" has reference to the period fixed by statute and in no wise refers to the individual who may happen to be the incumbent for more than one term. State ex rel. Emmons v. Farmer, 271 Mo. 306. The term of a circuit clerk is four years and until his successor is elected or appointed, and qualified.

The present Circuit Clerk and Recorder of Sullivan County, according to your letter, must have been elected in the year 1934 for a term of four years. That term ended when

he was re-elected for the second term in the year 1938 and qualified for such second term, applied to the office of Circuit Clerk of Sullivan County. The clause of Section 13408, supra, which we are assuming is the one upon which the Circuit Clerk bases his contention, continued the rate of compensation which was in effect in the year 1937 to the end of the term at the close of the year 1938 and did in no way affect the salary for the term of office which commenced January 1, 1939.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

WOJ:CP

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

OFFICERS - COUNTY SURVEYORS: A person can hold the office of county surveyor and city surveyor in the same county at the same time.

November 9, 1942

11-25

FILED
93

Mr. B. F. Walther
County Surveyor and Engineer
St. Francois County
Farmington, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 5, 1942, which reads as follows:

> "I would appreciate very much having your opinion regarding some questions under Section 8660 in which the County Surveyor became ex officio County Highway Engineer as of January 1, 1941 in counties over 20,000 population. In the consideration of these questions I wish to state the fact that the county has no special road districts, township organization or road overseers.
>
> "The questions are as follows:
>
> "1. Does Sections 8655 to 8672 apply to the ex officio County Highway Engineer acting as stated above?
>
> "2. What powers are delegated to the ex officio County Highway Engineer under Sections 8661 and 8662?
>
> "3. There being no road overseers as under Section 8666, does the employees or operators of equipment under Section 8661 become classified as being road over-

> seers and the same subject to appointment or removal by the County Court?
>
> "4. Can a County Surveyor and ex officio County Highway Engineer be appointed and accept compensation therefor as a City Engineer for a municipality within said county? "

In answer to your first three questions, we are enclosing a copy of an opinion rendered by this office, on December 9, 1941, to Hon. David E. Blanton, Prosecuting Attorney of Scott County, Missouri, in regard to the county surveyors and ex officio county highway engineers in counties of not less than 20,000 inhabitants, nor more than 50,000 inhabitants.

In answer to your fourth question, we are submitting the following:

In a careful research, we fail to find any statute, or any section under the Constitution, which prohibits a person from holding a county office and a city office in counties having a population such as your county has. The Constitution does prohibit a state officer holding office under the United States, as appears in Section IV, Article XIV, of the Constitution of Missouri, but your office is not a state office, but is merely a county office for the reason that your jurisdiction is limited to the county. It was so held in reference to a sheriff in the case of State v. Williams, 144 S. W. (2d) 98, l. c. 103, where the court said:

> "* * * We hold he is a 'county officer' within the meaning of this section. The statements in State v. Finn, 4 Mo. App. 347 and State ex rel. Attorney Genera v. McKee, 69 Mo. 504, to the

> effect that a sheriff is a state officer are mere obiter dicta. In State ex rel. Holmes v. Dillon, 90 Mo. 229, 2 S. W. 417, we held that the words 'state officer' as used in the constitution were intended to refer to such officers whose official duties and functions are co-extensive with the boundaries of the state and were never intended to refer to a sheriff whose functions are confined to his county and who is commonly known and called a county officer. * * * * * * * * * "

The Constitution of Missouri also prohibits, in counties or cities having more than 200,000 inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set out in Sec. 18, Article IX of the Constitution of Missouri.

Since there is no constitutional prohibition, under the Constitution, or any statute, preventing a person, in a county having the population of your county, from holding a county and city office, we must refer to the common law. In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, which was passed upon by the Supreme Court of this State June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold a county and city office should depend on whether or not the two offices were incompatible. This case held that a deputy sheriff of the city of St. Louis could also hold the position of school director in the city of St. Louis.

In the case of State ex rel. Langford v. Kansas City, et al., 261 S. W. 115, the court, in following the case of State ex rel v. Bus, supra, said, at l. c. 116:

> " * * * In State ex rel. v. Lusk, 48 Mo. 242, the court held that the offices of clerk of the county court and clerk of the circuit court of Cole county were not incompatible, and one person could hold both offices at the same time, because the clerk could act by deputy in one or both courts. But the court added:
>
> "'Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.'
>
> "In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. * *"

Also, in the case of State ex rel. v. Bus, 135 Mo. 325, l. c. 338, the court said:

> "It follows from what has been said that the right to hold at the same time the office of deputy sheriff and school director is not forbidden by either section 1 of the Acts of 1845, or by section 18, article 9, of the constitution.

> "V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

In that case the court held that the duties of the office of deputy sheriff and those of school director are not inconsistent and incompatible.

Since the matter set out in your fourth question must be considered according to the common law, it results that the ruling must be made in accordance with the facts in each separate case. Therefore, the fourth question in your request is whether or not the duties of the county surveyor are incompatible with the duties of a city surveyor in the same county. There is no question but that a county surveyor's duties and the duties of a city surveyor are in common; their duties are not antagonistic and in no way are their duties inconsistent or incompatible.

CONCLUSION

In view of the above authorities, it is the opinion of this department that since the duties of a county surveyor and the duties of a city surveyor in the same county are not incompatible and are not inconsistent, a person can hold the office of county surveyor and city surveyor at the same time and receive compensation from both the county and the city.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW
ENC (1)

CRIMINAL PROCEDURE - Suit against sheriff, for excessive fees retained, must be filed within three years after the discovery of the shortage.

December 10, 1942

FILED
93

Honorable Alvin B. Walker
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 7, 1942, which, omitting the tabulation set out therein, reads as follows:

> "On August 5th. 1937 the State Auditor filed with the County Clerk of Sullivan County, an audit of the various county offices of said county for the period of January 1, 1935 to December 31, 1936.
>
> "In this report it shows excess fees paid John W. Lee Sheriff for the year of 1935 by the county the sum of $476.50 and for the year 1936 the sum of $467.85 or a total of $944.35.
>
> " * * * (Omitting tabulation).
>
> "It is now called to my attention that no adjustment of this matter has been made.

> "I would like to have your opinion as to whether limitation has run such as would bar an action to recover the excess fees paid the sheriff whose term expires on the 31st. day of December 1936.
>
> "It is my impression that this would be an action for money had and received and would be barred by the five year statute or Section 1014 R. S. 1939."

Under the facts in your request the State Auditor, on August 5, 1937, filed with the county clerk of Sullivan County, an audit showing that the sheriff at that time had retained fees, in excess of those lawfully allowed to him, in the amount of $944.35, which amount was due Sullivan County. Also, in your request you state that it is your impression that this action would be barred by the five year statute, as set out in Section 1014 R. S. Missouri, 1939. Section 1014, supra, reads as follows:

> "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 1013, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or

> injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud."

We are calling your attention to Section 1015 R. S. Missouri, 1939, which has been held by the courts of this State as being applicable to actions against a sheriff, for money received by him, in virtue of his office. Section 1015, supra, reads as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In construing both Section 1014 and Section 1015, supra, the Supreme Court of this State, in the case of Putnam County v. Johnson, 259 Mo. 73, l. c. 79, 84, said:

> " * * * The judgment upon the demurrer will have to be reversed, because both the third and fourth counts in this petition state good causes of action for money had and received. Not only so, but upon their face it is shown that the five-year Statute of Limitations is the only one which could be invoked, as to them, and it could not be successfully invoked. These counts in the petition do not proceed upon the theory of the defendant having been an official, and having received the money sued for 'in virtue of his office' as contemplated by Revised Statutes 1909, section 1890, the three-year Statute of Limitation. These counts charge that the defendant received these funds as the agent of the county, not as an officer of the county. What the proof may show upon trial is one thing, and what the petition shows, when attacked by demurrer, is quite a different thing. It may be that the proof will utterly destroy the allegations of these two counts, but that is a matter to be determined upon the trial of the facts, rather than upon this demurrer. It is not uncommon for county officers to be agents of the county for matters beyond those of the office. Whether

the facts will so show in this case, we have no means of knowing. We only know that defendant is alleged to have received the funds as agent. For this reason the demurrer was not well taken as to these two counts, and for like reason the instant judgment will have to be reversed.

" * * * * * * * * *

"'The county court is given the power to audit the accounts of these officers and it is made their duty to examine statements made by them and, if necessary, to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct. This is particularly so when the statements on their face, as in this case, are not such as the law requires. It cannot be said that the county court was ignorant of facts which were open to its examination, and which it was its duty to know.'

"It is true that Judge MacFarlane was discussing the tolling of the Statute of Limitation by fraudulent acts, but he says much that is of interest here. The county court passes upon and allows charges of the county clerk. To state a good cause of action grounded upon fraud, and fraud practiced must be pleaded. This is as much requisite in a petition grounded upon fraud, as it is a requisite to show fraud for the purpose of tolling the statute. We do not believe the pleader intended to ground the action upon fraud, but if he did, the demurrer was well taken, because the

> facts alleged were insufficient. The five-year Statute of Limitation has no application to the first and second counts.
>
> "But plaintiff says the three-year statute, supra, has no application, because the items of cash named were not received by defendant ' in virtue of his office.' We do not agree to this view. If they were not received 'in virtue of his office' how were they received? We can conceive of no other way or capacity in which they were received. They may have been wrongfully and, speaking from the statute, unlawfully received, but they were evidently received 'in virtue of his office.' In other words they were received as an officer, not as an individual or agent. Take the alleged overcharge for the tax books. Whether the defendant was allowed or retained the proper or the improper amount for such service, yet whatever amount he did retain for such services was retained by him officially, for official work, and was received, had held and retained 'in virtue of his office' as used in the statute."

Under the holding of the above case the court held that even though the county clerk was described in the petition as an agent, he still had received the money by virtue of his office, and, the cause may be barred in three years, as set out in Section 1015, supra. The action would not revert to what is now Section 1014, supra, even if he was described in the peti-

tion as an agent of the county. Also, in the case of St. Joseph v. Wyatt, 274 Mo. 566, l. c. 570, (Sup. Ct.) on the same theory said:

> "It is contended by the United States Fidelity & Guaranty Company that plaintiff's demand as to said shortage of $16,431.69, which occurred more than three years prior to the commencement of this action, is barred by the provisions of Section 1890, Revised Statutes 1909, which reads as follows:
>
> "'Within three years: First, an action against a sheriff, coroner or other officer upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State.'
>
> "We are clearly of the opinion that the liability of the Guaranty Company for the payment of said sum of $16,431.69 must be determined under the above section, in connection with the facts of the case. The burden of proof devolved upon plaintiff to show a state of facts which prevented said statute from running against it. The quantum of proof necessary under such circumstances is fully

discussed in Shelby Co. v. Bragg, 135 Mo. l. c. 298, and following; Callan v. Callan, 175 Mo. l. c. 360-1-2; State ex rel. v. Harter, 188 Mo. 516; State ex rel. v. Yates, 231 Mo. 276; Johnson v. United Railways, 243 Mo. l. c. 298, and following; Putnam County v. Johnson, 259 Mo. 73."

In the above case the suit was against the bonding company who was on the bond of a city treasurer of the city of St. Joseph. The same holding was also had in the case of The State to use of Hudson v. Finn, 102 Mo. 222, where a former sheriff of the city of St. Louis had refused to make a settlement on taxes due the State. In that case they held that the three-year section applies to sheriffs.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a suit cannot be maintained at this time by Sullivan County against a sheriff for the recovery of excessive fees retained by him for the years of 1935 and 1936, which fees were reported on August 5, 1937, to the county clerk of Sullivan County by the State Auditor's office, by reason of an audit of the various county offices of that county. Such an action is barred in three years from August 5, 1937, by the Statute of Limitations, as set out in Section 1015 R. S. Missouri, 1939.

APPROVED:

Respectfully submitted

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
Assistant Attorney General

WJB:RW

REPOSSESSION OF MORTGAGE PROPERTY UNDER THE SOLDIERS' AND SAILORS' RELIEF ACT OF 1940:

Under the Soldiers', etc. Civil Relief Act of 1940 a mortgagee cannot repossess an automobile bought by a person in military service prior to Oct. 17, 1940, if the mortgagor is unable to pay because of his military service.

June 3, 1942

6-17

FILE 95

Mr. Gordon P. Weir
Attorney at Law
Greenfield, Missouri

Dear Mr. Weir:

We have for answer your request of February 14, 1942, in which you inquire as follows:

> "I wonder if I can impose upon you for the answer to a legal question, while this may be out of order at the same time I will appreciate you informing me on the same.
>
> "Where an automobile dealer has sold an automobile to a person and this party is called to service, can the dealer or the former car owner repossess the automobile during the absence of the mortgagor or is he compeled to wait until the selectee has returned from service?"

The question of whether or not a mortgagee may repossess an automobile of a person in the military service will depend upon a federal act commonly referred to as the Soldiers' and Sailors' Civil Relief Act of 1940, c. 888, sec. 301, 54 Stat. 1181, effective Oct. 17, 1940. This act is in part as follows(50 U. S. C. A. sections 531-532):

> " * * * * * * * Installment contracts for purchase of property
> (1) No person who prior to the date of approval of this Act has received, or whose assignor has received, under a contract for the purchase of real

or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction: Provided, That nothing contained in this section shall prevent the modification, termination, or cancelation of any such contract, or prevent the repossession or retention of property purchased or received under such contract, pursuant to a mutual agreement of the parties thereto, or their assignees, if such agreement is executed in writing subsequent to the making of such contract and during or after the period of military service of the person concerned.

(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.

(3) Upon the hearing of such action

the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this Appendix), on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties.

C. 888, sec. 302, 54 Stat. 1182, effective October 17, 1940, is as follows:

"Mortgages, trust deeds, etc.
(1) The provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this appendix), on application to it by such person in military service or some

person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) stay the proceedings as provided in this Act; or
(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

C. 888, sec. 303, 54 Stat. 1183, effective October 17, 1942, is as follows:

"Stay of action to resume possession of motor vehicle, etc., encumbered by purchase money mortgage, conditional sales contract, etc.
No court shall stay a proceeding to resume possession of a motor vehicle, tractor, or the accessories of either, or for an order of sale thereof, where said motor vehicle, tractor, or accessories are encumbered by a purchase money mortgage, conditional sales contract, or a lease or bailment with a view to purchase, unless the court shall find that 50 per centum or more of the purchase price of said

> property has been paid, but in any such proceeding the court may, before entering an order or judgment, require the plaintiff to file a bond, approved by the court, conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any such judgment or order should the judgment or order be set aside in whole or in part. * * * * *"

In the recent case of Jamaica Savings Bank v. Bryan, 25 N. Y. S. (2d) 17, being a case where it was sought to foreclose a mortgage given by a soldier in the service of the U. S. Army prior to October 17, 1940, the court construed the foregoing stated in the following language:

> "* * * * * Of course, the fact that a defendant is in military service is not a defense to the action under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 U. S. Stat. at Large, p. 1178, 50 U. S. C. A. Appendix sections 501-585. That act by no means contemplates that persons able to meet their obligations may set up the act in bar to prevent creditors from pursuing their remedies. It does mean that soldiers and sailors in the service who are handicapped by reason of their military service, either in making valid defenses to an action or in meeting their financial obligations, shall have the protection of the court to prevent prejudice to their rights by reason of such service.
>
> The question then arises: Is the defendant John W. Bryan prejudiced by his service herein and is his ability to conduct his defense materially affected by such service? If such be the fact, then while what is set forth in his answer does not constitute a denial, a

defense or a counterclaim and really is no answer to the matters set forth in the complaint, the court could stay all proceedings herein, pursuant to Section 201 of the Soldiers' and Sailor's Civil Relief Act of 1940, 54 U. S. Stat. at Large, p. 1181, 50 U. S. C. A. Appendix section 521. That section provides, as follows: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person, or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'

There is absolutely nothing before the court on which it could base an opinion to the effect that defendant's ability to conduct his defense is materially affected. The answer and the affidavit submitted set forth the bare facts as to his service.

Accordingly, the court will take proof on the matter which may be either in the form of affidavits or testimony, whichever the parties agree upon. After such proof has been furnished, the court will be in a position to determine whether or not a stay should be granted, the length thereof and the terms and conditions to be imposed pursuant to Section 204 of the act (54 U. S. Stat. at Large, p. 1181, U. S. C. A. tit. 50, Appendix, Section 524). * * * * * * * * * * * * "

The period of a stay of proceedings is fixed by 50 U. S. C. A. sec. 524, 54 Stat. 1181, which provides:

> "Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others."

In construing this statute, we believe any doubt should be resolved in favor of the person in military service, because the Act was plainly enacted for his benefit.

Careful consideration must be given to the question whether the granting of a stay of proceedings is discretionary or mandatory, when the conditions stated in the statute are found to exist. Throughout this statute it is provided that when the conditions of the granting of a stay are found to exist, the court may, on its own motion, and shall on application being made, grant such stay (50 U.S.C.A. Sections 521, 531 and 532.)

One of the conditions of the granting of a stay is prescribed by 50 U.S.C.A. section 533, which in part provides that, "No court shall stay a proceeding to resume possession of a motor vehicle . . . unless the court shall find that 50 per centum . . . of the purchase price . . . has been paid . . ."

Nothing in that section provides whether the granting of the stay is discretionary or mandatory when the 50 per centum of the purchase price has been paid. Said Section 533 must be construed together with the whole Act, including Section 531 of the same Title, which in part provides, ". . . the court . . . may in its discretion, on its own motion, and shall, except as provided in section 303 (section 533 of this Appendix) on application to it by such person in military service . . . order a stay of proceedings . . ." (italics ours) Substantially the same provisions are in Section 532. Reading Sections 531, 532 and 533 together, it is our opinion that where a motor vehicle is the subject of the action, a stay cannot be granted in any event unless the court finds that 50 per centum of the purchase price has been paid, but that when the courts so finds, and finds that the other necessary conditions exist, it may, on its own motion, but must, on application being made, grant such stay. Section 533, supra, does not affect the question whether the granting of the stay is discretionary or mandatory; it merely adds an additional condition to the granting of such stay, where a motor vehicle is the subject of the action.

CONCLUSION.

In view of the above authorities, and the purpose for which the Soldiers' and Sailors' Civil Relief Act of 1940 was enacted, it is our opinion that a mortgagee cannot repossess the automobile of a person in military service where a deposit or installment of the purchase price has been paid prior to October 17, 1940, except by action in a court of competent jurisdiction.

In such action, if the court finds that the ability of the defendant to conduct his defense is materially affected by his military service, and that 50 per centum of the purchase price of the motor vehicle has been paid, the court may, on its own motion, but must on application being made, grant a stay of proceedings for the duration of the defendant's

military service and three months thereafter, or some part of such period.

If the court finds that the ability of the defendant to comply with the terms of the contract is materially affected by his military service, and that 50 per centum of the purchase price of the automobile has been paid, the court may, on its own motion, but must, on application being made, grant a stay of proceedings for the period stated above.

If the court finds that less than 50 per centum of the purchase price of the automobile has been paid, the court cannot grant a stay of proceedings, but may, either on its own motion, or on application being made, (1) order repayment of prior installments or deposits or part thereof, as a condition of terminating the contract and repossessing the automobile, (2) or the court may require the plaintiff to file a bond to indemnify the defendant against loss in the event the judgment is later set aside, (3) or the court may make such other disposition of the case as may be equitable.

Respectfully submitted,

ERNEST HUBBELL
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

GW:FS

SCHOOLS: Directors have the right to refuse to allow the use of a school building for other than school purposes.

October 26, 1942

FILED
95

Mr. W. A. Williams
Superintendent of Schools
Reynolds County
Centerville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you submit to this office for an opinion the following question:

> "Does the board of education have the right to refuse to let the people of the community have Sunday School and church in the school house, if the people voted it open to such services at the annual school meeting?"

The control of the schoolhouse of a school district is governed by Section 10337, R. S. Missouri, 1939. Before considering the provisions of said section which deal with the use of schoolhouses for other than school purposes, we think a study of the history of such provisions will help to arrive at the correct meaning of the section.

We find that Section 7044, R. S. Missouri, 1879, vested in the directors of a district the care and keeping of the schoolhouse and other property of the district, and charged them with the duty to provide the school with necessary equipment. This was as far as the statute went.

In 1881 the Legislature amended said Section 7044 of the 1879 Statutes (Laws of 1881, page 202) by adding thereto the following words:

> "Nothing in this section shall be so construed as to prevent the use of any schoolhouse for religious, literary or other public purposes, when such use shall be demanded by a majority of the voters of such district, voting at any annual or special meeting where such question was submitted."

It will be noted by the foregoing provision that the board was authorized to allow the schoolhouse to be used for certain other purposes than holding school "when such use shall be demanded by a majority of the voters of such district."

Said provision regarding outside uses of the schoolhouse remained in the foregoing form until in 1891, when the Legislature (Laws of 1891, page 215) amended the said section containing said provision by including among the purposes for which the building could be let, meetings of any farmer or labor organization or society for educational purposes, whether secret or otherwise, and by adding to said section the following:

> "Provided, however, that when the use of the school-house is allowed for the above named purposes it shall be the duty of the party or parties using it to keep it clean and in good repair, and to leave it in as good condition as it was when they took charge of it: Provided, further, that should the party or parties so using the said school-house fail to comply with the provisions of this act, the directors of such district may refuse them the further use of it until said provisions are complied with."

The provisions with respect to the use of the building for other than school purposes remained unchanged until 1909, when the Legislature (Laws of 1909, page 770) repealed said section of the Statutes in which said provisions were

contained and enacted in lieu thereof a new statute, which became Section 10784, R. S. Missouri, 1909. The portion of said Section 10784 regarding the use of the building for other than school purposes read as follows:

> "The board of directors shall not allow the use of the schoolhouse or school premises for religious, literary or other public purposes, or for the meeting of any farmer or labor organization, secret or otherwise, except when such use shall be demanded by a majority of the voters of the district at any annual or special meeting: Provided, that when the use of the schoolhouse and school premises is allowed for the above named purposes, they may be so used until the next annual meeting, and it shall be the duty of the person or persons so using them to keep them clean and in good repair, and to leave them in as good condition as they were when they took charge of them: Provided, further, that should the person or persons so using the schoolhouse and school premises fail to comply with the provisions of this section, the board of directors of such district may refuse further use of them until said provisions are complied with."

Said Section 10784, R. S. Missouri, 1909, was repealed in 1915 (Laws of 1915, page 382) and a new section enacted in lieu thereof, which said new section is now Section 10337, R. S. Missouri, 1939, and which reads as follows:

> "The board of directors or board of education shall have the care and keeping of all property belonging to the

district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. The board shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, and shall provide fuel, heating apparatus, and other material and appliances necessary for the proper heating, lighting, ventilation and sanitation of the schoolhouses; shall have the floors swept and the fires made at the expense of the district, and cause an accurate account of the expense thereof to be kept and a report of the same to be made at the next annual meeting. The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting. Whenever any such application shall be granted and the use of such houses, buildings or grounds shall be permitted for the purposes aforesaid, the board of directors, or board of education, having charge of the same may provide,

> free of charge, heat, light and janitor service therein when necessary, and may make such other provisions, free of charge, as may be needful for the convenient and comfortable use of such houses, buildings and grounds for such purposes, or said boards of directors, or boards of education, may require all such expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, may be permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from such use, ordinary wear and tear excepted: Provided, however, this article shall not apply to cities which have or may hereafter have 75,000 inhabitants or more."

By referring to the foregoing history of the provisions in question we find that prior to 1881 the school board was charged with the care and custody of the schoolhouse, and was not permitted to allow such schoolhouse to be used for anything other than school purposes. With the statute in that form, the Supreme Court of this state held that the school board was without authority to allow the schoolhouse to be used for any purpose other than the holding of school. (Dorton v. Hearn, 67 Mo. 301.)

The first authority granted by law for the use of the schoolhouse for other than school purposes was that contained in the amendment of 1881, supra, which provided that nothing in the statute granting the school board custody of the school building should prevent the use of same for religious, literary or other public purposes when such use should be demanded by a majority of the voters of the district. Such proviso appears to have been a limitation upon

the control of the schoolhouse vested in the directors. Said proviso, in effect, said that the directors could not prevent the use of the building for other purposes than school purposes if a majority of the voters at an election duly held demanded its use for religious, literary or other public purposes.

By the amendment of 1891, supra, the Legislature enlarged the said provision with regard to allowing the use of the schoolhouse for certain outside purposes when such use should be demanded by a majority of the voters in an election upon that question, but added a proviso making it the duty of the persons so using the building for such purposes to keep it clean and in good repair, and to leave it in as good condition as when they took charge of it. Said latter amendment also granted the board of directors the right to refuse the further use of the schoolhouse for such outside purposes if the parties so using it fail to comply with the provisions regarding the careful use of the building.

It will be seen by the amendment of 1891 that the Legislature undoubtedly understood the provision allowing the voters to demand the use of the schoolhouse for outside purposes as a limitation upon the power of the directors and as a right which the voters had. By said amendment of 1891 the Legislature limited the right of the people to use the schoolhouse for outside purposes, even though such use had been demanded by a majority of the voters, when such use was being abused. In such latter case the directors were authorized to refuse to allow the further use of the building. Therefore, the law, as it stood after the amendment of 1891, contained limitations on both the directors and the patrons of the school in connection with the use of the schoolhouse for outside purposes. Evidently experience had convinced the Legislature that neither the board nor the patrons should be given unlimited right to use the school building for outside purposes.

The new statute of 1909 covering the use of the building provided that "the board of directors shall not allow the use of the schoolhouse or school premises for religious, literary or other public purposes, or for the meeting of any farmer or labor organizations, secret or

otherwise, except when such use shall be demanded by a majority of the voters of the district at any annual or special meeting * * *." This statute of 1909 expressly limited the authority of the board of directors to allow the use of the schoolhouse for outside purposes, but provided that they should not allow such use except when such use had been demanded by a vote of the majority of the voters of the district. Said act of 1909 further provided that in case the persons so using such building for outside purposes should not comply with the provisions of the act regarding the proper care of the building while being so used, the board of directors could refuse the further use of it, but that otherwise when the voters had demanded the use of it at an election, such right of use should continue until the next annual meeting of the voters. The act of 1909 was also both a limitation on the power of the directors to allow the use of the schoolhouse for outside purposes and a limitation upon the patrons of the district using the building. Similar to the act of 1891, the act of 1909 vested in the directors the ultimate decision as to the proper care of the building and as to when the use of the same for outside purposes should be stopped.

The act of 1915, which is now Section 10537, R. S. Missouri, 1939, provided as follows:

> " * * * The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters

> voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting. Whenever any such application shall be granted and the use of such houses, buildings or grounds shall be permitted for the purposes aforesaid, the board of directors, or board of education, having charge of the same may provide, free of charge, heat, light, and janitor service therein when necessary and may make such other provisions, free of charge, as may be needful for the convenient and comfortable use of such houses, buildings and grounds for such purposes, or said boards of directors, or boards of education, may require all such expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, may be permitted as herein provided shall be jointly and severally liable for any injury or damage thereto, which directly results from such use, ordinary wear and tear excepted: Provided, however, this act shall not apply to cities which have or may hereafter have 75,000 inhabitants or more."

By the latter act it will be seen that the directors "<u>may allow</u>" the use of the schoolhouse for outside purposes when in their judgment such use will not interfere with the prime purpose to which such schoolhouse is devoted, to-wit, the purpose of conducting a public school. The law as it now stands does not in any way say that the board cannot prevent the use of the building for outside purposes when such use is demanded by a majority of the voters, as did the provisions of the act of 1881. The first part of Section

10337 vests the care and keeping of the schoolhouse in the directors of the district, and then follows the provision that the board "may allow" the use of the building for outside purposes when such use will not interfere with the main purpose to which the building is devoted. Had the act stopped with the last quoted portion, there would have been no limitation upon the right of the board of directors to allow the free use of the schoolhouse for certain outside purposes. However, said statute contains the following proviso:

> "Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting."

Thus, the Legislature evidenced an intention to provide a check upon the board of directors in allowing the use of a schoolhouse for outside purposes. That check is a vote of the majority of the voters of the district. It was evidently the purpose of the Legislature to provide that where directors became reckless or careless in allowing the use of school property for outside purposes, the voters of the district could stop such use of the building by voting against it. The vote against it would hold good until the next annual school meeting. By that time a board might be elected in whom the voters had more confidence and perhaps at that meeting the voters would not restrict the board in allowing the use of the building for outside purposes.

We think it is clear that the statute as it now stands leaves the authority to grant the use of the building for outside purposes to the board of directors, subject only to that right being taken away from them by the voters of the district. Instead of the voters being allowed to demand the use of the building, as they were allowed to under former statutes, they are now given only a veto power over the board of directors. Absent the

exercise of this veto power by the voters, the board has the entire say as to when the building may be used for certain designated outside purposes. The board does not have to wait until the voters tell them they can grant the use of the schoolhouse for such purposes, but they can so allow the use of the schoolhouse until they are stopped by the voters. Therefore, the voters do not vote to open the schoolhouse for outside purposes, but the only vote they have in that regard is to close the school house against its use for such purposes.

Said Section 10337 further leaves to the board of directors the determination of whether, when they allow the use of the building for outside purposes, the expenses incident to such use shall be provided free by the district or whether such expenses shall be paid by the persons or organizations so allowed to use the building. The statute, therefore, seems to vest the entire matter of determining how and when the schoolhouse may be used for outside purposes in the board of directors, subject only to the power of the voters to restrain them by a majority vote. If the board elects not to allow the schoolhouse to be used for outside purposes, the building cannot be so used. No authority is given the voters under the law as it stands now to compel the board to grant the use of the building for such purposes. The only authority which the voters have in that regard is to prohibit the board from granting the use of the building for outside purposes. They do not have any authority to compel the board to grant the use of the building for such purposes.

In arriving at the above conclusion we have not overlooked Section 10419, R. S. Missouri, 1939, which prescribes the powers of the voters at an annual school meeting. Said section reads, in part, as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:
>
> * * * * * * * * * * * * * *

> "Fifth--To determine, by majority vote, whether or not the schoolhouse of the district may be used during the ensuing year for religious, literary or other purposes, or for the meeting of farmer or labor organizations, secret or otherwise."

Said Section 10419 is clearly a general statute covering the powers of the voters at an annual meeting. It should be noted that the section provides that "when not otherwise provided," the voters shall have power to do the things therein enumerated, one of which is to determine whether or not the schoolhouse shall be used for the ensuing year for certain outside purposes. As we have pointed out above, we think the determination of the right to use a schoolhouse for outside purposes has been "otherwise provided" for by Section 10337, supra, which vests the power of such determination in the board of directors. Of course, by both Sections 10337 and 10419, the voters have the right to vote at the annual meeting on whether the board shall be prohibited from allowing the use of the schoolhouse for the designated outside purposes during the ensuing year.

It is a familiar rule of statutory construction that all statutes touching the same subject matter should be read together and harmonized, if possible, so as to give effect to all of them. (Little River Drainage District v. Lassater, 325 Mo. 493, 29 S. W. (2d) 716.) By reading Sections 10337 and 10419 together, we think they harmonize in that both of them can be given force and effect by holding that the board of directors has the right to determine whether the school building shall be used for certain outside purposes, unless the voters at the annual meeting by a majority vote prohibit the board from so doing.

CONCLUSION

It is, therefore, the opinion of this department that in all school districts of this state, except in

cities having 75,000 inhabitants or more, the board of directors has the right to refuse to let the people of the community use the schoolhouse for civic, social and educational meetings, and the voters of the district do not have the right to compel the board to grant the use of the building for such purposes.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

BOARD OF PHARMACY: Appeal does not vacate Board's revocation of license pending decision of Governor and Attorney General.

LICENSES:

January 12, 1942

1-16

FILE
97

Honorable Ted D. Willard, Secretary
Board of Pharmacy
Camdenton, Missouri

Dear Sir:

We are in receipt of your letter of January 7th wherein you state as follows:

> "On February 27, 1941 the Missouri Board of Pharmacy revoked the license of Harry Ludmeyer of Joplin, Missouri and Abraham I. Schnaer of Kansas City, Missouri. They in turn as provided for by the Statutes appealed to the established Appeal Board, consisting of you and the Governor.
>
> "Hearings upon which were held before you in the early part of September 1941, as yet this office has had no notice of what decision has been rendered in the matter by you and the Governor. These men have now demanded that I issue them a renewal license to practice pharmacy for 1942 in Missouri, stating that due to the fact an appeal is still pending and that they are still in good standing and are eligible to practice pharmacy in Missouri.
>
> "I am asking whether or not in your opinion these licenses should be issued or withheld until your final decision in the case is rendered. I will appreciate an early reply to this, since these men are insistent upon receiving their license."

Section 10006, Revised Statutes of Missouri, 1939, provides for renewal of licenses for pharmacists in part as follows:

> "Every person now licensed or registered as a pharmacist under the laws of this state shall be entitled to continue in the practice of his profession until the thirty-first day of December, 1909, and after such date shall be entitled to renewal of his license under the provisions of this chapter upon the presentation of an application for such renewal. * * * "

Section 10007, Revised Statutes of Missouri, 1939, provides for an appeal to the Governor and Attorney General from the action of the Board in revoking a license.

> "If the applicant for license as a pharmacist has complied with all the requirements of the two preceding sections, the board of pharmacy shall enroll his name upon the register of pharmacists and issue to him a license which shall entitle him to practice as pharmacist for a period of one year from the date of said license. The board of pharmacy may refuse to grant a license to any person guilty of felony, or gross immorality or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the board of pharmacy may, after due notice and hearing, revoke a license for like cause or any license which has been procured by fraud, or the license of anyone who shall allow his license to be used where he is not personally,

> actively and continuously engaged in the pharmaceutical business at a fixed and definite location. An appeal from the action of the board in refusing to grant or in revoking a license for such cause may be taken to the governor and attorney-general, the decision of which officers, either affirming or overruling the action of the board shall be final."

The question is whether the appeal to the Governor and Attorney General vacates the Board's action so that, pending a decision of the Governor and Attorney General, the men may secure a renewal license to practice pharmacy in Missouri for the year 1942.

It is to be noted that the Governor and Attorney General, in considering the actions of the Board of Pharmacy in revoking a license, may either affirm or overrule the action of the Board. The appeal is not tried de novo since there is no provision made by statute for rehearing the case a second time by the Governor and Attorney General. The record made by the Board is simply reexamined, and the Board's action affirmed or overruled.

An analogous situation is found in the case of Silent Automatic Sales Corporation v. Stayton, 45 Fed. (2d) 476, l. c. 477, 478, wherein the court considered the question of whether a judgment in a court below was vacated upon appeal. The court said:

> "In a number of states a distinction is drawn between appeals from courts of record, where the case is affirmed or reversed upon a re-examination of the record made below, and those tried de novo in the appellate court, such as, in Missouri, an appeal from a justice of the peace to a circuit court of the state. The rule in this circuit has

thus been declared by Judge Thayer, speaking for this court in Ransom v. City of Pierre, 101 F. 665:

"'When a case removed to an appellate court by a writ of error or an appeal is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded, and given in evidence, as an estoppel upon issues which were tried and determined, in the absence of a statute providing that it shall not be so used pending appeal. A supersedeas bond merely stays process for enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel.'

"This case is cited and discussed with approval by the Supreme Court of Missouri in Rodney v. Gibbs, 184 Mo. 1, 14, 82 S. W. 187. Reference is also made to Freeman on Judgments as stating the 'settled doctrine.' In that text-book we find the following language.

"'In some cases the operation of an appeal has been made to depend upon the character of the jurisdiction of the appellate court. If the latter court has authority to try the cause de novo, and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then it is plain that by the appeal the judgment of the inferior court is not merely suspended, it is vacated and set aside,

> and can no longer have effect as an estoppel.' 2 Freeman on Judgments, par. 722, p. 1528.
>
> "This statement of the rule is in accord with a long line of Missouri decisions: Turner v. Northcut & McCarty, 9 Mo. 252; Lee v. Kaiser, 80 Mo. 431; Ketchum et al. v. Thatcher, 12 Mo. App. 185; Williams v. Lewis, 47 Mo. App. 657; Earl v. Hart, 89 Mo. 263, 1 S. W. 238; Young v. Thrasher, 61 Mo. App. 413; George v. Waller (Mo. Sup.) 19 S. W. (2d) 284."

In referring to the nature of a trial "de novo," the court, in the case of Nichols v. Vinson, 32 Atl. (Del.) 325, said:

> "The case then comes up to this court to be tried 'de novo,' that is, just as though no action whatever had been instituted in the court below."

And in the case of Ex Parte Morales, 53 S. W. (Tex. Cr.) 107, 108, the court said:

> "The term 'de novo' means, 'a new; a second time.' 1 Rap. & L. Law Dict., 8 Am. & Eng. Enc. Law (2d Ed.) p. 832."

Section 2738, Revised Statutes of Missouri, 1939, provides that appeals from justice courts shall be tried de novo.

> "Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and

> shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

There is nothing in Section 10007, supra, comparable to the above section, which would permit the Governor and Attorney General to "proceed to hear, try and determine the same anew." It is obvious that the Legislature, in restricting their decision "either affirming or overruling the action of the Board," intended merely a reexamination of the Board's record. In declaring the decision of the Governor and Attorney General to be "final," it was meant that no further appeal from their decision would be permitted.

From the foregoing, we are of the opinion that the appeals of Harry Ludmeyer, Joplin, Missouri, and Abraham I. Schnaer of Kansas City, Missouri, under Section 10007, Revised Statutes of Missouri, 1939, does not vacate the action of the Board of Pharmacy, and that their renewal licenses should be withheld pending a decision by the Governor and Attorney General.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

MW:VC

PUBLIC LANDS: Sale of public lands.

January 27, 1942

1-29

FILE 97

Hon. Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Wilson:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the question of the procedure for the sale of public lands in a county.

In your letter you indicate that the tract of land sought to be sold is a portion of Section 16 of a certain township and range. The 16th section of each Congressional Township may be sold by virtue of the provision of Section 12717, R. S. Mo., 1939, which is as follows:

> "In all congressional townships in this state in which there are fifteen householders, they shall have the right to sell their sixteenth sections, or such lands as have been or shall be selected in lieu thereof; and upon a petition of a majority of such householders, the county court shall make an order, a copy of which shall be furnished the sheriff, directing him to expose such lands to sale at the court house door, and while the circuit court of the county is in session, after giving twenty days' notice thereof: Provided, that in any fractional township in this state wherein less than fifteen householders now or shall hereafter reside, a majority of the householders of such fractional township may petition the county court for an order to sell the sixteenth section in such township, or other lands which have been or shall be selected in lieu thereof, in like manner as hereinbefore provided."

In speaking of the duties imposed on the county court by this section the Supreme Court in the case of Doddridge v. Patterson 222 Mo., 146, 153 said:

> "* * *By reading that section, it will be seen that the county court has no authority upon its own instigation to sell the school lands of the respective townships of the county, but that its authority and jurisdiction to order such lands to be sold in the ordinary townships depend upon two conditions precedent or jurisdictional facts--first, that the township must have at least fifteen householders; and, second, that a majority of them must petition the county court to make an order to sell the lands.* * *"

Again at l. c. 154 the court said:

> "* * *A congressional township is six miles square and contains thirty-six sections of land,* * *"

The forming of the congressional township is prescribed by section 751 at page 50 of Title 43 U.S.C.A. This section provides in part as follows:

> "The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land surveyed or patented prior to May 18, 1796, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

From your letter, it appears that you may be under the impression that the township referred to in said section 12717 supra, is a "municipal township". We think the language of this section clearly indicates that the lawmakers did not have in mind a "municipal township" but intended to and did refer to

the "congressional township".

The lands within the bounds of the sixteenth section of each township are school lands and the title to such lands does not pass to the counties but must be passed in accordance with the provision of said section 12717. The provisions of said section were in effect long prior to the laws creating a "municipal township."

CONCLUSION

From the foregoing, it is the opinion of this department that a majority of the householders of the municipal township 41 of range 26 in Henry County, Missouri, must sign a petition for the sale of the lands in section sixteen of said township and range before the county court has authority to make an order for the sale of same.

Respectfully submitted,

TYRE W. BURTON
ASSISTANT ATTORNEY GENERAL

APPROVED:

VANE C. THURLO
(Acting) Attorney General

TWB:AW

TOWNSHIP OFFICERS:

Township officers who failed to qualify as provided by Statutes are de facto officers and full credit may be given their official acts unless the third party has knowledge of the failure to qualify

March 9, 1942

Honorable Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

FILE 97

Dear Sir:

We have for answer your letter of the fifth of March, 1942, which is as follows:

> "The Township officers in one of our townships have failed to comply with sections 13954-13955, R. S., 1939, in regard to their qualifications.
>
> We would like to know if these officers can legally perform their duties as township officers and if full effect can be given to any duties and acts they perform."

Section 13954, R. S., 1939, provides as follows:

> "Every person chosen or appointed to the office of township trustee and ex officio treasurer, member of the township board, township collector, or township clerk, and ex officio township assessor, or constable, before he enters on the duties of his office and within ten days after he shall be notified of his election or appointment, shall take and subscribe, before some justice of the peace, such oath or affirmation as is prescribed by law."

and section 13955, R. S., 1939, provides as follows:

> " Such person shall, within ten days thereafter, cause such certificate, together with his acceptance of the

> office to be filed in the office of the township clerk; his neglect or refusal so to do shall be deemed a refusal to serve."

In an early case, ie., State v. McAdoo, 36 Mo., 453 the Supreme Court said as follows:

> "* * *It appears from the record, that at an election held in Laclede county on the 5th day of September last, for sheriff of said county, the defendant and several other persons were candidates for the said office of sheriff, and that he received the highest number of votes cast, but had failed to take, file and subscribe the oath required of candidates by the Constitution of this State, within fifteen days next preceding the election.
>
> By section 8 of Art. II. of the Constitution, no vote in any election by the people shall be cast up, nor shall any certificate of election be granted to any person who shall not within fifteen days next preceding such election have taken, subscribed and filed said oath.
>
> McAdoo, having omitted to comply with the requirements of the Constitution, was ineligible; and the casting up the votes, and issuing the certificate to him, were acts unauthorized by law, and null and void. We are of opinion, therefore, that, in exercising the rights and privileges, and receiving the emoluments of said office, he has been guilty of usurpation, and we accordingly adjudge that he be ousted therefrom.
>
> Having no evidence that he acted from any other than mistaken views, we for-

> bear imposing any fine on him, and only order that he pay the costs. Judge Holmes concurs, Judge Lovelace absent."

This law has never been changed.

In State v. Smith, reported in 139 S. W. (2d) 929, 345 Mo., L. C. 1158 the court sets out and upholds the following:

> "Moreover, we are of the opinion that Dr. Mitchell was at least a de facto alderman. 'An officer de facto is to be distinguished from an officer de jure, and is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. He is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility , want of power or defect being unknown to the public.' McQuillin Municipal Corporations, 2nd Ed., Revised Vol. 2, Sec. 500, Page 204"

In the case of Alleger v. School District No. 16, Newton County, 142 S. W. (2d) 660, the court upholds the doctrine as set out below:

> "* * * * But in State ex rel v. Perkins, 139 Mo. 106, loc. cit. 117, 40 S. W. 650, loc. cit. 652, where this question arose, it was stated: 'The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done be a pseudo officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet, if the public or third persons are not deceived thereby,-if they know the true state of the case,-the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease, also, all of its ordinary validating incidents and consequences."

In the case of State ex rel v. Seay, 64 Mo. 89, the court writing the opinion states:

> "The law abhors vacancies in public office and great precautions are taken to guard against their occurence. The policy of the law is to have someone always in place to discharge the duties of public offices, and in a doubtful case the construction of the law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a casus omissus resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence."

CONCLUSION

It is therefore the opinion of this office that the township officers are usurpers in their offices and cannot legally hold the same, but that full effect can be given to any acts performed by them prior to their removal from office providing that third parties who may have been injured by their acts did not have knowledge of their lack of qualification for their offices.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

G:DS

PUBLIC ADMINISTRATORS: Section 301, Laws of Missouri, 1941, page 286, is constitutional.

March 17, 1942

3-27

FILE
97

Hon. Conn Withers
Prosecuting Attorney
Liberty, Missouri

Dear Mr. Withers:

We are in receipt of your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

> "The question has been raised concerning the duty of the Public Administrator of Clay County, Missouri, whose term expired December 31, 1940, to make final settlement and turn over assets on estates in his hands which were received by him as such Public Administrator to his successor, the present Public Administrator of said County.
>
> "The former Public Administrator has been advised that the Act of the 1941 Legislature relating to this subject is void and unconstitutional.
>
> "I enclose a copy of the opinion rendered by Lawson & Hale, Attorneys at Law, to the former Public Administrator, expressing the foregoing view.
>
> "I make no personal expression concerning the correctness of the conclusion reached in the opinion enclosed, but merely supply it so you may see the question raised and the position taken by the former Administrator insofar as this may assist your Department in its research on this question.

"Will you please advise whether or not, in your opinion, considering the Acts of the 1941 Legislature of Missouri, the former Administrator is required to make such final settlement and turn over such assets in estates of which he took charge as Public Administrator to his successor.

We are enclosing herewith two opinions which have been heretofore rendered by this department construing Section 301, Laws of Missouri 1941, namely, one to Hon. S. F. Weir, Judge of the Probate Court, Atchison County, Rockport, Missouri, and one to Hon. R. F. Sevier, Judge of the Probate Court, Liberty, Missouri. It is our view that the two previous opinions answer all questions of those presented by your opinion request with the exception of the one touching the constitutionality of Section 301, supra. We therefore limit this opinion to the question, "Is Section 301, page 286, Laws of Missouri, 1941, constitutional?"

Section 301, supra, provides as follows:

"The public administrator shall before the first day of the regular term of the probate court after the expiration of one year after his successor in office shall have qualified, publish notice of final settlement as is provided in Section 229, of the Revised Statutes of Missouri, 1939, for all estates in his charge as public administrator in which final settlement can be made during that term of court. Upon the first day of said term, the Probate Judge shall upon his own motion, order the public administrator to account for and deliver all money, property or papers belonging to all estates in his hands in which final settlement can not be made during that term of court, to his successor in office, or to the heirs of said estate, or to any executor or administrator regularly appointed, as provided by law, and such accounting and delivery shall be accomplished during that term of court.

> Provided that when the Public Administrator shall turn over the assets of an estate to his successor in office, or to any other executor or administrator regularly appointed as is provided by law, and before any final distribution has been made of the assets of the estate, the Probate Judge shall allow him compensation based on the proportionate part of the services and trouble rendered for the period of time such Public Administrator actually served as such administrator, and provided that such compensation for services rendered by both the original and succeeding administrator who shall complete the work of such administration shall not exceed a commission of five per cent on personal property and all money arising from the sale of real estate."

In the case of Witzmann v. The S. Ry. Co., 131 Mo. 612, l. c. 618, the court said:

> "Adjudicated cases do not, as a general rule, afford us much assistance in passing upon questions of this character, other than in a general way, as each case must be adjudged according to its own peculiar facts and the directness or remoteness, as the case may be, of its provisions to matters in consonance with its title. * * * * * * * * "

In the case of State v. Davis, 284 S. W. 465, l. c. 470, the court had this to say:

> "'Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider,

> not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. * *"

In tracing the history of this section, we find that it was first enacted in substance in 1857, and we herewith copy verbatim the original section, Section 1, together with its title:

> "ADMINISTRATORS. AN ACT concerning Public Administrators.
> *
> Be it enacted by the General Assembly of the State of Missouri, as follows:
>
> "Sec. 1. That every Public Administrator in this State, as well the present incumbents as their successors in office, shall, at the expiration of the term for which he shall have been appointed or elected, continue to have charge of any estate of which he shall have commenced the administration, until such estate shall have been fully administered, or he shall be discharged in the ordinary course of law, as other administrators; Provided, however, That this section of this act, so far as it applies to the county of St. Louis, shall be so limited as to require the Public Administrator of said county, within one year from the time his successor in office shall be elected and qualified, to turn over to such successor all estates and property in his hands, as such Public Administrator, which he shall not, within said year, have finally settled. * *
> *"

This section, supra, was retained in our statutes verbatim until the General Statutes of 1865, (See G. S. 1865, page 516, Section 12.)

In the revision of the Statutes in 1879, the original section was somewhat changed. We therefore copy Section 309, page 46, Laws of Missouri 1879, which reads as follows:

> "To continue in charge of estates after end of term. -- Every public administrator in this state shall, at the expiration of the term for which he shall have been appointed or elected, continue to have charge of any estate of which he shall have commenced the administration, until such estate shall be fully administered, or he shall be discharged in the ordinary course of law as other administrators. (G. S. 516, Sec. 12, amended.)"

When the statutes of 1889 were revised, the 1879 section was reworded and designated Section 301, page 175, R. S. Mo. 1889, and reads as follows:

> "To continue in charge of estates until discharge of estates until discharged, etc. -- When a public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of law as the administrator. (R. S. 1879, Sec. 309, amended.)

This wording was retained until the repeal and reenactment of Section 301, page 286, Laws of Missouri, 1941, supra.

In the case of State ex rel Mueller Packing Co. v. Calvird, 92 S. W. (2d) 184, l. c. 188, the court said:

> "As the above-quoted title to the act of 1913 clearly stated, that act repealed article 1, chapter 98, R. S. Mo. 1909, and enacted the new article in lieu thereof. Under those circumstances, this court held in Sherrill v. Brantley, 334 Mo. 497, loc. cit. 502, 66 S. W. (2d) 529, 530, that: 'The title of the original act became thereby the title of the later law and the constitutionality of the substituted section

> is to be determined upon whether it comes properly within the purview of this title. State ex rel. v. Gideon, 277 Mo. 356, 210 S. W. 358.'
>
> "Article 1, chapter 98, R. S. 1909, was enacted in 1907. In contained a comprehensive title. Laws Mo. 1907, p. 377. Section 8972 thereof (Laws Mo. 1907, p. 380) is exactly the same as the present section 8707. No suggestion is made nor can be logically made that section 8707 does not properly come within the purview of the title of the act of 1907."

At the outset, we wish to make the observation that if the legislature had not seen fit to have enacted Section 1, Laws of Missouri 1857, and to have retained sections of similar import and substance to the present time, then a public administrator, would be legally bound, in his official capacity, to make a turn over settlement in all estates in his hands immediately after the expiration of the last day of his statutory term, and upon the order and approval of the court, if he was elected through the force of a section similar to Section 295, R. S. Mo., 1939. Consequently, Section 1 of the Laws of 1857, and subsequent sections of similar import and substance have no doubt been considered invaluable in completing the administration of estates.

We wish also to point out that the marked difference between Section 301, Laws of Missouri 1941, and the preceding sections, is that Section 301 accelerates the administration of estates.

We further wish to point out that Section 301 also provides for the compensation of the public administrator on those estates which he must turn over. If this provision were not in Section 301, or was unconstitutional, then it is our view that Section 298, R. S. Mo. 1939, would apply.

In the brief attached to the opinion request, we note that it is the position of the attorneys that Section 301 violates Section 28, Article 4 of the Constitution of Missouri, for the reason that the title to the section does not clearly express the subject of the act.

In the case of State v. Danuser, 6 S. W. (2d) 907, l. c. 909, the court said:

> "'The state Constitution (section 28, art. 4), is read to little purpose if it be held to require that the title of an act must present the particularity of an itemized account or to minutiae of a chemical analysis. When the Constitution provides, therefore, that "no bill * * * shall contain more than one subject which shall be clearly expressed in its title," it simply means that the title shall indicate in an unmistakeable manner the general contents of the act; it does not require, nor was it intended that it should descend into particulars, but that it will be sufficient if it defines the nature of the statute and thus informs the reader as to its purpose. The nature of this constitutional provision being thus understood, the tendency of the courts in numerous rulings has been to construe it liberally in aid of all well directed legislative power.'
>
> "An apposite ruling, which fits like a glove the facts in the instant case, is that of State v. Mullinix, 301 Mo. 385, 390, 257 S. W. 121, 123, in which the court said:
>
> "'The generality of a title will not affect its validity where it does not tend to cover up or obscure legislation which is in itself incongruous. A requisite to congruity is that the amendatory act shall pertain to and admit of being made a consistent part of the law to be amended. The disposition of the courts has always been to avoid thwarting the efficiency or evident salutary effect of legislative action by a liberal interpretation of the constitutional provision (Burge v. R. R., 244 Mo. 76, 148 S. W. 925; Booth v. Scott, 276 Mo. 1, 205 S. W. 633).'"

The court, in the case of Sherrill v. Brantley, 66 S. W. (2d) 529, l. c. 532, said:

> "'The purpose of a title is to serve as a clear and comprehensive indicator of the purport of the act. While it may be so general in its terms as to omit reference to or the expression of matters germane to the principal features of the statute, if it sufficiently indicates the substantial purpose of the law, it will not be violative of the Constitution; but where a title decends to particulars and specifies a certain class included within the provisions of the act, to the exclusion of others, it does not sufficiently indicate the purport of the law, and is to that extent violative of the constitutional provision."

And, in the case of Graves v. Purcell, 85 S. W. (2d) 543, l. c. 549, the court said:

> "* * * There is a presumption that the statute here assailed is constitutional. The burden rests upon the party questioning the constitutional validity of a statute to establish its unconstitutionality beyond a reasonable doubt, and if its constitutionality remains in doubt, such doubt must be resolved in favor of its validity. * * * *"

The wording of the title to Section 301, Laws of Missouri, 1941, reads as follows:

> "ADMINISTRATION: Relating to term of office of public administrators. AN ACT to repeal Section 301, Article 13, Chapter 1 of the Revised Statutes of Missouri, 1939, and to enact in lieu thereof a new section relating to the term of office of public administrators."

It is our view that the wording of the title of the act clearly advises one that the section of which it is a part has something to do with the term of office of a public administrator and we are mindful of the cases set forth in the brief and the view taken by the attorneys that the word "term" as

used in the title would indicate a section similar to Section 295, supra, but in construing titles to sections we must give the words of the act a liberal construction, with the view of sustaining the presumption of constitutionality, as distinguished from a restricted construction.

We wish to point out that regardless of the presumption of constitutionality that attends the wording of the title of an act, the wording of the title of Section 301, Laws of Missouri 1941, wherein it reads in part, "An Act to Repeal 301, Article 13, Chapter 1 of the Revised Statutes of Missouri 1939," would immediately and clearly advise one that the section of the statutes which gave a public administrator the right to administer until final settlement of all estates coming into his hands, was to be repealed, and this right taken away from him. Then he is met with the wording "and to enact in lieu thereof a new section." We think this wording would immediately advise a person that the new section was certainly to take the place in some measure of Section 301 that was repealed, and when he is met with the further wording "relating to the term of office of public administrator", he would certainly be advised that that wording had to do with the term of office of public administrator as defined in Section 301, Article 13, Chapter 1, R. S. Mo. 1939.

We think that this is undoubtedly a fair observation to be made of one merely reading the title of the act, and when we turn to Section 301, of which the above is the title thereto, we find that the wording down to the word "provided" is only different from Section 301, R. S. Mo. 1939, in that it casts the duty upon the public administrator to make a turn over settlement in all estates in his hands in which he cannot make final settlement at the regular term of the probate court after the expiration of one year after his successor in office shall have been qualified. Even under Section 301, R. S. Mo. 1939, it would be his duty to make a settlement in all of these cases, the difference being that under Section 301, R. S. Mo. 1939, he would retain the remaining estates, whereas, under Section 301, Laws of Missouri, 1941, he must turn them over to his successor.

CONCLUSION

It is our view that when the rules of construction are applied to Section 301, Laws of Missouri 1941, the title to said act does not deceive one as to the contents of the ensuing section and therefore must be held to be constitutional.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC : NS

COUNTY TREASURER:
ISSUANCE OF PROTESTED
WARRANTS FOR COUNTY
LIBRARY EXPENDITURES:

County treasurer may not protest warrants for county library in cases where the revenue for payment of warrants is not collected in the year of the issuance of such warrants.

June 11, 1942

6-17

FILE
17

Hon. Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you request an opinion on the following statement of facts:

> "Our county library system has been voted. It was voted on at the regular school election the first Tuesday in April. The county court has appointed the members of the board -- three members in addition to the County Superintendant of Schools. One half mill was voted at the election. It is now being extended on the county tax books. Our county treasurer would like to know whether he should protest warrants on the anticipated revenue immediately, or whether he must wait until the actual cash is in his hands, which would be around the middle of January, 1943. Inasmuch as the board wants to start operations now, this question is a very important one to him. I can find no law on the problem, and respectfully request the written opinion of the Attorney General's Office."

In answer to your request, we call attention to Section 12, Article 10 of the Constitution, which provides in part as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * * * * *."

From your letter, you indicate that the tax moneys available for the payment of obligations incurred under the County Library Act, will not be available until the end of the current year. The income and revenue provided for this year, under this section, is the only income to which you may look for the purpose of paying obligations incurred in this year.

On the question of issuance of protested warrants, I am enclosing a copy of an opinion dated March 1, 1939, to Hulen & Walden, Moberly, Missouri. While this opinion does not directly pertain to your question, it does treat on the subject of issuance of protested warrants.

In the case of Brooks v. Schultz 178 Mo. 222, the court held that the library tax is subject to the Constitutional limitations. We think the same rule would apply to the issuance of warrants to pay library obligations as would apply to the payment of other county obligations. We further call your attention to Section 13858 R.S. Mo., 1939, which we think would apply here. This section provides in part as follows:

> "It shall be the duty of the county treasurer, upon presentation to him of any warrant drawn by the proper authority, if there shall be money enough in the depositary belonging to the fund upon which said warrant is drawn and out of which said the same is payable, to draw his

> check as county treasurer upon a county depositary in favor of the legal holder of said warrant, and to take up said warrant and charge the same to the fund upon which it is drawn; but no county treasurer shall draw any check upon the funds in any depositary unless there is sufficient money belonging to said fund upon which said warrant is drawn to pay the same, and no money belonging to said county shall be paid by any depositary except upon checks of the county treasurer. * * * * * *"

This section pertains to the duties of the treasurer in issuing his check in payment of warrants drawn by the county court but does not pertain to his duties relating to the protesting of warrants. Section 13833 R. S. Mo., 1939, seems to contemplate that the county court may issue warrants when funds are not in the treasury to pay same but will be available out of the revenue collected and to be collected during the year of the incurring of the obligations for which such warrants are issued.

This section is as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

It seems by the provisions of this section, that it is the duty of the county treasurer to protest warrants when money is not available to pay them.

In speaking of the construction to be given Section 12 of Article 10 of the Constitution and particularly that portion of the section which pertains to the indebtedness which a county may incur, the Supreme Court in the case of Trask v.

Livingston County 210 Mo. 582, quoted from other Missouri decisions as follows, l.c. 594:

> "In Mountain Grove Bank v. Douglas County, 146 Mo. 42, * * * * * * * *. It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year. * * * * *"

Also in the Trask case supra, the following is quoted at l. c. 592:

> "* * * In Book v. Earl, 87 Mo. l.c. 252, it was well said: '* * * Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.' * * * * *"

It will be noted from the quotation in the Earl case, supra, that the court said that a county court might anticipate the revenue collected and to be collected for any given year and contract debts of ordinary current expenses.

Applying this rule here, to your question and to our statutes, we know that all taxes, real and personal, are due on the first day of October and become delinquent on January 1st, thereafter. Taxes levied by the county court this year are payable on October 1st, of this year and we all know that revenue is collected from such taxes during the current year. That being the case, it would appear that warrants in anticipation of such revenue may be issued by the county court and protested by the treasurer before the revenue actually comes in.

CONCLUSION

From the foregoing, it is the opinion of this Department, that the county court may anticipate the revenue collected and to be collected for library purposes and issue warrants in payment therefor.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:AW

CRIMINAL LAW; and
PROSECUTING ATTORNEY: Information cannot be filed in Circuit Court where a justice of the peace releases defendant on preliminary.

August 5, 1942

8-6

FILED
97

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 30th, 1942, which reads as follows:

> "The following question has arisen in connection with criminal procedure:
>
> "' Can a prosecutor file his information in Circuit Court, charging a defendant with the same crime with which he was charged before a Justice, and upon the hearing, the Justice discharged the defendant?'
>
> "I have been cited to the following: 'Preparation and Presentation of the State's Case by Arthur V. Lashly, Part III of The Missouri Crime Survey, Page 10', reading as follows:
>
> "'This is subject to the exception that a felony may be begun by an affidavit of the complaining witness filed before a justice of the peace upon which the warrant issues and a preliminary hearing had, and the theory of the preliminary hearing is that the justice of the peace may hold or release the defendant according to the evidence produced: but practically speaking, the prosecuting attorney controls that too, because he

must produce and present the evidence, and the justice of the peace as a rule is guided by the recommendation of the prosecuting attorney with respect to the sufficiency of the evidence. Regardless of the action of the examining magistrate, discretion still rests with the prosecuting attorney, because if the justice finds the evidence insufficient and discharges the defendant, the prosecutor may, nevertheless, file his information in the circuit court charging the defendant with the same crime with which he was charged in the affidavit and upon which he had a preliminary hearing'.

"I have had a few cases of complaint filed, where a change of venue was taken from one justice, and by disqualifying other justices the complaint was forced before one justice, who, over my recommendation, and advice, released the defendants. I realize these complaints could be presented to a grand jury; that is an expensive procedure.

"Please advise if these criminal cases can be handled as outlined in the Missouri Crime Survey; and your recommendation as to the handling of cases of this nature, where, by forcing these hearings before a certain justice, defendants are released against my advice, and protest."

Section 3893 R. S. Missouri, 1939, reads as follows:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons

> with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. And if upon such hearing the justice shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave: Provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

This section has been passed upon, first, in the case of State v. Cooley, 12 S. W. (2d) 466, l. c. 468, where the court said:

> "'* * * It is a well-established law of this state that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await

the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused even though he has been discharged on the preliminary examination. State v. Whalen, 148 Mo. 286 (49 S. W. 989). The plea in abatement was properly overruled, as the Act of 1905 (Laws 1905, p. 132), upon which it is based, has no reference whatever to indictments preferred by a grand jury.'

"We also ruled that a purpose of a preliminary examination is 'to safeguard them (the accused) from groundless and vindictive prosecutions.' State v. Tunnell (Mo. Sup.) 296 S. W. loc. cit. 426; State v. Sassaman, 214 Mo. 695, loc. cit. 723, 114 S. W. 590. These pronouncements indicate 'the way the wind blows.'

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination

by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury.

"It follows from these conclusions the prosecuting attorney is without authority to file an information charging a felony, in the absence of a finding by a magistrate 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof.' Other jurisdictions with similar constitutional or statutory provisions have so ruled. (Cases cited) * * * * * * .

"Respondent directs attention to State v. Pritchett, 219 Mo. 696, loc. cit. 703, 119 S. W. 386. There the defendant complained that he was not accorded a preliminary examination. We ruled the examination was waived, and said:

"'Although the justice might, after a preliminary examination, discharge the prisoner, such action would in no way operate as a bar to an indictment, or to an information by the prosecuting attorney for the same offense, and whatever the justice might do in the case is from a legal standpoint merely preliminary.'

"This statement was unnecessary to a decision of the case. If the learned judge intended to rule that on the discharge of an accused by a magistrate the

> prosecuting attorney was thereby authorized to file an information for the same offense, we do not agree with him. Such a ruling is contrary to all the authorities, and should not be followed. If he intended to rule that a discharge is not a bar to the filing of a complaint with another magistrate, he is in harmony with all the authorities and should be followed."

Also, in the case of State v. McKinley, 111 S. W. (2d) 115, Pars. 1-3, where the court said:

> "The purpose of the statute is to safeguard the accused from groundless and vindictive prosecution, and to prevent an abuse of power by the prosecuting attorney. The latter is without authority to file an information charging a felony until after a preliminary examination has been held and a magistrate has found there is probable cause to believe a felony has been committed, and that the accused is guilty thereof. State ex rel. McCutchan v. Cooley, 321 Mo. 786, 792, 12 S. W. 2d 466, 468. But the failure to accord a preliminary examination is waived by the accused if he does not raise the point before he pleads the general issue to the information. State v. Langford, 293 Mo. 436, 443, 240 S. W. 167, 169; State v. Pipey, 335 Mo. 121, 126 (2), 71 S. W. 2d 719, 721."

Under the above two cases, unless the magistrate has found there is probable cause to believe a felony has been committed, the prosecuting attorney is not authorized to file an information in the criminal court. Also, under

the two above cases, if a magistrate discharges a defendant for the reason that there is not probable cause to believe a felony has been committed, the prosecuting attorney may file another complaint before another magistrate on the same charge.

Under Section 3819 R. S. Missouri, 1939, a defendant shall be granted a change of venue in a case pending before a justice of the peace, upon the filing of an affidavit, either that the justice is prejudice against him, or is of near relation to the injured party or prosecuting witness, stating in what degree they are interested in the subject of the offense; or as a material witness in the case; or that the defendant cannot have a fair trial in the township on account of the bias and prejudice of the inhabitants. After the filing of this affidavit Section 3820 R. S. Missouri, 1939 applies. This section reads as follows:

> "If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers and a transcript of all his docket entries in the case to the next nearest justice in the township, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that the other justice in the township is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to the injured party or prosecuting witness, stating in what degree, or that he cannot have a fair and impartial trial before such justice in the township, in which case, then to a justice in some other township in the county, or, if the change be allowed on account of the bias or prejudice of the inhabitants of the township, then

> to a justice in some other township in the county; and the justice to whom such case shall be sent shall forthwith proceed with the same in like manner as if said cause had been originally brought before him. No more than one change of venue in the same case shall be allowed."

The above section applies to preliminary examinations, and it was so held in the case of Ex Parte Bedard, 106 Mo. 616, 17 S. W. 693.

Under the facts set out in your request, in reference to the filing of a change of venue which places the case before a magistrate who would be favorable to the defendant, we would advise that the case be filed in some township where such an affidavit would not result in the case being sent to an unfavorable justice. In felony cases a complain may be filed in any place in the county, and before any justice of the peace in the county.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a prosecuting attorney cannot file his information on a felony in the circuit court charging a defendant with the same crime with which he was charged before a justice, and upon the hearing of same the justice discharged the defendant.

It is further the opinion of this department that if a justice of the peace, upon a preliminary, discharges a defendant, the prosecuting attorney is authorized to file another complaint before another justice of the peace in any township in the county.

APPROVED:

Respectfully submitted

_____

HARRY H. KAY
(Acting) Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

BOARD OF PHARMACY: Rule or regulation with respect to renewal of licenses of pharmacists in armed forces.

- - - -

"Under this section I would like your opinion as to whether the Board of Pharmacy would have the authority to adopt a regulation exempting men in the Armed Forces of our Nation from paying their renewal fees in the time specified by law."

A portion of Section 10009 R. S. Mo., 1939, provides:

" * * * * * Every licensed pharmacist or permit holder who desires to continue in the practice of this profession shall, within thirty days next preceding the expiration of his license or permit, file with the board an application for the renewal thereof, which application shall be accompanied by the fee hereinafter prescribed. If the board shall find that the applicant has been legally licensed in this state and is entitled to a renewal of license, or to a renewal of such permit, it shall issue to him a certificate attesting that fact. If any pharmacist shall fail for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists, and such person, in order to again become registered as a licensed pharmacist, shall be required to pay the same fee as in the case of original registration: Provided, that no application for the renewal of a license shall be granted after a period of two years after its expiration, and if any pharmacist fail within that time to make application to the board for a renewal of his license, he shall be subject to

all of the provisions of this chapter regulating the issuance of licenses. * * * * * * * * "

This Section, in clear terms, provides:
(1) Every pharmacist should apply for a renewal of registration and license and pay the required renewal fee within thirty days before and not more than sixty days after the expiration of his or her license.
(2) A pharmacist failing to apply for a renewal until after sixty days of the expiration of his or her license shall be stricken from the register of licensed pharmacists and to become re-registered and re-licensed upon application therefor he shall pay the fee required for original registration.
(3) No license may be renewed that has expired more than two years before an application for renewal is made.
(4) One whose license has not been renewed for two years or more is required to apply for and take an examination in the same manner as a person never before licensed.

Where the language of a statute is plain and unambiguous it may not be construed but is given effect as written. St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667, 347 Mo. 456; State ex rel R. R. Co. v. Shain, 106 S. W. (2d) 898; State ex rel insurance Co. v. Lucas, 153 S. W. (2d) 10.

The Board of Pharmacy is authorized by Section 10012 R. S. Mo., 1939, to adopt rules and by-laws. The pertinent portion of that Section is:

"The Board of Pharmacy shall have a com-

> mon seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this chapter, * * * * * "

By the very terms of this authorization such rules and "by-laws" must be consistent with "the law" and cannot be contrary to the pharmacy statutes. This, of necessity, follows from the wording of the above partially quoted Section.

Futhermore, the board has no power to waive the payment of the fees required for registering and licensing pharmacists as provided by Section 10015 R. S. Mo., 1939. Any attempt to do so would contravene a definite statutory requirement.

However, a rule or regulation (by-law) might be promulgated by the board to the effect that all pharmacists in the armed forces failing to make application for their renewal of licenses and registration sixty days after the expiration of their license and registration upon making application within two years and paying the required fee should be re-registered and re-licensed. Such rule would conform to and be in furtherance of the statutory requirements. It would, in addition, without doing violence to the statute, be of assistance to those pharmacists who serve their country in its perilous crisis.

As has been pointed out recently by the Supreme Court of Missouri, "Let no citizen be penalized because he is a patriot. Let us therefore

keep faith with those who fight for us." State ex rel McGaughey v. Grayson, 163 S. W. (2d) 335, l. c. 342. However, the State Board of Pharmacy is of statutory origin and cannot change the fixed requirements of a licensing act; only the Legislature may do this.

CONCLUSION

It is the opinion of this department that while the State Board of Pharmacy is authorized to promulgate rules and by-laws not inconsistent with the Pharmacists' Act and in furtherance thereof, yet it may not waive the clear and definite terms of the licensing and registering renewal statute. It may, however, in keeping with the terms of such statutory enactment, by a rule or by-law allow all pharmacists in the armed forces failing to make application for renewal of license and registration sixty days after the expiration of license and registration, upon making application within two years and paying the required fee to be re-registered and re-licensed.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

VCT:FS

CONSERVATION COMMISSION: Right to seine rough fish in private
FISH AND GAME: lake.

November 5, 1942

11-7

FILED
97

Honorable Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

We are in receipt of your letter of October 21, 1942, requesting an official opinion on the following:

> "One of our Platte County citizens owns a piece of property upon which is located a lake formed by overflow from the Missouri River. His property entirely encloses the body of water in question. He desires to take the rough fish from this water on his place for purposes of sale. He has what is known under the Regulations of the Conservation Commission as a 'Commercial License', which would enable him to properly dispose of the fish if he is able to acquire them legally. He would like to seine the rough fish from this water before the winter freeze destroys them, and sell them under his 'Commercial License.' My problem is whether or not he can do so. I know that the Conservation Commission does not attempt to enforce its regulations on bodies of water privately owned where a fee is charged to fish, and it would seem to me that a proper analogy to draw from that would be that they cannot enforce their regulations against this man who owns the lake and all the land surrounding it. Will you please advise?"

The law in this state as well as in other states is well established that the title to all wildlife is in the state. Section 8883, R. S. Missouri 1939 reads:

> "The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same and said possession shall be consent to such title in the state."

In State vs. Springfield Gas & Electric Co., 204 S. W. 942, l. c. 945, the court said:

> "* * * * * * * Section 6508, R. S. 1909, vests ownership of, and title to, fish in the state, and this without regard to the character of the stream or creek in which the fish may be. State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N.S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382. * "

In State vs. Blount, 85 Missouri 543, l. c. 547, the court specifically defines the right that anyone may have in game, that it can be no more than a qualified property right, that he may

hunt and take such game on his premises to the exclusion of others but in order to preserve fish, the state may exercise its police power and forbid the taking except by prescribed methods. In so holding the court said:

> "It is further contended by counsel, that if the statute means this, that it is a violation of both the constitution of the state and the United States, which forbids the taking of private property for public use. While conceding the ingenuity of the argument made in support of this proposition, I cannot admit its soundness. The property which a man hath in animals, feroe naturoe, is a qualified property; that is, he may have the privilege of hunting taking and killing them on his own premises, to the exclusion of others. He has but a transient property in these animals, usually called game, so long as they continue within his premises. 2 Black Com. 394. This qualified, transient property, is not taken away by the statute. One who may have the right to take fish from such waters as are specified in the statute, is not denied the right to do so, but, in order to the preservation of fish and prevent their destruction, the state, in the exercise of its police power, simply forbids them from being taken by the use of certain prohibited methods. He can exercise such right in any other method than those which the statute prohibits.
>
> "In the exercise of this power the state, in various statutes, forbids the killing or capturing of certain kinds of game within certain periods of the year, and forbids their capture by the use of certain means during the other periods of the year, and such laws have never been supposed to be obnoxious to constitutional provisions declaring that private property shall not be taken for public use without compensation. "

In State vs. Weber, 205 Missouri 36, l. c. 48, the court held the title to deer raised and kept in captivity is no better

than the title to wild deer which is killed or captured and reduced to his possession. In so holding the court said:

> "If the provision of section 13, which declares it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, should be construed as referring to deer in a wild state, and to such only, the evasion of the law would be an easy matter. Suppose the deer which defendant purchased and had in possession had been killed while in a wild state, there is no doubt that, the evidence of sex being removed, he would be guilty of a violation of the law; and, so far as the question of title or ownership is concerned, the title which a person holds to deer which he has raised and kept in captivity is no better than his title to the wild deer which he kills or captures, and reduces to his possession."

Also, in State vs. Weber, supra, l. c. 44, the court said:

> "No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, and it has always been held that the State has authority to regulate the sale of such game, or prohibit it altogether. * * * * * * * * * * * * * *"

In State vs. Weber, supra, l. c. 47-48, the court held that the state may prohibit catching and selling fish and such prohibition even extends to such as have been artificially propagated or maintained. In so holding the court said:

> "The Legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artifically propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running

through their own lands. The statute under consideration falls within this power.'"

In State vs. Weber, supra, l. c. 46, the court further said that the defendant was the owner under a statute similar to Section 8883, R. S. Missouri 1939, since Mrs. Casey from whom defendant purchased the deer had raised and held them in captivity up to the time they were sold to defendant, that defendant's ownership was such private ownership in game as is recognized in Section 8883, R. S. Missouri 1939, that Mrs. Casey had the right to sell the deer as any other property belonging to her, but that deer is game under the law, and the state has the power to enact laws to preserve and protect game and that the property rights of the defendant were in no way infringed.

In Windsor vs. State, 12 L. R. A. N. S. 869, l. c. 872-873, the court quoted from Stevens vs. State approvingly wherein it was held that no individual has any property rights in game other than such as permits the individual to acquire and even when game is captured and reduced into possession his ownership in it may still be regulated. In so holding the court said:

> "* * * * * * * * * * From all these considerations to which we have adverted, the just and rational construction to be put upon the statute in question is that all oysters taken from any of the waters of this state must be culled, and that all oysters less than 2½ inches from hinge to mouth, whether taken from natural beds or from private lots, are 'unmerchantable oysters,' and that anyone having such oysters in his possession is liable to the penalty provided therefor.
>
> "In reference to the second contention of the appellant, that Sec. 8 is an infringement of the 14th Amendment to the Constitution of the United States, which declares that no one shall be deprived of life, liberty, or property without due process of law, little need be said. In Tyler v. State, 93 Md. 311, 52 L. R. A. 101, 48 Atl. 480, this court said: 'We recently

> held in Stevens v. State, 89 Md. 669, 43 Atl. 929, that it is entirely within the power of the state to prohibit the having in possession, or exposing to sale, in this state, within the closed season, game which has been taken either within the state or elsewhere. The same principle would apply to a prohibition against having in possession oysters of which more than a specified portion were of a size declared by law to be unmerchantable.' In Stevens v. State, supra, the court said: 'The authorities agree that the ownership of all game animals and birds is in the people in their sovereign capacity,- that is, in the state,- and no individual has any property rights in game other than such as the state may permit him to acquire, and even when game has been captured and reduced into possession by the individual with the permission of the state, his ownership in it may be regulated and restrained by appropriate legislation enacted for considerations of state or the benefit of the community. In other words, the cases hold that the question of enjoyment in this field is one of public policy, and not of private right.' * * * * * * * * * * * * * * *"

In People vs. Horling, 100 N. W. 691, l. c. 692-693-694, the court likewise held that the state could regulate the taking of fish from a lake on property belonging to defendant which lake was close to the Grand River that occasionally overflowed into said lake. In so holding this is what the court said in part:

> "On the part of the defendants, they offered evidence tending to show that since 1851 the defendant John W. Horling has been the owner and in possession of the land upon which this bayou or lake is situate; that he owns all the land around said lake or bayou, and that the same is not a meandered lake; that over 15 years ago he put up notices, painted wooden signs, and nailed them on the trees in the vicinity of the lake, telling

the public that it was private property, and that no fishing was allowed in said lake or bayou, and that said signs have ever since been kept up to notify the public; that the bank of the river very seldom overflows, but once a year the river would get high enough so that the water would flow into the old inlet, which would last sometimes 15 days; the water would subside in the river, then the river would be entirely shut off, and the bayou or lake would have no connection with any public waters until the next spring freshet came; that there is no water in the ditch to exceed 20 to 25 days in any one year; the rest of the time the bayou or lake is entirely disconnected from any other waters; that there is no inlet to said lake; that the inlet from the river has no defined channel, except where it breaks through the high bank near the river; that this is dry so much of the time that it is overgrown with tame grass and becomes good pasture land; that during the last 30 years the owner of the land has piped and tiled cold spring water from the adjoining land down to this lake, and during all these years has planted little fishes in said lake, obtained from surrounding pools of water, such as carp, bass, sunfish, and pickerel; that on account of the planting of these fish (not obtained from any public fish hatchery) this bayou or lake has become well stocked with fish, so that the fishing is much better than in Grand river, and people resorted there to fish to such an extent that it became necessary, and the owner of the land put up signs forbidding trespassing, and notifying the public that it was a private lake, and that fishing was not allowed; that on the day alleged in the complaint and warrant the respondents were fishing with a net, which they claimed they had a right to do, as it was private property; they set these nets near the place where the cold water pipes and tile made the water fresh, and where the fishes were in the habit of frequenting to get cool water.

* *

"* * * * * * * * *'To fish is a privilege accorded by the state, and the question of individual enjoyment is one of public privilege, and not of private right. "Unless the catching of fish," as is said by one writer, "is conducted with reason, either the fish may be altogether esterminated, or the enjoyment of the right by one may interfere with the equal enjoyment of the right by others." Hence, for the protection of fish, a valuable article of food and merchandise, the control of which is in the state, and to preserve equality in the right to fish, the state has an undoubted right to regulate the manner in which they shall be caught, and to protect their migrations.'

* *

"* * * * * * * * *There may be and doubtless are various and perhaps many, lakes, ponds, sloughs, and bayous in the state which are so far private property that the owner may drain them, or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in their actual condition, are places where fish common to the waters of the state are propagated and raised. And, while this is so, the statute makes no distinction between bodies of water thus situated and those in respect to which public rights or private easements exist. Its language applies to all alike. Indeed, the power to protect and preserve the fish in the waters of the state would be practically nugatory, if, as is contended, it was confined to streams and water courses, and was excluded in case of all bodies of water which were so far subjected to private ownership that the owners would have a right to drain them or fill them up, and thus destroy them as bodies of water. *

"* * * * * * * * * * * * * * * 'We are unable to see how the mere fact that said lake, instead of having a continual connection with the river, has such connection only during periods of high water, can have any essential bearing upon the rights which the owner of the soil has in the fish that happens for the time being to be

> in the lake. It is impossible, therefore, to distinguish the present case from those arising in relation to other waters in the state to which the statute is applicable. The public interest is involved in both in the same way, if not to the same extent, and the public interest in both is such as to justify legislative interposition.'"

In the case of State vs. Heger, 194 Missouri 707, l. c. 711, the court in discussing the question of the ownership of wild game and the unanimity of opinion that such ownership is vested in the people of the state, said:

> "The authorities are uniform in holding that that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best. (Cases cited.)
>
> "* In the leading case upon this subject (Geer v. Connecticut, 161 U. S. 519), Mr. Justice White, says:
>
> "'From the earliest traditions the right to reduce animals ferae naturae to possession has been subject to the control of the lawgiving power.' In speaking of this power in Haggerty v. Ice Mfg. & Storage Co., supra, Sherwood, J., said: 'The exercise of this power has been definitely traced back even as far as the time of Solon, who forbade the Athenians to kill game. And in France, as early as the Salic law, the right to reduce a part of the common property in game to possession and consequent ownership

was regulated by law. Such regulations prevailed in every country in continental Europe and in England. Treating of this subject, Blackstone says: "There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals ferae naturae, as are known by the denomination of game, with the right of pursuing, taking and destroying them, which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren or free fishery.....In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing and taking to his own use all such creatures as are ferae naturae, and, therefore, the property of nobody, but liable to be seized by the first occupant, and so held by the imperial law even so late as Justinian's time..... But it follows from the very end and constitution of society that this natural right, as well as many others belonging to a man as an individual, may be restrained by positive laws enacted for reasons of State or for the supposed benefit of the community." (2Bl. Co., 410.) This prerogative of the king as an attribute of government recognized and enforced by the common law of England by appropriate and oftentimes severe penalties and forfeitures, was vested in the colonial governments threw off the yoke of the mother country, that right of sovereignty passed to and was vested in the respective States. This sovereign attribute and power as existent in the States of this Union has often been exercised by them by passage of laws in the most of these States for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases the common ownership of game, which otherwise would remain in the body of the people, is lodged in the State to be exercised like all governmental powers in the State in its sovereign capacity, to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the

> sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the State.'"

You further state that this citizen has taken out a "Commercial License". Section 62 of the Wildlife & Forestry Code of Missouri 1942, provides non-game fish may be taken by the holder of a commercial fishing permit during the prescribed open season by seines, etc., from the Missouri and Mississippi rivers exclusively.

Also, Section 37 of the Code provides for a fee for such commercial fishing permit and reads in part:

> "To possess, and use trotlines, throw lines, jug lines, hoop nets and seines, except minnow nets or seines, in the taking of non-game fish from the Missouri or Mississippi Rivers exclusively, and to sell such fish, and to sell mussels, in accordance with these regulations, upon the payment of a Resident Commercial Fishing Permit fee as follows:
>
> "For each 100 linear yards or fraction thereof of seine.....$10.00
> For each hoop net..... 1.00
> For jug lines of not to exceed 100 hooks in the aggregate and for any number of trotlines or throw lines..... 1.00"

All of which indicates such licensee shall sell non-game fish in this State when taken exclusively from the Missouri and Mississippi Rivers.

Therefore, it is the opinion of this Department that the State may, in the exercise of its police power, regulate the taking of fish in this State from any waters regardless of the nature of same. That authority to regulate the taking of fish is vested in the Conservation Commission under Section 16, Article 14, of the Constitution of Missouri and in view of the regulations adopted by the Commission in the Wildlife and Forestry Code of Missouri 1942, supra, such citizen cannot seine

rough fish in said lake without special permission of the Conservation Commission of the State of Missouri.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARH:EAW

RECORDER OF DEEDS: - Recorder may indicate partial release of personal property in chattel mortgages.

RELEASE OF CHATTEL MORTGAGE:

April 27, 1942

5-1

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

FILE 98

Dear Sir:

This is to acknowledge receipt of your letter of recent date, in which you request the opinion of this department.

Your letter is as follows:

> "In behalf of the Recorder of Deeds of Clay County, Missouri, I respectfully request your opinion on a subject raised by the Recorder in the following terms:
>
> "'The situation is this, - a mortgage covering both real estate and personal property was recorded in this office sometime ago. At a later date a supplemental indenture to this instrument was recorded, giving the trustees in the original mortgage authority to release any part of the personal property covered by the original mortgage. We are now in receipt of an instrument of partial release, covering part of the personal property described in this mortgage. IS THERE ANY PROVISION IN THE STATUTES GIVING THE RECORDER AUTHORITY TO MAKE A PARTIAL RELEASE OF PERSONAL PROPERTY?

"As I understand it, Sec. 3470 R. S. Mo. 1939 refers solely to mortgages and deeds of trust on real estate, and the entire scope of the recording and releasing of chattel mortgages is contained in Article III, beginning at Sec. 3486. It seems to me that Sec. 3489 is only for release when the mortgage or deed of trust is satisfied in full.

"I am very anxious to have an opinion on this at an early date, and if you will forward this letter to the Attorney General I will appreciate it very much.'"

After your recitation of the facts above, you ask this question: Is there any provision in the statutes giving the recorder authority to make partial release of personal property?

From your letter we understand a mortgage covering both real and personal property was given and recorded in your county, and that you are in receipt of an instrument of partial release covering a part of the personal property described in the mortgage. You state in your letter that the original mortgage gives authority to the trustees therein named to release any part of the personal property covered by said mortgage. Since we do not have the mortgage before us, or the instrument of partial release, we are only able to pass on your question as a general proposition of law.

Section 3489 R. S. Missouri, 1939, provides how, and in what instances, the recorder shall release chattel mortgages, We herewith set forth part of said section:

"* * * Such mortgage or deed of trust, when satisfied, shall be discharged by

any of the following methods:

"1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.

"2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.

"3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

"When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and

which have been entered satisfied
on the chattel mortgage register."

If a mortgage covering both real estate and personal property is of record in your office, and in said instrument authority is given the trustees named therein to release a part of the personal property covered by said mortgage, the recorder should record said instrument of writing releasing a portion of the personal property described in the mortgage. If the instrument releasing the personal property is properly executed and duly acknowledged, according to law, by persons authorized to execute same, we can see no good reason why it is not a valid release.

It is not necessary, under the above circumstances, for the recorder to enter in a column for that purpose the word "satisfied", as set forth in Section 3489, supra, as the release does not fully satisfy the whole mortgage.

It is only in instances where the mortgage or deed of trust is satisfied in full that it is the duty of the recorder to mark same "satisfied" as provided in Section 3489, supra.

CONCLUSION

It is, therefore, our opinion that the recorder should record the instrument which releases the personal property mentioned above, and may, on the margin of the record where the original mortage is recorded, set forth the book and page where the release is recorded, so that any person examining the record may see just what property has been released and thereby determine for himself whether it is a valid and sufficient release.

Respectfully submitted

APPROVED:

COVELL R. HEWITT
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

CRH:RW

INSANE PATIENTS: COUNTY COURT'S LIABILITY: The liability of the County Court for insane patients must be determined by Section 9358, R. S. Mo. 1939.

January 30, 1942

2-7

FILE
99

Hon. Thomas G. Woolsey
Prosecuting Attorney
Boonville, Missouri

Dear Mr. Woolsey:

This is to acknowledge receipt of your letter of recent date wherein you request an opinion from this office. Your request is as follows:

"This question has arisen in our County and I shall appreciate the benefit of your knowledge with reference thereto.

"Mr. A. who had lived in Pettis County for many years came to Cooper County to live with his sister and within 90 days or at least a comparatively short time after coming to Cooper County he became insane. A hearing was had before the County Court and the patient was committed to the State Hospital as a County patient. Information now comes to this office that he has a small bank deposit in the aggregate sum of $200.00 in the Sedalia Bank.

"Query: What should we do with the money? Do you recommend that the case be re-opened and a hearing had in the Probate Court with the appointment of guardian and curator and use the funds, as far as they will go, toward caring for this patient? If you do recommend that the patient be committed privately, do you know of any authorization in law for the Probate Judge to accept the findings of the County Court as to his sanity and thereby save the additional expense of the second hearing?

"If we are obliged to have the second hearing and get service on the patient

> who is now in Fulton the $200.00 would be exhausted before the patient could be recommended as a private patient."

We assume that the patient in question was legally committed to the State Hospital at Fulton, Missouri, under the provisions of Article 12, Chapter 51, R. S. Mo. 1939, which provides for the commitment of an indigent insane patient to the State Hospital as a county patient. Upon such commitment the county court of the county so sending the patient becomes liable for his maintenance in said hospital.

Your first question is whether the two hundred dollars which you state is in a bank, and belonging to the patient, may be used by the county court of Cooper County to defray the expenses of the patient in the state hospital.

Section 9347, R. S. Mo. 1939, under the article providing for the commitment of indigent insane persons, provides as follows:

> "If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

It will be noted that under this section, if the facts justify it, the county court, through its clerk, may transmit to the Superintendent of the State Hospital, a certificate setting forth that the county patient in the

State Hospital has sufficient estate to support and maintain him in said hospital, which certificate shall be based on an order made by the county court.

In your letter of request you did not state whether or not the patient so committed was married or single, or the head of a family, or had debts or other liabilities.

We refer you to Section 9358, R. S. Mo. 1939, for the reason that we are unable to answer the question until we know the status of the individual and to determine whether the $200.00 could be applied to the payment of the expenses of the patient in the State Hospital.

Section 9358, R. S. Mo. 1939, provides:

"The words 'insane' and 'lunatic,' as used in this chapter, shall be construed as including every species of insanity or mental derangement. The terms 'insane poor' or 'indigent insane,' when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by the head of a family: Provided, that when the said words are applied to a married woman, her separate estate, if any, and that of her husband shall be estimated as aforesaid, and the total amount of both estates shall determine the question aforesaid, whether she be a 'poor' person or not, within the meaning of this chapter. A person with a family is one who has a wife and child, or either; county patients are those supported in a state hospital at the expense of the counties sending them; pay or private patients are those supported in the hospital by their family or friends, or from the proceeds of their own property. Every word in this chapter importing the masculine gender shall extend and

be applied to females as well as males; and any word importing the singular number only, or the plural number only, may be applied to one person or thing as well as to several persons or things."

If, after the county court determines the status of the individual, as fixed under the terms of Section 9358, supra, and the facts justify it, it may make such an order as the facts warrant.

Under Article 18, Chapter 1, R. S. Mo. 1939, a procedure is set forth to inquire into the sanity of a person having property, and the appointment of a guardian and curator. The primary purpose of the provisions under this article is to take charge of the insane person's property and administer same under the jurisdiction of the probate court. In any event, a hearing as to the sanity of the patient must be held in the probate court before the appointment of a guardian and curator. The fact that the patient was adjudged insane by the county court would not give the probate court any jurisdiction in the matter.

We cannot definitely answer your question without knowing the status of the individual in question, as provided in Section 9358, supra, however, we think that when you apply the facts of your case to the provisions of Section 9358, supra, your county court will be able to determine what action should be taken by it.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

CRH:NS

NEPOTISM: **School director cannot appoint daughter of the half-brother of his father-in-law.**

- -

May 12, 1942

Hon. Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

FILE
99

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The County Superintendent of school for Cooper County has requested me to construe Section 13 of Article 14 of the Constitution of Missouri as appears on page 166c of Volume I, R. S. Mo. 1939, in the light of this set of facts:
>
> "Mr. A. was the father of B by his first wife and C by his second wife, making B and C brothers of half blood. B is the father of a daughter, E, who is a school teacher; C is also the father of a daughter, D, who married Mr. X. X is a member of a certain school board in Cooper County, which Board desires to employ E as a school teacher for the school year of 1942-43.
>
> "Since X married D who is already a half first cousin to E would X, in voting to employ as teacher in the school of which he is a board member, forfeit his office as held in State ex inf. v. Whittle, 333 Mo. 705?

> "I take the position that although B and C have the common parent A, their children would not be first cousins, but rather half first cousins which would remove them from the provisions in the Whittle case and for that reason X would not be penalized for employing E.
>
> "I shall appreciate your construction of this Section at your earliest convenience."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

> "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."
>
> (Underlining ours.)

Our Supreme Court in State ex inf. Norman v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154, held this provision to be self-enforcing. The purpose for this amendment was given in State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, 333 Mo. 705, as follows:

> "It is a matter of common knowledge that at the time of the constitutional convention in 1922-1923, and for a long

> time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.
>
> "It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, designated therein section 13, art. 14, * * *

> "* * * the civil law rule is to begin with the intestate, and ascend from him to a common ancestor, and descend from that ancestor to claimant, reckoning a degree each generation, as well in the ascending as in the descending line. * * * * * * * * *"
>
> (Underlining ours.)

In 16 Am. Jur. 826, it is said:

> "The civil law does not begin, as does common law, and reckon from the common ancestor downward to each of the persons related or to the remotest of them, but it reckons from the person in question upward to the common stock and then downward to the other party related.
>
> "Every generation in lineal, direct consanguinity constitutes a different degree, reckoning either upward or downward. The difference in the method of the common and civil law in the computation of degrees exists only in relation to collateral consanguinity."
>
> (Underlining ours.)

In 56 Am. Decisions 294, the law is given as follows:

> "The method of computing those degrees by the civil law was to commence at either of the persons whose relationship was to be determined, and count up to the common ancestor and then downward again, counting each person a degree, to the other person. For example, Titius and his brother are related in the second degree, for from Titius up to his father, who is their

> common ancestor, is one degree, and then down to Titius' brother is another. Titius and his nephew are related in the third degree, for from Titius up to his father is one degree, and from the father down to the nephew is two degrees: 1 Broom & Had. Com. 646; 2 Kerr's Bla. Com. 457; 3 Redfield on Wills, 84; McDowell v. Addams, 45 Pa. St. 432; Paddock v. Wells, 2 Barb. Ch. 331; Spear v. Robinson, 29 Me. 543; Sweezey v. Willis, 1 Bradf. 495; Bingham on Descents, 298; 4 Kent's Com. 412; Co. Lit. 23 b."
>
> (Underlining ours.)

In all of the above quotations it will be seen that in determining the degree of relationship that one has to reckon up to the "common ancestor" and then down to the person whose relationship is sought to be determined. Under this rule the fact that a man was married twice and had a child by each wife does not in any way change the method of computation, because the father is the "common ancestor" in determining the relationship of his descendants. In the instant case, X, since he stands in the same position as his wife D, is related to C by one degree, to A by two degrees, to B by three degrees and to E by four degrees, thereby bringing such relationship within the prohibition of Section 13 of Article XIV.

CONCLUSION

It is, therefore, the opinion of this department that, under Article XIV, Section 13, of the Constitution of Missouri, a school director may not vote to employ as a teacher the child of a half brother of his father-in-law.

Respectfully submitted,

AG'K:CP

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK

ELECTIONS: Central committee of political party can only fill vacancies on a ticket after the primary when nominated candidates die or resign.

April 13, 1942

4-16

FILE
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Honorable H. Parker York
Prosecuting Attorney
Lancaster, Missouri

Dear Sir:

This will acknowledge receipt of your letter of the 7th which reads as follows:

> "The County Clerk of Schuyler County has requested my opinion relative to the present meaning and intent of sections 11538, 11539 and 11562 as amended and reenacted by the Legislature in 1941. In particular he wishes to know whether under these new sections the Central Committee of a political party who had no candidates in the primary can, after the time has passed for the holding of a primary and before the general election, make up a ticket or a part of a ticket and submit such names to him to be carried on the ballot in the general election. I refer to candidates for county office, of course. Also what would the effect of these amended sections be if such political party had had at least one candidate for some office running in the primary and then after such primary had submitted to the county clerk through its central committee enough names to fill its ticket for the general election? What significance, if any, should be placed on the fact that in the first proviso of section 11538 as reenacted in 1941 the words, 'and not otherwise' were added in place of the words 'or otherwise' which words were

> referring to the manner in which vacancies existing on the ticket could be filled by the central committee? I call your attention also to the omission of the words, 'or where no person shall offer himself as a candidate before such primary' from the amended version of section 11562 (Laws of 1941, p. 354) and the adding of the words, 'and resulting from the death or resignation, and not otherwise, of the nominee of a party at such primary,' and request your opinion as to the meaning of this amended section."

The right of political parties to nominate candidates for public office is a privilege granted and controlled by the Legislature. In 29 C. J. S., p. 123, Sec. 89, it is said:

> "In the absence of constitutional or statutory provisions to the contrary, a political party has the right to nominate its own candidates for office and the determination of who shall represent it as its nominees is controlled by the action of the party itself. Nomination of candidates for public office by political parties is, however, a political privilege depending on the will of the people as expressed through the legislature, or, in the absence of statute, on the will of party adherence, expressed through conventions, caucuses, or otherwise, in accordance with rules and regulations of such parties, and is not an absolute or constitutional right, or, as otherwise stated, the right to nominate candidates for civil office is not a contract right guaranteed by constitution but rather a private privilege granted by the legislature under its general power to regulate elections."

To answer your question, therefore, we must see what rights have been granted by the Legislature to political parties to supply names of candidates on a ticket when a vacancy occurs in such nominated ticket.

Article 4, Chapter 76, R. S. Mo. 1939, provides how nominations shall be made. Section 11525 reads as follows:

> "Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

Sections 11526 and 11527 of said article provide what the certificates of nomination shall contain and where they shall be filed. Section 11533 of said article reads as follows:

> "The certificate of nomination of a candidate for office, selected by any primary election as herein defined, shall be signed, and executed by the presiding officer and secretary of the political committee under whose direction it is held: Provided, that in case of the death or inability of the presiding officer or secretary of said political committee to perform the duties herein required, the surviving qualified officer thereof shall sign and execute the certificate of nomination, which shall be accepted as if executed by both said officers."

The foregoing sections provide a method by which political parties may make nominations of candidates for public office. The names thus nominated would constitute

the ticket of the political party making such nominations to be voted on at the general election.

Section 11538, page 354, Laws of Missouri, 1941, after providing when certificates of nominations shall be filed, provides, among other things, as follows:

> "Provided, that in case of any vacancy in said nomination, by resignation or death and not otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy; "

The foregoing section clearly provides that only vacancies in nominations which result from the resignation or death of a nominated candidate can be filled by the central committee of the political party. It is interesting to note that Section 11538, R. S. Mo. 1939, provided that such political committee could fill vacancies in nominations caused by "resignation, death or otherwise." In the new section enacted in lieu of the one containing the latter provision, the words "or otherwise" are omitted and in lieu thereof the following words are inserted, "and not otherwise."

Furthermore, Section 11539, page 355, Laws of Missouri, 1941, provides for a central committee of a political party and invests that committee with power to fill vacancies in nominations in the following language:

> "* * * That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise, on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. * * *"

It should be noted also that the part of Section 11539, as it appears in R. S. Mo. 1939, which corresponds

to the foregoing quotation, reads as follows:

> "* * That for the purpose of making nominations to fill vacancies on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. * * *"

It will be noted that in the old section the committee was given the power to fill vacancies on a ticket without any limitation as to how such vacancies occurred. The new section passed by the Legislature in 1941 limits the vacancies which can be filled by the central committee of a political party. The new section clearly shows a deliberate intent on the part of the Legislature to limit the situations in which a political committee can fill vacancies in nominations. Likewise, the same Legislature (1941) repealed Section 11562, R. S. Mo. 1939, and enacted a new section in lieu thereof. The old section (11562) read as follows:

> "Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

The new section enacted in lieu of the foregoing section (page 353, Laws 1941) reads as follows:

> "Vacancies occurring after the holding of any primary and resulting from the death or resignation, and not otherwise, of the nominee of a party at such primary, shall be filled by the party committee of the district, county, or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

We do not see how language could be any clearer in limiting the conditions under which a political committee can fill a vacancy in nominations. There are just two situations when such committee can thus function. One is where there is a vacancy in the nominated ticket by death of candidate already nominated and the other is where there has been a resignation of a nominated candidate. It must follow therefore that when a political party had no candidates in the primary, there could be no vacancy in its ticket, after the primary, which arose by reason of the death or resignation of a nominated candidate. Whether the political party had no candidates at all in the primary or whether it had candidates for only part of the offices would make no difference. In either event, the central committee could not, after the primary, supply a name on the ticket of its party unless someone had been nominated for an office and had either died or resigned after the primary.

Conclusion

It is, therefore, the opinion of this office that the central committee of a political party which had no candidates in the primary could not, after the primary, make up a ticket or part of a ticket by supplying the names of candidates for offices to be voted on at the general election. Likewise, where a political party had some candidates in the primary but did not have candidates for each office, the central committee could not supply names of candidates for the offices for which there were no candidates in the primary.

Yours very truly

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:EG